

TENANT FEES ACT FAQS



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PERMITTED PAYMENTS

1. What exactly are the Permitted Payments under the Act?

The Permitted Payments are:

- Rent
- A refundable Tenancy Deposit (capped at five weeks rent for rent not exceeding £50,000 per annum or six week's rent if greater)
- A refundable Holding Deposit to reserve a property (capped at one week's rent)
- Novation, Variation of Assignment of Contract capped at up to £50 including VAT (or agents reasonable cost incurred if higher (which must be evidenced)
- Surrender of Tenancy (covering the landlord's costs in reletting the property, all rent outstanding until a new tenant is found (up to the maximum outstanding rent on the tenancy)
- Default Fees (lost keys or other respective security devices; late rent payment after 14 days rent was overdue capped at 3% above the Bank of England Base Rate (currently at 0.75%)
- Utilities (water, gas or other fuel, electricity, sewerage); Communication Services (phones other than mobile phones, Internet, Satellite television); Council Tax; Green Deal charge (or any subsequent energy efficiency scheme)

2. Are capped fees per tenant or per tenancy?

Fees are capped tenancy, except for Variation/Novation/Assignment of Contract where it is capped up to £50 including VAT per request of change to the tenancy agreement.

3. Can agents require tenants to take out Tenant Liability Insurance or Contents Insurance?

No, agents cannot require tenants to take out Tenant Liability Insurance and/or Contents Insurance, this will be a Prohibited Payment if it is a condition of granting the tenancy.

However, agents can strongly encourage tenants to get such cover, recommend providers and receive commissions providing they are transparent with the tenant.

4. Can agents charge Utility bills on top of the rent?

Yes, landlords and agents can charge for Utility bills on top of the rent but need to make sure the charges levied on the tenant do not exceed the cost of the utilities, otherwise agents will be breaching the Maximum Resale Price Provisions set by Ofgem. Therefore, agents might want to consider charging an all-inclusive rent, instead of rent + an additional amount for bills.

5. Can agents charge for missed contractual appointments?

Agents can require tenants to put the landlord back in the position they would have been had the tenant complied with the terms of their tenancy. Therefore, as long as there is a clause in the tenancy requiring the tenant to indemnify the landlord against the landlord's costs for missed contractual appointments then the agent can require the tenant to pay those costs. If the tenant does not, they can be taken to court during or after the tenancy, or the costs can be deducted from the tenant's deposit at the end of the tenancy (provided that this is allowed within the deposit clause of the tenancy agreement).

6. Can fees for gardeners and cleaners be charged on top of the rent?

No, requiring tenants to use gardeners or cleaners in addition to their rent payment will be classed as a Prohibited Payment. However, what agents can do is calculate the annual cost of gardening/cleaning and then spread this cost over the 12 months of the tenancy paying for the gardening/cleaning themselves when necessary.

7. Can agents require a tenant to pay for chimney sweeping?

No, if chimney sweeping is a requirement of a tenancy agreement it will be classed as a Prohibited Payment. Please note, the Government's guidance specifically references chimney sweeping as not being a Utility. However, what agents can do is calculate the annual cost of chimney sweeping and then spread this cost over the 12 months of the tenancy paying for the chimney sweeping themselves when necessary.

8. Can a tenant be charged Court fees?

No, any such clause in a tenancy agreement will be deemed a Prohibited Payment and unfair under the Consumer Protection from Unfair Trading Regulations 2008 and will therefore be unenforceable and thrown out by a Court.

However, landlords and agents can legitimately ask for Cost Orders (where the tenant covers the agents legal costs) from the Judge after a Possession Order has been granted.

9. Can agents charge for serving Notices for Possession?

No, agents cannot charge for serving Notices for Possession these are Prohibited Payments under the ban.

RENT

10. When can agents ask for the first month's rent month in advance and the Tenancy Deposit?

Agents can only ask for the rent in advance and the Tenancy Deposit after the tenant has signed the tenancy agreement. To take it before signing the agreement will, in effect, mean that agents have taken a significantly larger Holding Deposit than is allowed.

