

Recent Developments in Residential Landlord Tenant Law

Mini-CLE Presented by the WSBA Real Property Probate and Trust Section
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Overview

- ▶ Residential Landlord - Tenant Basics
- ▶ Fair Housing at Federal, State & Local Level
- ▶ New statutes
 - ▶ Source of Income Protection
 - ▶ Deceased Tenants
 - ▶ Tenants Rights at Foreclosure
- ▶ Seattle "First In Time" Ordinance Discussion

Layers of Landlord/Tenant Regulation

- ▶ Federal Laws
 - ▶ Fair Housing
 - ▶ Environmental (e.g., lead paint)
- ▶ Revised Code of Washington (RCW)
 - ▶ RCW 59.18, RCW 59.12
 - ▶ Other chapters (e.g., RCW 61.24; RCW 43.33.110 (*Smoke detection devices*), RCW 19.27.530 (*carbon monoxide detectors*))
- ▶ Municipal Laws

What's Not Controlled by the RLTA RCW 59.18.040

- ▶ Institutions or facilities where residence is merely incidental to detention or the provision of medical, religious, educational, recreational, or similar services,
 - ▶ Examples: correctional facilities, licensed nursing homes, convents, dorms, and hospitals
- ▶ Occupancy with an agreement to purchase (e.g., Rent-to-Own arrangements)
- ▶ Hotels, motels, or other transient lodging whose operation is defined in RCW 19.48.010
 - ▶ Occupancy is less than 30 days
- ▶ Agriculture
 - ▶ Single-family residence which are incidental to leases or rentals entered into in connection with a lease of land to be used primarily for agricultural purposes
 - ▶ Rental agreements providing housing for seasonal agricultural employees while provided in conjunction with such employment
- ▶ Occupancy by an employee of a landlord whose right to occupy is conditioned upon employment in or about the premises (e.g. on-site managers, maintenance staff)
- ▶ Proprietary Leases - RCW 59.18.435 & RCW 64.90 *et seq.*

Fair Housing

- ▶ Fair housing is the right of all people to be free from discrimination in the rental, sale, or financing of housing, regardless of their protected class.
- ▶ Broader than Landlord-Tenant Laws
 - ▶ Fair Housing Laws: cover rights of renters and home buyers to be free from protected class discrimination in their choice of and treatment in housing transactions
 - ▶ Landlord-Tenant Laws: cover general rights and responsibilities of rental tenants and housing providers

Protected Classes

Federal Protected Classes

- ▶ Race
- ▶ Color
- ▶ National Origin & Ancestry
- ▶ Religion
- ▶ Sex (Gender)
- ▶ Disability
- ▶ Familial Status (Parental)

State & Local


- ▶ Marital Status
- ▶ Sexual Orientation
- ▶ Gender Identity
- ▶ Veteran/Military Status
- ▶ Age
- ▶ Section 8/Housing Vouchers
- ▶ Political Ideology

Who Must Comply with Fair Housing Laws

- ▶ Rental Transactions
 - ▶ Property owners & managers
 - ▶ Maintenance staff
 - ▶ Outside contractors (e.g., plumbers, landscapers, etc.)
 - ▶ Advertisements
 - ▶ Other residents (e.g., tenant vs tenant)
 - ▶ Landlord can be liable for discriminatory acts of a third party
 - ▶ When a housing provider is aware that a resident may be experiencing harassment because of their protected class, the provider has a legal responsibility to investigate, to take action to stop any harassing behavior, and to ensure that it does not recur. If a housing provider fails to take effective action, a fair housing complaint can be filed.

