

TENANT FEES ACT 2019:

Taking the sting out of renting?

The stated aim of the [Tenant Fees Act 2019 \(Act\)](#) is to reduce the costs that tenants in the private rented sector face at the outset, and throughout a tenancy, to deliver a fairer and more affordable private rented sector. It is part of the Government's plans to "*build a housing market fit for the future.*" The Act will apply to all new assured shorthold tenancies and student lets, including those which are renewed after 1 June 2019. Existing tenancies and student lets will be brought under the new rules from 1 June 2020 but landlords need to plan ahead now.

Summary

The main operative provisions:

- ▶ will come into force on 1 June 2019
- ▶ apply to England only (The Act extends to England and Wales, but, at the moment, the main prohibitions in the Act are cast as England- only provisions)
- ▶ prohibit landlords and letting agents from requiring tenants of certain residential tenancies to make payments other than those specifically permitted under the Act. The effect is to prohibit the charging of fees by a landlord's agent for viewings, background checks, inventories, or anything else not expressly allowed
- ▶ set caps on security and holding deposits (being deposits paid to reserve a property prior to the signing of a tenancy agreement), and for certain other payments
- ▶ require property agents to belong to an approved or designated Client Money Protection Scheme (CMPS) (this provision has been in force since 1 April 2019)
- ▶ in essence, prevent landlords from charging tenants for anything other than rent, a tenancy deposit and any holding deposit. The Act does however specify certain "permitted payments" which landlords can charge, including an interest charge on late payments (subject to limits) and the reasonable cost of replacing lost keys
- ▶ impose financial penalties and criminal sanctions for breaches
- ▶ prevent landlords from serving notices to recover possession of their properties until unlawful payments have been returned

The Government has produced [Guidance](#) for tenants, landlords, letting agents and enforcement authorities to help explain how the legislation affects them. Whilst this is not legally binding, it is a statement of good practice and the respective parties should have regard to the guidance. Local enforcement authorities have primary responsibility for enforcing the legislation.

Tenancies to which the Act applies

The Act applies to tenancies of housing in England. For the purposes of the Act, "tenancy" means:

- ▶ assured shorthold tenancies (other than ones of social housing and certain long leases);
- ▶ student lettings by an educational institution falling within paragraph 8 Schedule 1 [Housing Act 1988](#); and
- ▶ licences to occupy (excluding holiday lets and licences to occupy social housing). The Guidance provides instances where someone might have a licence rather than a tenancy agreement (for example: lodgers, a friend house-sitting whilst the owner is on holiday and service occupancies- where an employee is required to occupy the accommodation under their contract as it is essential for performance of their duties).

The inclusion of licences in the definition of "tenancy" is a clear anti-avoidance provision designed to stop those involved in the letting of housing exploiting the lease/licence distinction to avoid complying with the new provisions.

What payments will be banned?

The Act bans all payments in connection with a tenancy, licence or student let in England unless permitted by the Act. Any provisions in a tenancy/licence agreement to the contrary will be void and not legally binding.

Landlords and letting agents must not require tenants (including prospective tenants and anyone guaranteeing the rent) to make any "prohibited payments". In short, a payment is a "prohibited payment" unless it is a permitted payment as listed in [Schedule 1](#).

The only permitted payments are as follows:

PERMITTED PAYMENT	COMMENT
Rent	<ul style="list-style-type: none">▶ Landlords are prevented from requiring an increased rent at the outset, as an anti-avoidance provision. This means that for the first year of the tenancy, landlords must not charge more at the start of the tenancy compared to a later period: the amount by which any rent payment exceeds the rent for any subsequent period within that first year is a prohibited payment. This means landlords and letting agents will not be able to "front load" rental payments to recoup their costs.▶ The Guidance states that a landlord can still ask a tenant to pay their rent in a lump sum upfront (e.g. if there is no suitable guarantor or reference checks)
Refundable tenancy deposit	<p>This is subject to the following caps:</p> <ul style="list-style-type: none">▶ no more than five weeks' rent where the annual rent for the tenancy immediately after its grant, renewal or continuance is less than £50,000; and▶ no more than six weeks' rent where the annual rent for the tenancy immediately after its grant, renewal or continuance is £50,000 or more. <p>Any amount above these caps will be a prohibited payment.</p> <ul style="list-style-type: none">▶ Any tenancy deposit should be protected in one of the three Government backed tenancy deposit schemes within 30 days of taking the payment
Refundable holding deposit	<ul style="list-style-type: none">▶ This must be no more than one week's rent. Any amount above this cap will be a prohibited payment.▶ A holding deposit cannot be required if the landlord/letting agent has previously received a holding deposit after 1 June 2019 in respect of the same housing and has not repaid it where it was required to do so (this does not apply to previous holding deposits paid before 1 June 2019) <p>This is a potential trap for landlords and letting agents – for as long as they retain a holding deposit in contravention of the Act they are not entitled to require the payment of any new holding deposit from another tenant in respect of the same housing.</p>