11. Can agents charge more rent to recoup losses incurred as a result of the tenant fees ban?

Yes, agents can increase the rent to recover their losses. However, they cannot charge more rent in one rental period than in any other. Therefore, if an agent is trying to recover £240, they cannot add that sum onto month one they must spread it equally across all 12 months of a tenancy. Furthermore, this must be incorporated into the rent and not charged as 'rent plus fees.'

HOLDING DEPOSIT

12. What amount can be charged for a Holding Deposit?

A Holding Deposit is capped at one week's rent. This is calculated by monthly rent x 12 ÷ 52.

13. Is the Holding Deposit cap per tenant or per tenancy?

The Holding Deposit cap applies per tenancy. If tenants are jointly liable for the rent and are entering a joint contract, the Holding Deposit is capped at the weekly rent in which they pay as a whole. For example: three joint tenants agree to a weekly rent total of £240, so the Holding Deposit is capped at this amount, if they chose to split this equally, they would pay £80 each.

14. Is the Holding Deposit the agents or the landlords?

The Holding Deposit can be either the agents, the landlords or both. Essentially, it depends on what is contained in the landlord's terms of business. ARLA PropertyMark recommends all terms of business are amended to make clear how a retained Holding Deposit will be dealt with, i.e. will it be the landlord's money, the agent's money or split between the two?

15. Does the Holding Deposit need to be protected in a Tenancy Deposit Protection Scheme?

No, the Holding Deposit does not need to be protected in a Tenancy Deposit Protection Scheme. However, if the Holding Deposit is used towards the main Tenancy Deposit, the 30 days under the Housing Act 2004 will start running on the day the tenancy is signed.

16. What is the Deadline for Agreement?

The Deadline for Agreement is the period in which a Holding Deposit can be held for—in the legislation this is 15 calendar days. The Deadline for Agreement can be extended for as long as is necessary, provided both parties agree in writing. The process starts on the day the Holding Deposit is taken and finishes on the day the contract is entered into (signed by both parties and dated). Please note: the tenancy start date and/or actual move in date are irrelevant for the purpose of Holding Deposits. It is all about the date the contract was signed.

17. What constitutes entering an agreement within the 15-day Deadline for Agreement?

By entering an agreement, the Government expects agents to go from taking the Holding Deposit to signing the contract within 15 calendar days. This means both parties signing and dating the tenancy. The tenancy start date and move in date are irrelevant for the purposes of the Tenant Fees Act. It is all about the date the tenancy is signed.

18. Can a prospective tenant agree from the outset to increase the 15-day Deadline for Agreement?

Yes, a prospective tenant can agree in writing from the outset to increase the Deadline for Agreement.

19. Can the Deadline for Agreement be extended until there is vacant possession of the property?

No, extending the Deadline for Agreement using “vacant possession” is too ambiguous, agents will need to specify an exact number of days and/or date.

20. Does the 15-day Deadline for Agreement apply where no Holding Deposit is taken?

No, the Deadline for Agreement does not apply where no Holding Deposit is taken.

21. For what reasons can a Holding Deposit be retained?

A Holding Deposit can be retained in four circumstances:

- If the tenant fails a Right to Rent check regardless of when the deposit was accepted;
- If the tenant provides false or misleading information to the landlord or letting agent, which the landlord is reasonably entitled to consider in deciding whether to grant the tenancy because this materially affects their suitability to rent the property;
- If the tenant notifies the landlord or letting agent before the Deadline for Agreement that they have decided not to enter into the tenancy agreement;
- If the tenant fails to take all reasonable steps to enter into a tenancy agreement.

22. Does the Holding Deposit have to be returned to the tenant if they have failed their references?

No, if a tenant has provided entirely factual accurate information, but still fails referencing, this will be classed as the landlord or agent pulling out and the Holding Deposit will need to be refunded. If the tenant fails referencing because they have lied on their application form, this will be classed as the tenant providing false or misleading information and the Holding Deposit can be withheld.

23. Will the Holding Deposit have to be returned if the landlord cannot agree to amendments to the tenancy agreement from the tenant?

No, if the tenant pulls out because the landlord refuses a change to the tenancy agreement after it has been signed, this will be classed as the tenant withdrawing from the tenancy agreement. Therefore, they will forfeit their Holding Deposit.

