

FAQ ABOUT SECURITY DEPOSITS

from our Webinar

Some of our most-asked questions about security deposits, answered here.

CAN I DEDUCT FOR MY TIME TO REPAIR AN APARTMENT? WHAT ABOUT MY EMPLOYEE'S TIME?

MGL Chapter 186, Section 15b reads, "The lessor may deduct from such security deposit for the following:

'a reasonable amount necessary to repair any damage caused to the dwelling unit by the tenant or any person under the tenant's control or on the premises with the tenant's consent, reasonable wear and tear excluded. In the case of such damage, the lessor shall provide to the tenant within such thirty days an itemized list of damages, sworn to by

the lessor or his agent under pains and penalties of perjury, itemizing in precise detail the nature of the damage and of the repairs necessary to correct such damage, and written evidence, such as estimates, bills, invoices or receipts, indicating the actual or estimated cost thereof."

The law specifically contemplates that the amount withheld may imprecisely correspond to the actual cost, such as a contractor estimate (with the actual amount not yet paid out) or an "estimated cost," perhaps including a landlord's own time. Two caveats:

First, note the requirement to provide "precise detail." You would need to show a timecard or other log, and would likely be expected to exclude the time to get to the property. You might also be asked to provide documentation showing that you or your employee were the most appropriate person to repair the damage. Billing eight hours of watching YouTube to learn how to perform basic carpentry would likely not be found reasonable.

Second, note that the law does not specify a landlord's wage. We have heard anecdotally that the only wage specified in the law is the minimum wage. It is unclear if a wage specified in the rental agreement would be upheld.

We teach that most landlords across the state will find their only certain path to withholding in hiring a third-party contractor who produces an unbiased third-party receipt or invoice for actual costs.

CAN I KEEP THE LAST MONTH'S RENT IN THE SAME TENANT/LANDLORD ACCOUNT AS THE SECURITY DEPOSIT?

No, keep them separate. The security deposit is the renter's money. The last month's rent is yours.

THE TENANT HAS 15 DAYS TO RETURN THE APARTMENT CONDITION STATEMENT. IF THEY DO NOT RETURN THE STATEMENT, THEN WOULD THE LANDLORD CONSIDER EVERYTHING TO BE FINE WHEN THE TENANT MOVED IN?

Everything will be as written in the signed statement of condition. Don't leave room for doubt. It's best to say, "Nothing is broken, everything is in perfect shape."

HOW DO I SEPARATE INTEREST FROM YEAR TO YEAR WHEN I'VE KEPT THE SECURITY DEPOSIT IN THE SAME ACCOUNT FOR A TENANT WHO HAS BEEN THERE FOR MANY YEARS?

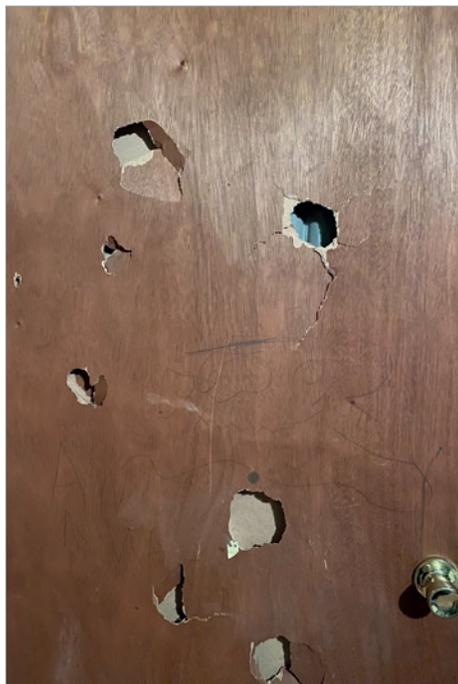
You should withdraw interest in order to pay it out each year. If you haven't paid out all accrued interest, pay it all out now, including any effect from compounding.

You can transfer interest from the security deposit account to your business checking account for the purpose of making a payment.