Advertising

- ▶ Fair housing laws cover all advertising
- ▶ Avoid words and phrases that suggest preferences/limitations of protected classes
- ▶ Equal Housing Opportunity logo
 - ▶ Signal to public that the property is available to all persons regardless of race, color, religion, sex, handicap, familial status, or national origin
- ▶ Affirmative advertising is permitted
 - ▶ Family friendly
 - ▶ Disability access
 - ▶ Section 8 accepted



Reasonable Accommodations

- ▶ Change, exception, or adjustment to a property rule, policy, practice, or service.
 - ▶ Example: A request by a tenant in a wheelchair for a guide dog in an apartment community with a "no pets" policy.
 - ▶ Example: Providing a reserved parking space at the building entrance for a tenant, even though the rest of the complex does not have reserved parking
- ▶ Requested accommodation must be reasonable and should not present an undue burden on the landlord. If the accommodation is not reasonable or if it would impose an undue hardship on the landlord, the request may be denied.
- ▶ Very fact specific, but not a negotiation
 - ▶ X is unduly burdensome, but would Y suit your needs?
- ▶ Offering an accommodation before it is requested may subject your client to a claim of discrimination.

Reasonable Modifications

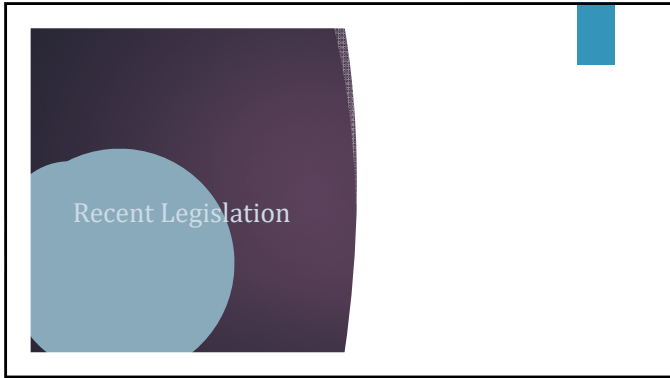
- ▶ A structural change made to the premises
 - ▶ Example: A request to install grab bars in the bathroom; adjusting height of kitchen counters
- ▶ Different than reasonable accommodations
- ▶ Also subject to a reasonableness test
- ▶ If the modification is for something that the law already requires a landlord to have in place, then the landlord is responsible for the cost of the modifications.
- ▶ Landlords may require a resident to pay for modifications to the property and require that those modifications be removed when the resident vacates the property, but only where it is reasonable to do so
 - ▶ Can request to restore interior
 - ▶ Usually cannot request restoration of common areas

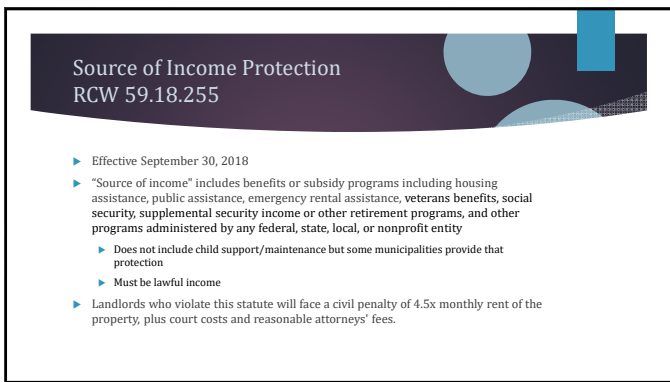
Fair Housing and Tenant Screening

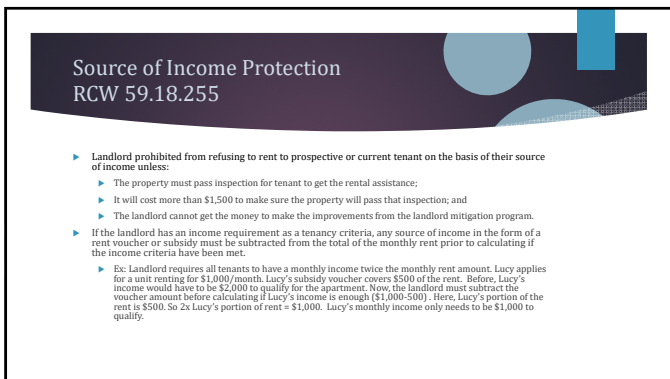
- ▶ Federal, State and Local laws and protected classes vary
- ▶ General principles and best practices:
 - ▶ Avoid discriminatory rules
 - ▶ Treat everyone the same, but make accommodations appropriately
 - ▶ Develop objective criteria and use consistently
 - ▶ Inform applicants of standards and avoid steering their decision to apply
 - ▶ Keep good records, especially of denial