24. What constitutes as false and misleading information?

In order to withhold a Holding Deposit for providing false and misleading information, the tenant must have actively lied, and the agent must be able to prove the lie. Therefore, agents should ensure their tenancy application forms exactly mirror the questions that will be asked by their referencing provider. This way agents can prove that the tenant said one thing, and the actual answer from the referencing agency was something else. For example, look at the tenant's income: does the referencing agency ask for the basic salary, on-target earnings (OTE), actual last year's salary, car allowance/bonuses?

25. Is a bad landlord reference classed as false and misleading information?

No, a bad landlord reference is not classed as false and misleading information. The tenant must have actively lied. Therefore, agents may want to consider asking tenants about any history of rent arrears or anti-social behaviour during the last tenancy. They can then ask the landlord the same question, and if the answers are different, this would constitute as false or misleading information, but a bad landlord reference alone does not constitute as false and misleading information.

26. What constitutes as a tenant pulling out?

A tenant pulling out is where tenants put down multiple Holding Deposits on different properties and then withdraw their application before signing the contract, therefore, forfeiting their Holding Deposit in full.

27. Where the Holding Deposit has to be refunded, must it be paid within seven calendar days or in the tenant's account as cleared funds within seven calendar days?

The Holding Deposit must be paid within seven calendar days. An agent is not responsible for the length of time it takes for the money to clear through the banks.

28. What happens if one joint tenant provides false and misleading information?

Technically, if one joint tenant provides false or misleading information, then the whole Holding Deposit is forfeited, and agents can move onto another set of tenants. However, agents must take a commercial decision as to whether they remove one tenant and continue with the other(s) or start the whole process (and incur all the time and expense) again.

29. If a tenant's employer doesn't get the reference back within the Deadline for Agreement, does the tenant forfeit their Holding Deposit?

Technically, yes. A tenant could forfeit the Holding Deposit on the basis that the tenant has not signed the contract by the Deadline for Agreement. However, agents must make a commercial decision and would be permitted, with the tenant's consent, to extend the 15-day deadline for agreement for a sufficient period to allow the employer to return the references.

30. Where a Holding Deposit is retained, does an agent need to inform the tenant?

Yes, agents are required to provide reasons in writing as to why they are withholding the Holding Deposit within seven calendar days of making that decision.

Also consider that if the Holding Deposit was retained it is VAT-able, and therefore, agents will need to deduct VAT and it cannot be charged on top.

31. Where a Holding Deposit is retained it becomes a VAT-able fee. Therefore, can agents charge VAT on top of the Holding Deposit cap?

No, agents cannot charge VAT on top of the Holding Deposit. VAT will need to be deducted from the week's rent.

REFERENCING

32. Can agents insist tenants use a reference provider of the agent's choice?

No, agents cannot require a tenant to pay for a reference.

33. Can a previous or existing tenant be charged for a reference?

No. However, an outgoing agent can charge the tenant's incoming landlord or agent for providing a reference on behalf of that tenant, but the agent cannot charge the tenant for the cost of a reference check.

34. Can a referencing company charge a tenant for a DIY referencing service?

A referencing company can only charge for a DIY service if the tenant approaches them directly and not at the request of an agent or landlord.

TENANCY DEPOSIT

35. Exactly how much Tenancy Deposit can be taken?

Where the annual rent on the tenancy is under £50,000 the maximum Tenancy Deposit is five weeks rent. Where the annual aggregate rent is over £50,000 the maximum Tenancy Deposit is six week's rent.

36. Is the cap based on the original rent or the new rent?

The Tenancy Deposit cap is based on the new rental amount. Therefore, agents should remember that if they put the rent up, they won't be returning a week's rent (if they've taken a six-week deposit). Agents should calculate five weeks of the new rent and then deduct that from the existing deposit to work out what must be refunded. The Tenancy Deposit Scheme (TDS) and mydeposits have deposit cap calculators on their websites to assist agents.

37. Will agents be in breach of the ban if the Deposit Replacement schemes offer terms better than can be achieved under the Tenant Fees Act (for example: Offering eight week's cover instead of a five week deposit, or requiring a tenant to take out Tenant Liability Insurance as a condition of using their scheme)?