HOW DO YOU DEAL WITH AN OLD SECURITY DEPOSIT TO MAKE IT COMPLIANT?

An attorney would advise you to return the deposit and start over. An experienced landlord may wish to establish compliance going forward, and only return the deposit if any issues arise. A good-faith error should not eliminate the moral expectation that your apartment be returned in the same condition it was rented.

If your renters are renewing, you can create an entirely new tenancy. Return the old deposit and take a new one under fully compliant terms.



Think you're withholding a security deposit for this? Only if you have a condition statement.

I'M FULLY COMPLIANT AND MY TENANT'S LEASE IS RENEWING. DO I HAVE TO RETURN THE DEPOSIT?

We have never seen it raised as an issue that a deposit from an ongoing tenancy was not returned. The best practice is to keep it in the original compliant account.

ARE YOU ALLOWED TO CHARGE A TENANT FOR ANY BANK FEES THAT ARE REQUIRED TO MAINTAIN THE ESCROW ACCOUNT?

No.

IF THREE ROOMMATES WANT TO SPLIT THE SECURITY DEPOSIT AND EACH PAY A THIRD OF IT, HOW WOULD THAT WORK? WOULD YOU HAVE TO OPEN UP THREE SEPARATE ACCOUNTS, OR CAN ONLY ONE PERSON BE TIED TO THE SECURITY DEPOSIT?

The law does not specify, and we are not aware any of case law. The most important thing is to hold the deposit away from your creditors and return the deposit in timely fashion. So, if the roommates have signed jointly and severally, you can probably put it under just one tenant's social security number. Just be sure to return it and collect a new deposit if that individual rotates out of the unit. Whoever gets the interest will get the tax statement.

Although tedious, it would be better to keep any money received from different individuals in different accounts under their respective social security numbers.

HOW DO LARGE COMPANIES THAT MANAGE 100-PLUS UNITS TEND TO STRUCTURE THEIR SECURITY DEPOSIT AND LAST MONTH'S RENT? DO THEY HAVE 200 DIFFERENT SECURITY DEPOSIT AND LAST MONTH'S RENT ACCOUNTS TO KEEP ALL THE FUNDS SEPARATE, OR IS THERE A WAY TO OVERLAP AND MITIGATE THE NUMBER OF ACCOUNTS TO TRACK?

Large companies use what are called deposit escrow subaccounts, such as what is offered by Avidia Bank in Hudson and others (DESA). This creates the correct ownership structure while still permitting online access and instant account setup.

The last month's rent is yours; you can keep that wherever you want.

REGARDING THE AMOUNT OF THE SECURITY DEPOSIT BEING THE AMOUNT OF THE FIRST MONTH'S RENT – DOES THAT MEAN THAT IF THE RENT IS RAISED IN THE FOLLOWING YEARS, THE SECURITY DEPOSIT SHOULD STAY AT THE ORIGINAL AMOUNT AND CANNOT EVER BE INCREASED?

Yes. We recognize that it is common practice to increase the amount of the deposit as rent increases over time. The only way to effect this is to end the first tenancy and collect a new security deposit under a new tenancy.

WHAT IF THE TENANT REFUSES TO GIVE YOU A W-9 AND YOU CAN'T OPEN THE ACCOUNT? WHAT IF THEY HAVE NO SOCIAL SECURITY NUMBER?

If you do not collect social security numbers as part of your normal application process, do not collect a security deposit. If you collect social security numbers as part of your normal process, and the potential tenant declines to provide you with their number, you may decline to pursue their rental application.

There is one exception: International students and a limited number of others will not have a social security number for legitimate reasons. You should not decline to pursue these applications, as it may open you to claims of discrimination on the basis of national origin. You can still take a security deposit. Have the applicant complete form W-8BEN. A good bank will be able to open a security deposit account for you as if they had received a W-9. Applicants who decline to provide a social security number they have may not complete a W-8BEN. The form only works for individuals who are not eligible for social security numbers.