Rental Applications & Tenant Screening RCW 59.18.257

- ▶ Written notice to applicants:
 - ▶ Info accessed to conduct screening
 - ▶ Criteria resulting in denial
 - ▶ Name/address of screening agency and tenant's rights
- ▶ Adverse Action Notice
- ▶ Additional municipal rules







Source of Income Protection —Current Tenants

- ▶ Landlord cannot evict a tenant due to their source of income
- ▶ Landlord cannot make any distinction, discrimination, or restriction against a prospective tenant or current tenant in the price, terms, conditions, fees, or privileges relating to the rental, lease, or occupancy of real property or in the furnishing of any facilities or services in connection with the rental, lease, or occupancy of real property
- ▶ Landlord cannot engage in "steering" by attempting to discourage a prospective or current tenant who receives a housing subsidy benefit from renting the property, or represent that the unit is unavailable when it actually is
- ▶ Cannot advertise, state or have signage that indicates a preference, limitation, or requirement based on any source of income.

Landlord Mitigation Program RCW 43.31.605

- ▶ Administered by Washington Department of Commerce
- ▶ Up to \$1,000 for improvements identified as necessary to pass the housing inspection for the subsidy provider
 - ▶ Landlord must pay for the first \$500 of improvements and rent to the tenant whose was conditioned on the real property passing inspection
 - ▶ Landlord can also get reimbursed for up to 14 days of lost rental income from the date of offer of housing to the applicant whose housing subsidy program was conditioned on the real property passing inspection until move in by that applicant
- ▶ Up to \$5,000 reimbursement for damages as reflected in a judgment obtained against the tenant through either an unlawful detainer proceeding, or through a civil action against a tenant
 - ▶ The application must filed within 1 year of the judgment
 - ▶ New in 2018: judgment no longer required
- ▶ Program covers property damage exceeding wear and tear, unpaid rent and utilities, and other damages and repair costs.

Landlord Mitigation Program RCW 43.31.605

- ▶ Claims must be between \$500 and \$5,000 to be eligible for reimbursement. Claims or damages exceeding \$5,000 are eligible but no more than \$5,000 per tenancy will be paid.
 - ▶ Example: If the damages are \$8,000, the Landlord can still apply to the mitigation program, but only \$5,000 will be paid.
- ▶ Landlord must apply deposits and payments from third parties in satisfaction of the debt to the claim and notify the Department of Commerce of those payments.
- ▶ Landlord must have solid record keeping
- ▶ Reimbursements for eligible claims shall be made on a first-come, first-served basis, to the extent of available funds.
- ▶ Landlord prohibited from taking further legal action against the tenant, pursuing collection, or authorizing another entity to pursue collection on the landlord's behalf for damages attributable to the same tenancy.

Death of a Tenant RCW 59.18.590

- ▶ Applies in the event of a tenant's death when the tenant is the sole occupant of the dwelling unit
- ▶ Tenant can volunteer or landlord may ask a tenant to fill out a form designating a person to act on their behalf in the event of the tenant's death
- ▶ Form is separate from the rental agreement
 - ▶ Form Requirements:
 - ▶ Contact Information: Designated person's name, mailing address, email address, and phone number
 - ▶ Signed statement authorizing landlord to allow the designated person to access the tenant's unit, remove the tenant's property, receive refunds of amounts due to the tenant, and dispose of the tenant's property consistent with the tenant's last will and testament and any applicable intestate succession law AND
 - ▶ A conspicuous statement that the designation remains in effect until it is revoked in writing by the tenant or replaced with a new designation
- ▶ Tenant can change the designation at any time with a new written form
- ▶ Form does not have to be executed with the formalities of a will