No, tenants have a choice of providing a traditional five/six-week Tenancy Deposit or taking out a Deposit Replacement product. If they choose the Deposit Replacement product and it provides better than what is accepted under the Act, this is allowed as the tenant made this choice as an alternative to choosing a traditional Tenancy Deposit.

However, it must be optional, and the agent must be able to prove they gave the tenant a choice between a traditional Tenancy Deposit and a Deposit Replacement product.

38. What happens if the tenant offers to pay a higher Tenancy Deposit?

Agents cannot accept a higher Tenancy Deposit. The deposit cap is absolute, there are no exceptions. If an agent takes any deposit over the cap it will be a Prohibited Payment.

39. After the tenant fee ban, are agents able to charge tenants for breach of contract disbursements from the deposit?

Yes, provided the breach of contract disbursements are reasonable, the agent can evidence the cost and they are allowable deductions within the deposit clause of the tenancy agreement. For clarity, agents cannot require the tenant to pay for disbursements for breach of contract at the time, and then deduct them from the deposit.

VARIATION AND NOVATION OF CONTRACT

40. What constitutes a Novation of Contract?

A Novation of Contract is essentially a new contract based on an almost identical existing contract. The prime example in the lettings sector, is one where a tenant moves out and a new tenancy is signed by the remaining tenants and the new tenant. This is different from an Assignment, where one tenant assigns their rights under an existing tenancy to another person under the existing tenancy. Effectively, these are the two different methods in law that agents use for what is known in the industry as a Change of Sharer.

41. Can you provide examples of a Variation of Contract that may incur a £50 including VAT charge?

As long as the requests are contained within the tenancy agreement, including the charge and the landlord consents to the request, tenants can be charged for requests such as: Can I sub-let?; Can I have a pet?; Can I redecorate?; Can I run a business from my home?

42. If a tenant wants to renew can they be charged £50 under Novation of Contract?

No, a renewal is not a Novation of Contract and therefore, cannot be charged for.

CHANGE OF SHARER

43. What is the cap for Change of Sharer?

The cap for a Change of Sharer is up to £50 including VAT, or the agent's reasonable costs if higher. Please note: an agent cannot charge for their time or efforts.

44. What exactly are 'reasonable costs incurred' in the case of a Change of Sharer? How would this be calculated?

In conducting a Change of Sharer, the reasonable costs would be referencing, which other than in exceptional circumstances will not exceed £50 (this is because agents cannot charge for their time in administering the work involved). However, if an inventory needs to be undertaken this will likely cost more than £50 including VAT and therefore agents will be able to charge for the cost of the inventory and referencing. Please note: If agents are charging more than £50 including VAT, they must be able to evidence the work has cost them more.

SURRENDER OF TENANCY

45. What is the cap for Surrender of Tenancy?

Officially, the cap for a Surrender of Tenancy is the maximum rent outstanding on the property. However, the Government Guidance states that agents must be reasonable and should consider the landlord's costs in reletting the property and the rent outstanding until a new tenant moves in.

46. What constitutes a reasonable cost incurred for a Surrender of Tenancy?

When considering reasonable costs, ARLA Propertymark would recommend that agents charge the tenant the landlord's tenancy setup cost as detailed in the landlord fee schedule and any rent until a new tenant moves in.

DEFAULT FEES

47. What are the specific Default Fees as detailed in the Act?

There are two official Default Fees:

- Lost keys or other respective security devices
- Late rent payment after 14 days rent was overdue, capped at 3% above the Bank of England Base Rate (currently at 0.75%)

48. Are the capped fees of £50 including VAT?

Yes, a cap on all fees is inclusive of VAT.

49. How do we calculate the rent arrears cap?

The rent arrears cap is calculated on the total arrears outstanding with interest charged on a daily basis.

For example: £500 in arrears are outstanding for 30 days.

The current Bank of England base rate is 0.75%.

$£500 \times 0.0375 = £18.75$.