IF YOU DO EVERYTHING PROPERLY, BUT DO NOT SEND THE ANNUAL STATEMENT, WHAT IS THE PENALTY?

The penalty is three times the amount of the deposit, plus attorney's fees.

IF MY TENANT STAYS FOR A SECOND YEAR AT MY PROPERTY, SHOULD I PAY THEM THE INTEREST AFTER THEIR FIRST YEAR, OR AT THE END OF THEIR SECOND YEAR OF TENANCY?

Pay interest at the end of each year of tenancy. In this scenario, you will pay interest twice.

IF INTEREST IS ONLY 3-5 CENTS, CAN WE JUST EXPLAIN ON THE PHONE THAT WE'RE KEEPING IT AND SEE IF THAT WORKS? IT DOESN'T MAKE SENSE TO PAY 3-5 CENTS OF INTEREST EVERY YEAR IF A TENANT RENEWS FOR 2-PLUS YEARS.

The law does not make sense; the approach described would not be legally compliant, and you would be exposed to triple damages plus attorney's fees if your tenant took you to court. Pay the interest each year.

MAY THE LANDLORD HAVE THE TENANT SIGN A DOCUMENT ALLOWING THE INTEREST TO REMAIN IN THE ACCOUNT UNTIL THE END OF TENANCY? WHAT IF THE TENANT WANTS TO, AND INSISTS?

No, a renter cannot sign away their rights under any statute. MGL Ch 186, Section 15b specifically says the following: "Any provision of a lease which conflicts with any provision of this section and any waiver by a tenant or prospective tenant of any provision of this section shall be deemed to be against public policy and therefore void and unenforceable."

ARE THERE ANY PENALTIES IF YOU DO NOT PROVIDE TENANTS A RECAP OF THEIR DEPOSIT INTEREST AFTER A YEAR?

Yes, the penalties are triple damages, plus attorney's fees.

IS THERE A FORM SECURITY DEPOSIT RECEIPT LETTER IN THE MASSLANDLORDS LIBRARY THAT WE CAN PRINT OUT?

Yes, there are five security deposit forms: One for when you first take the money, a second for when you put it

in a compliant bank, a third for the conditions statement, a fourth for the annual statement and a fifth example withholding letter. These forms are all members-only content.

WHAT HAPPENS IN THE EVENT THAT THE TENANT DOES NOT PROVIDE A FORWARDING ADDRESS POST-TENANCY?

The best practice recommended by one judge is to put the deposit in the form of a cashier's check or other guaranteed form, mail the check to last and usual address (to your apartment), and hope mail forwarding catches it. If not, pick the envelope out of the unit's mailbox and save it, unopened, for many years (there is no timeframe or case law that we know of saying how long is adequate).

IS THERE A STATUTE OF LIMITATIONS? IF YOU MUST HOLD RECORDS FOR 2 YEARS, DOES THAT MEAN THAT A TENANT ONLY HAS 2 YEARS TO PURSUE A LANDLORD IN COURT? IF NOT, THEN HOW LONG DOES A TENANT HAVE TO SUE A LANDLORD FOR SECURITY DEPOSIT VIOLATIONS?

The limitation period for claims arising under MGL Ch 93A is four (4) years. Because the Attorney General's regulations make it a violation of Ch 93A to violate any provision of the security deposit statute, landlords should work on the assumption that the tenant has at least 4 years to bring a claim.

FOR THE 30-DAY TIMELINE THAT THE LANDLORD HAS TO RETURN THE BALANCE OF THE SECURITY DEPOSIT AND/OR ITEMIZATION OF DAMAGES, DOES THE LANDLORD JUST HAVE TO PROVE THAT THE SECURITY DEPOSIT WAS DISPATCHED TO THE TENANT (MAILED, FAXED, ETC.) WITHIN 30 DAYS (PROOF OF SERVICE), OR MUST IT ACTUALLY BE RECEIVED BY THE TENANT BY THE END OF THAT 30 DAYS?