Death of a Tenant RCW 59.18.590

- ▶ The designated person can be different than the tenant's personal representative (PR) in their will
- ▶ The designated person's authority terminates once the landlord or the designated person knows a PR has been appointed, or a successor of the decedent provides proof of death to the landlord under RCW 11.62.010(2)

Disposal of Deceased Tenant's Personal Property RCW 59.18.595

- ▶ When a Landlord learns a tenant has died, they must promptly mail or personally deliver a written notice to any known Personal Representative, Designated Person, Emergency Contact, or any person reasonably believed to be a successor of the decedent.
 - ▶ If they know of any email addresses for these people, they must email the notice as well.
- ▶ Required Contents of the Notice:
 1. Copy of any designation executed by the tenant pursuant to RCW 59.18.590
 2. Name of the deceased tenant & rental property address
 3. Approximate date of the tenant's death
 4. The rental amount and the date through which rent is paid
 5. Statement that tenancy will terminate fifteen days from the date the notice is mailed or personally delivered or the date through which rent is paid, whichever comes later
 - a) However, Tenant Representative can make arrangements with the landlord to pay rent in advance for no more than sixty days from the date of the tenant's death to allow time to arrange for orderly removal of the tenant's property.
 - b) The tenancy ends at the end of the period for which the rent has been paid
 6. Statement that failure to remove the tenant's property before the end of the tenancy will allow the landlord to enter the dwelling unit and take possession of any property found on the premises, store it in a reasonably secure place, and charge the actual or reasonable costs, whichever is less, of drayage and storage of the property, and after service of a second notice sell or dispose of the property as provided
 7. Landlord's Contact Information—mailing address, email address, and telephone number
- ▶ Upon learning of the tenant's death, the Landlord may enter the unit and dispose of any perishable food, hazardous materials, and garbage found on the premises, and turn over any animals to the Tenant Representative, or animal control/humane society

Removal of Deceased Tenant's Personal Property RCW 59.18.595

- ▶ Landlord must turn over possession of the tenant's property to a Tenant Representative if a request is made in writing within the specified time period or any subsequent date agreed to by the parties
- ▶ Within fourteen days after the removal of the property by the Tenant Representative, the Landlord must refund any unearned rent, and give a full and specific statement to the Tenant Representative of the basis for retaining any deposit together with the payment of any refund due the deceased tenant under the terms and conditions of the rental agreement (similar to RCW 59.18.280)
- ▶ At the time of removal, Tenant Representative must provide the landlord with an inventory of the removed property and signed acknowledgment that he or she has only been given possession and not ownership of the property

Selling & Disposing of Personal Property RCW 59.18.595

- ▶ Landlord must send a second written notice if they intend to sell or dispose of the personal property
- ▶ Only applies if the Tenant Representative has made arrangements to pay rent in advance
- ▶ Contents of Second Notice:
 1. Name, address, and phone number or other contact information for the Tenant Representative who made the arrangements to pay rent in advance;
 2. Amount of rent paid in advance and date through which rent was paid; and
 3. A statement that the landlord may sell or dispose of the property on or after the date through which rent is paid or at least forty-five days after the second notice is mailed, whichever comes later; if a Tenant Representative does not claim and remove the property.
- ▶ If the Representative (i) Pays the actual or reasonable costs of drayage and storage of the property, AND (ii) Gives the Landlord an inventory of the property and signs an acknowledgment that he or she has only been given possession and not ownership of the property, then Landlord may release the personal property to the Tenant Representative

Selling & Disposing of Personal Property RCW 59.18.595

- ▶ If the Representative does not contact the landlord or remove the personal property within the deadlines, the landlord can sell or dispose of the property
 - ▶ Cannot dispose of personal papers and personal photographs.
 - ▶ Personal papers and personal photographs that are not claimed by a tenant representative within ninety days after a sale or other disposition of other property will be either destroyed or held for the benefit of any successor of the deceased tenant as defined in RCW 11.62.005.
- ▶ If the FMV of the property is ≥\$1,000, Landlord must sell the property in a commercially reasonable manner
 - ▶ Landlord must make a reasonable estimate
 - ▶ Anything that remains unsold must be disposed of in a reasonable manner.
- ▶ If the FMV of the property is <\$1,000, the landlord may dispose of the property in a reasonable manner.