PERMITTED PAYMENT	COMMENT
Default charges	<p>These are only permitted for:</p> <ul style="list-style-type: none"> ▶ loss of a key or other access security device; and ▶ failure to pay the rent in full before the end of the period of 14 days beginning on the date on which the payment is required to be made <p>and only in circumstances where the tenancy agreement requires payment of the same. Landlords must ensure the tenancy agreement expressly includes such items.</p> <p>Interest on late rent payments is capped at 3% above the Bank of England base rate.</p> <p>The Act does not affect any entitlement to recover damages for breach of contract by way of a deduction from the tenancy deposit or by taking court action: a payment of damages for breach of a tenancy agreement or an agreement between a letting agent and the tenant or its guarantor is a permitted payment.</p>
Payments for variation, assignment, novation or termination of a tenancy at the tenant's request	<p>Permitted in certain circumstances and subject to various caps on what can be recovered. Generally what is recoverable is limited to reasonable costs or losses in respect of the transaction.</p> <ul style="list-style-type: none"> ▶ change to a tenancy agreement: capped at £50 or reasonable costs (if higher) - a payment for a variation (for example, change of tenant/permission to keep pets at the property) is the greater of £50 or the reasonable costs of the transaction. Any charge that exceeds the reasonable costs which have been incurred will be a prohibited payment ▶ early termination (at the tenant's request): capped at the landlord's loss or agent's reasonable incurred costs - landlords may charge for payment on termination of a tenancy only if it is at the tenant's request and provided the amount does not exceed the loss suffered by the landlord/or the reasonable costs to the letting agent as a consequence of the early termination. <p>The Guidance states that "<i>this usually means that a landlord must not charge any more than the rent they would have received before the tenancy reaches its end</i>" and "<i>we encourage you to not charge any early termination fees unless you can demonstratethat specific costs have been incurred (e.g. marketing and referencing costs.</i>" Any payment that exceeds the landlord's financial loss or an agent's reasonable cost will be a prohibited payment.</p>
Payments for council tax, utilities, television licences and for communication services	<p>Subject to various conditions:</p> <ul style="list-style-type: none"> ▶ Council tax: automatically a permitted payment ▶ Utilities (gas, electricity, water and sewerage), television licences and communication services: permitted if specified in the tenancy agreement ▶ Payment towards energy efficiency improvement under a green deal plan: permitted if specified in the tenancy agreement <p>The tenancy agreement should expressly state the amount of the rent and that utilities/communication services are charged separately.</p>

Prohibited arrangements

Landlords and letting agents are prohibited from requiring a tenant (including prospective tenants and guarantors):

- ▶ to enter into contracts with third parties if that contract is for the provision of a service or a contract of insurance. There are limited exceptions for contracts required by landlords relating to the provision of utilities and communication services to tenants; or
- ▶ to make a loan to any person,

in both cases where the same is in connection with a tenancy of housing in England.

Holding deposits: capped at no more than one week's rent

- ▶ A holding deposit of up to one week's rent is permitted provided the landlord or letting agent is not already holding an earlier deposit in relation to the same housing which has not been repaid where it was required to do so (otherwise it becomes a prohibited payment).
- ▶ [Schedule 2](#) deals with the treatment of holding deposits. Any holding deposit must be refunded to the tenant within seven days of the parties entering into a tenancy agreement in prescribed circumstances, otherwise it becomes a prohibited payment. Certain exceptions apply where the deposit may be retained (set out below)
- ▶ The holding deposit can be applied, subject to the payee's consent, to the first instalment of rent or towards any permitted security deposit.