The law says, "The lessor shall, within thirty days after the termination of occupancy under a tenancy-at-will or the end of the tenancy as specified in a

valid written lease agreement, return to the tenant the security deposit or any balance thereof; provided, however, that the lessor may deduct from such security deposit". The statute is not clear, but the context from other situations (especially where no forwarding address is given) is that the landlord must make a provable effort to return it, but does not need to prove receipt.

SUPPOSE A STATEMENT OF CONDITION WERE SIGNED BY A LANDLORD AND TENANT AS PART OF A SIGNED LEASE THAT MIGHT NOT HAVE THE TENANT TAKE OCCUPANCY FOR SEVERAL MONTHS. SHOULD THE LANDLORD RE-EXECUTE A STATEMENT OF CONDITION WITH THE SAME TENANTS WHEN THE TENANT ACTUALLY MOVES IN (OR WITHIN 15 DAYS), THUS VOIDING THE FIRST SIGNED STATEMENT OF CONDITION THAT WAS SIGNED BY LANDLORD AND TENANT A FEW MONTHS BEFORE?

In this scenario, do not issue the Conditions Statement when you take the deposit. The law reads, "Any lessor of residential real property, or his agent, who accepts a security deposit from a tenant or prospective tenant shall, upon receipt of such security deposit, or within ten days after commencement of the tenancy, whichever is later, furnish to such tenant or prospective tenant a separate written statement of the present condition of the premises to be leased or rented."

Issue the conditions statement on the later date only.

I MESSED UP AND I WANT TO RETURN MY DEPOSIT BEFORE THE START OF LITIGATION. HOW IS "THE START OF LITIGATION" DEFINED, SO THAT WE CAN RETURN THE SECURITY DEPOSIT BEFORE TRIPLE DAMAGES TRIGGERS? FOR EXAMPLE, DOES FILING THE SUMMARY PROCESS QUALIFY AS THE START OF LITIGATION?

Speak with an attorney. Best practice: Return it before you take any legal action, or upon first receipt of any legally significant notice.

I OWN A SMALL APARTMENT BUILDING (12 UNITS) AND IT'S IN A TRUST. CAN YOU PUT THE SECURITY DEPOSIT IN AN ESCROW ACCOUNT FOR THE TRUST, OR DOES IT HAVE TO BE UNDER EACH INDIVIDUAL TENANT'S NAME/SOCIAL SECURITY NUMBER?

The law reads, "Any security deposit received by such lessor shall be held in a separate, interest-bearing account in a bank, located within the commonwealth under such terms as will place such deposit beyond the claim of creditors of the lessor, including a foreclosing mortgagee or trustee in bankruptcy, and as will provide for its transfer to a subsequent owner of said property."

If the trust account meets all of these criteria (which it may, if it is irrevocable), then it would seem to comply. Check with an attorney if you are not sure.

ARE THESE REGULATIONS FOR COMMERCIAL PROPERTIES?

No, these regulations apply to residential rental units only.

DO YOU HAVE TO PAY INTEREST ON THE LAST MONTH'S RENT?

Sometimes. The statute reads, "Any lessor or his agent who receives said rent in advance for the last month of tenancy shall, beginning with the first day of tenancy, pay interest at the rate of five per cent per year or other such lesser amount of interest as has been received from the bank where the deposit has been held." So, if you put the money in an interest earning account, you need to pay that interest or 5%, whichever is less.

The case *Gallo v Marinelli* established that there is no requirement to place the money in an interest-bearing account, and that the last month's rent is the landlord's money (in principle). If no interest is received by the bank, then none is owed.

WHAT IF AN ANNUAL INTEREST PAYMENT IS SENT TO A TENANT BUT THEY DO NOT DEPOSIT THE CHECK? WE HAVE PROOF OF PAYMENT SENT.

Keep records. Best practice is to pay cash, or use an electronic debit system under the landlord's control, to debit rent less interest.