Selling & Disposing of Personal Property RCW 59.18.595

- ▶ Any income derived from the sale must be applied to the cost of sale and money due to the Landlord for storage and drayage of the property.
- ▶ Any excess derived from the sale must be held by the Landlord for one year from the date of the sale.
 - ▶ If no claim by the tenant's estate/representative is made within 1 year of the sale, then the property must go to the Department of Revenue's Unclaimed Property division.
- ▶ Landlord, Landlord's Family, Landlord's Employees prohibited from acquiring the tenant's property directly or indirectly.

Landlord's Liability after Death of a Tenant RCW 59.18.595

- ▶ Knowing violation: Landlord liable to the deceased tenant's estate for actual damages.
 - ▶ Prevailing party can recover costs and reasonable attorneys' fees.
- ▶ If the Landlord complies with the RLTA, then they are relieved from any liability relating to the deceased tenant's property.

Tenants and Foreclosure

- ▶ Public Law 115-174
 - ▶ Passed May 24, 2018
 - ▶ Repealed sunset provision of the Protecting Tenants at Foreclosure Act (PTFA)
- ▶ Under PTFA, tenants living in foreclosed properties are entitled to 90 days written notice before the new owner (successor in interest to the foreclosure) initiates eviction proceedings
 - ▶ If the lease is a term lease, the tenant may stay in the property for the remainder of the lease term, unless the purchaser intends to use the property as their personal residence; or
 - ▶ If it is a month-to-month lease, the tenant must vacate within 90 days
 - ▶ Tenants receiving federal housing subsidy can remain for the duration of the term
- ▶ PTFA applies in all states but does not override more protective state laws

Tenants and Foreclosure

- ▶ The PTFA only applies to "bona fide leases"
 - ▶ The tenant cannot be the mortgagor or a "child, spouse, or parent of the mortgagor." PTFA § 702(b)(1)
 - ▶ The lease must be the result of an "arms-length transaction." PTFA § 702(b)(2)
 - ▶ The lease must require payment of rent "that is not substantially less than fair market rent." PTFA § 702(b)(3).
- ▶ Tenant should pay rent to purchaser
- ▶ Purchaser steps into shoes of landlord until end of lease

Seattle First in Time Ordinance

Seattle First In Time Ordinance (FIT) SMC 14.08.050

- ▶ Enacted in August 2016
- ▶ Required Landlords to offer the unit to the first applicant who met the basic qualifications
 - ▶ Applications processed in order received
 - ▶ Even if a more qualified applicant applied later, the first person with a complete application who met the criteria had to be offered the unit
- ▶ Eliminated "preferred employer" discounts and preferences
- ▶ Vacancy advertisements need to list all qualification metrics
- ▶ Goal: eliminate implicit bias in tenancy decisions

Plaintiff's Argument

- ▶ Taking of property without compensation
- ▶ Taking of property for improper public use
- ▶ Violated right to substantive due process
- ▶ Violated free speech rights

Manufactured Housing Communities of Washington v. State

- ▶ 142 Wn.2d 247, 13 P3d 183 (2000)
- ▶ The right to freely dispose of property is a fundamental attribute of property ownership and the right cannot be taken without due process and just compensation
- ▶ A lease is a disposition of a property interest, just like the sale of a fee interest.
- ▶ Because the right to choose a buyer is a fundamental attribute of property ownership, so too is the landlord's right to choose a tenant
- ▶ Therefore, FIT ordinance was an improper taking

City's Argument

- ▶ City's Argument: FIT ordinance did not prohibit landlords from setting their own rental criteria
- ▶ Court's response: general rental criteria is not a substitute for the discretion to choose a specific tenant
- ▶ Further, the FIT rule takes away the landlord and tenant's ability to bargain for an arrangement that suits their interests.