Circumstances in which a landlord might be able to keep the holding deposit

These include:

- ▶ if it transpires the tenant does not have the right to rent the property pursuant to [Section 22 Immigration Act 2014](#) (persons disqualified by immigration status) and the landlord or letting agent did not know, and could not reasonably have been expected to know that the prohibition applied before accepting the holding deposit;
- ▶ if the tenant provides false or misleading information to the landlord or letting agent. In such cases, the landlord is reasonably entitled to take into account the difference between the information provided by the tenant and the correct information as well as the tenant's actions when deciding whether or not to grant a tenancy; and
- ▶ if the tenant decides not to enter into the tenancy or fails to take all reasonable steps to enter into a tenancy agreement. This exception does not apply if the landlord or letting agent has required a prohibited payment or entry into a prohibited contract, or has behaved in such a way that it would be unreasonable to expect the tenant to enter into the tenancy.

However, where a landlord or letting agent seeks to retain a holding deposit, it must serve a notice on the payee of the deposit setting out the grounds on which it intends to keep the deposit. Failure to serve the requisite notice within the time limits prescribed (normally seven days) will mean that the landlord or letting agent will forfeit their right to keep the same.

Sanctions for non-compliance

Where a prohibited payment or prohibited arrangement has been required, or the provisions relating to holding deposits have been breached, the potential consequences include:

- ▶ **Prohibited payment/prohibited arrangement: void.** Any prohibited payment or prohibited arrangement in relation to a tenancy will not be binding on the tenant or its guarantor; however, the agreement will continue, so far as practicable, to have effect in every other respect;
- ▶ **Repayment of prohibited payment with interest.** The enforcement authority may take steps to force the repayment of any prohibited payments together with interest;
- ▶ **Tenant application to FTT.** The tenant may apply to the First Tier Tribunal (FTT) to recover any prohibited payments, holding deposit (which has not been returned) or payments made under a contract entered into with a third party together with interest. The FTT may order the landlord/letting agent to pay all or any part of the amount within at least 7 days and no more than 14 days of the order. There is no right of recovery if an enforcement authority has commenced criminal proceedings against the landlord or agent for the same breach, or has required the landlord/letting agent to pay to the relevant person all or part of the amount;
- ▶ **Financial penalty:** The enforcement authority may impose a financial penalty of up to £5,000 for a first breach of the legislation. If a landlord/letting agent requires any prohibited payment or prohibited arrangement and commits a second breach within five years of an earlier penalty being imposed, that person commits a criminal offence (a banning order offence under the Housing and Planning Act 2016) which is liable on summary conviction to an unlimited fine. The enforcement authority can then choose to either prosecute the offender in the magistrates' court or impose a financial penalty of up to £30,000 (depending on the circumstances) (note that officers of corporates may also be held to have committed an offence).

Enforcement authorities are expected to develop and document their own policy on when to prosecute and when to issue a financial penalty.

The [Guidance](#) provides examples of breaches.

Impact of recovery of possession of property

The Act introduces a further hurdle for landlords seeking to recover possession of their property via the [section 21](#) Housing Act 1988 eviction procedure. Landlords cannot evict a tenant using section 21 until it has repaid any unlawfully charged fees or returned an unlawfully retained holding deposit.

Where the landlord:

- ▶ has required the tenant or its guarantor to make a prohibited payment and that payment was duly made; or
- ▶ has breached the rules relating to the treatment of holding deposits,

it may be barred by [section 17 \(3\)](#) of the Act from serving a section 21 notice (where it is an assured shorthold tenancy) for as long as all or part of the prohibited payment or holding deposit has not been repaid. This is a significant sanction as it interferes with the landlord's ability to terminate its relationship with the tenant. This means that the "no fault" eviction route will not be available until the prohibited payment has been returned to the tenant. All other rules around the application of section 21 eviction procedures will continue to apply.

New form of section 21 notice

A new Section 21 Notice Form 6A will replace the current version from 1 June 2019. This is to coincide with the commencement of the Act. The main changes to the notice are in the section explaining the restrictions on terminating a tenancy under Section 21 Housing Act 1988 (so that it refers to the prohibition on giving a section 21 notice if a landlord has received (and not returned) a "prohibited payment" under the Act), and also where it explains what a tenant should do if the notice has been served on them.

The version which has been used since 1 October 2015 can no longer be used from 1 June 2019 and the new one should instead be served on the tenant.

It is important that checks are carried out before serving the new form section 21 notice to make sure there is compliance with all applicable statutory requirements and there have been no breaches of the Act. Failure to comply with the terms of the Act could result in the notice being deemed invalid and being incapable of being relied on in future possession proceedings.