Improper taking for private use

- ▶ Article I, Section 16 of the Washington State Constitution: "absolute prohibition against taking private property for private use."
- ▶ A taking is not for public use just because it offers a "public benefit"
 - ▶ Compare: *Manufactured Housing* case which held that right of first refusal law giving mobile home tenant's right to preempt the park owner's sale, even though it had a laudable goal of preserving low income housing stock, it was still a taking for private use.
- ▶ Even though the goal of the FIT ordinance was to make it easier for certain classes of tenants to find rental housing, FIT still preempted a landlord's freedom to contract, and was thus a taking of private property for private use.

Substantive Due Process

- ▶ Government must pursue legitimate purposes in a "just and rational manner"
- ▶ Three Prong Test:
 - ▶ Is the regulation aimed at achieving a legitimate public purpose?
 - ▶ Does the regulation use means reasonably necessary to achieving that purpose?
 - ▶ Is the regulation unduly oppressive?

Substantive Due Process

- ▶ Is the regulation aimed at achieving a legitimate public purpose? **Yes**
- ▶ Does the regulation use means reasonably necessary to achieving that purpose? **No**
 - ▶ The government cannot eliminate ordinary discretion just because there is a chance some people have unconscious biases.
 - ▶ This expands "police power beyond reasonable bounds"
 - ▶ "A law is not reasonably necessary if its rationale and methodology have no meaningful limiting principle" *Reed v. Bantz*, 549 U.S. 521, 546, 126 S. Ct. 2572, 165 L. Ed. 697 (2006)
- ▶ Unreasonable means of pursuing anti-discrimination because it was sweepingly overbroad.
 - ▶ Requiring a person to contract with the first qualified applicant was an unreasonable means of pursuing its anti-discrimination goal
- ▶ Is the regulation unduly oppressive? **Yes**
 - ▶ FIT ordinance severely restricts innocent business practices and bypasses less oppressive alternatives for addressing unconscious bias.

Freedom of Speech

- ▶ The Ordinance mandated the methods that landlords can use to communicate with prospective tenants and controls the content of those communications. SMC 14.09.050(A)(1)-(2)
 - ▶ Written notice of all rental criteria and required application documents in the leasing office, or at the rental property, and if they do internet advertising on the website ads as well
 - ▶ Could not say "Unit available, call or email for further details"
- ▶ Because this is a commercial speech restriction, intermediate scrutiny is required
 - ▶ A rental advertisement is commercial speech because it proposes a commercial transaction
- ▶ "Society has a strong interest in preserving the free flow of information." *Kitsap Cty v. Mattress Outlet/Gould*
 - ▶ Ordinance was not content-neutral, and dictated the methods landlords can advertise
- ▶ 4 Prong Test:
 1. Is the speech about lawful activity and is it deceptive?
 2. Is there a substantial government interest at stake?
 3. Does the speech restriction "directly and materially" serve the interest?
 4. Is the restriction "no more extensive than necessary"?

Freedom of Speech

1. Whether the speech is about lawful activity and is not deceptive
 - ▶ *Yes, apartment rentals are lawful activities and advertising them is not deceptive*
2. Is there a substantial government interest at stake?
 - ▶ *Yes, Seattle has a legitimate interest in preventing discrimination*
3. Does the speech restriction "directly and materially" serve the interest? *No*
4. Is the restriction "no more extensive than necessary"? *No*
 - ▶ *The ordinance is not narrowly tailored to achieve its ends*
 - ▶ *The law forbids valuable speech activities such as case-by-case negotiation and tells landlords how to communicate their criteria.*

▶ **Therefore, the ordinance fails the intermediate scrutiny test.**

Seattle First in Time Ordinance —Where do we go from here?

- ▶ Seattle has appealed to the Washington Supreme Court
- ▶ Enforcement is stayed pending the outcome of the appeal