Enforcing authorities

Who enforces the ban?

Local weights and measures authorities (more commonly known as Trading Standards) have a mandatory duty to enforce in their local area. A district council which is not a local weights and measures authority, can also enforce should it choose to do so. Details of local trading standards authorities can be found [here](#).

The Act provides for a lead enforcement authority being either the Secretary of State or a local weights and measures authority nominated for the task. The lead enforcement authority is responsible for, among other things:

- ▶ overseeing the operation of the provisions of the Act; and
- ▶ providing information and advice to relevant authorities in England as well as the public.

In addition, the lead enforcement authority will be able to enforce the Act where it thinks necessary or expedient to do so.

What is the procedure for local authorities enforcing the breach?

The local authority must first serve a notice of intent on the person who has breached the legislation. This notice of intent must set out the amount of the proposed penalty and the reasons for imposing the penalty, along with reasons of the amount proposed. The recipient must be given 28 days to make representations. If after considering any representations, the enforcement authority decides to proceed with imposing a penalty, they must give a final notice, again with reasons. The final notice can be appealed to the FTT.

Do tenants have any other enforcement options?

The Act also makes provision for "relevant persons" to be able to recover unlawfully charged fees through the FTT. "Relevant person" will usually mean the tenant, but it also includes someone who acts on behalf of the tenant and someone who guarantees the rent.

Transitional arrangements (section 30)

When does the ban apply?

This depends on when the tenancy agreement was entered into. The ban is being introduced in two stages.

1. From 1 June 2019

Tenancies entered into after 1 June 2019

The Act applies to all requirements for payments, and to tenancies entered into after 1 June 2019. This means that landlords will be prohibited from charging any fees or other payments that are not included in the [Schedule 1](#) list of permitted payments. Landlords will be responsible for the costs associated with setting up, renewing or ending a tenancy (e.g. references, administration, inventory, renewal and check out fees). Agents do not have to pay back any fees that have been charged to a tenant before 1 June 2019. Landlords do not need to return any amount of tenancy deposit above the cap for tenancy agreements entered into before 1 June 2019,

Transitional period

There is a transitional period of one year during which the Act does not apply to prohibitive payments or arrangements imposed by a tenancy entered into before 1 June 2019:

Landlords can continue to require a tenant to pay fees stated in the tenancy agreement until 31 May 2020. After 1 June 2020, the relevant provision in the tenancy ceases to be binding on the tenant or relevant person (which can include a prospective tenant or guarantor). If the landlord or letting agent accepts a payment under such a provision which is not returned within 28 days, it is treated as a prohibitive payment and they will have acted in breach of the Act and be liable to the enforcement remedies listed above.

The provisions on the return of holding deposits apply only to deposits taken after 1 June 2019.

2. From 1 June 2020

The ban on prohibited fees will apply to all applicable tenancies and licences to occupy housing in the private rented sector. Landlords will not be able to charge any prohibited fees after 1 June 2020

Amendments to the Consumer Rights Act 2015

The Act amends the Consumer Rights Act 2015 concerning the information to be provided by letting agents. In an effort to stamp out confusing or hidden pricing, letting agents are required to clearly set out their fees online, either on third party letting sites or on their own site.

Membership of a client money protection scheme (CMPS)

From 1 April 2019, a property agent (defined as a person engaged in English letting agency or management work) who holds client money must be a member of an approved CMPS.

Comment

Tenants should get a clearer picture of the likely costs involved from the outset. Landlords may look to increase rents to make up any shortfall. Whilst landlords may still recover damages for repairs at the end of the tenancy, if the security deposit is limited to just 5 weeks' rent, then it may be necessary to make a court application to make up any shortfall.

It will be more important than ever for landlords to ensure they have in place the necessary checks (e.g. inventory check, photographic evidence of the condition of the property, immigration checks, references and credit checks) prior to the grant of a new tenancy and the tenancy terms comply with the terms of the Act. Whilst there are the transitional provisions which allow landlords to continue to charge for such items expressly included in a tenancy agreement entered into before 1 June 2019 (e.g. professional clean at the end of the tenancy), as from 1 June 2020, such terms will no longer be binding on the tenant. Landlords need to plan ahead by reviewing existing tenancy agreements and ensuring new tenancy agreements comply with the Act.

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