$18.75 \div 365 = £0.051$

$5.1p \times 30 \text{ days outstanding} = £1.54$

50. Can I charge for replacement locks and locksmith where necessary?

Yes, ARLA Propertymark's view is that a lock would be classed as another security device. Therefore, in situations where locks need to be replaced and locksmiths need to be called, agents will be able to charge for replacement locks, locksmiths and keys where necessary, under both the Default Fees and Damages provisions.

51. Can agents charge for time in dealing with lost keys?

No, agents cannot charge for time when dealing with lost keys. However, in exceptional circumstances (such as an emergency) agents can charge £15 per hour. ARLA Propertymark would not recommend levying this charge for replacing keys as it may be difficult to prove the exceptional circumstance at which point the £15 per hour charged will become a Prohibited Payment.

UTILITIES

52. What exactly are the Utilities included as a Permitted Payment under the Act?

Utilities included as a Permitted Payment are:

1. Electricity, gas or other fuel
2. Water or sewerage

Green Deal charges or other respective Energy Efficiency improvements under Section 1 of the Energy Act 2011 are also a Permitted Payment. Utilities may be charged for where the tenancy agreement requires the payment to be made.

53. Can an agent insist on specific utility providers?

No, agents cannot insist on specific utility providers. Tenants as the bill payers are entitled to choose whichever utility provider they so wish. A clause in the tenancy agreement can be added that the utilities must be returned to the original provider at the end of the tenancy.

DAMAGES

54. Can damages be deducted from the Tenancy Deposit?

Yes, damages can be deducted from the Tenancy Deposit as long as they are outlined in the tenancy agreement. Firstly, damages should be outlined within clauses requiring the tenant to indemnify the landlord for breaches of the tenancy agreement. Secondly, provided that the deposit clause allowed deductions for damages as a result of a breach of contract. Please note, agents will need to evidence the landlord's loss and will not be able to charge for their time (agents will only be able to pass on actual costs and will not be entitled to add on costs for their time or efforts).

TYPES OF LEASE

55. What leases are affected by the Tenant Fees Act?

The Tenant Fees Act affects Assured Shorthold Tenancies (ASTs), Licences to Occupy and Student lettings as specified in the legislation only.

56. What leases are not affected by the Tenant Fees Act?

All non-Housing Act tenancies are excluded from the ban, as are Assured Tenancies. Company Lets do not fall under the remit of the Housing Act so fees can be charged to the company, but the company is then issuing a Licence to Occupy to its staff and will therefore not be able to charge its staff for moving into the property

PETS

57. Can rent be increased in replacement of a Pet Premium on the Tenancy Deposit?

Yes, rent can be increased to replace a Pet Premium on the Tenancy Deposit as long as it is advertised correctly. Agents must consider the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), and if they are planning on charging additional rent for pets the tenants must be informed at the earliest available opportunity. For example: including the higher rent in the property particulars available to view in the office, on their website and on the portals.

58. If a tenant asks for a pet mid-tenancy, can an agent charge for this?

Yes, agents can charge if the landlord agrees for a pet mid-tenancy where the tenant has requested this. This Under the Tenant Fees Act, would be classed as a Variation of Contract and the tenant can be charged up to £50 including VAT. If the pet request is refused, agents cannot charge.

59. If a prospective tenant has a pet, can agents charge for negotiating with the landlord to allow the pet from the start of the tenancy?

No, Variations of Contract can only be charged once the tenancy has begun. Agents cannot charge tenants for negotiating the contract at the outset of a tenancy.

TRANSITION PERIOD

60. Can fees stated in an existing tenancy agreement be charged until 31 May 2020?

Yes, fees stated in existing tenancy agreements can be charged until the transition period ends. But remember, any fees charged during the transition period for existing tenancies must be in the tenancy agreement and clearly displayed on the tenant fee schedules prominently in the office and on the agents own website.

61. Can agents still charge fees when a Fixed-Term Tenancy becomes Periodic after 1 June 2019?

Yes, agents can charge fees when an existing tenancy becomes Periodic after 1 June 2019 up until 31 May 2020. Where Fixed-Term Tenancies which started prior to the ban coming into force, become periodic tenancies after the ban comes into force, this will be classed as a continuation of the existing tenancy and therefore fees can be charged until the backstop date of 31 May 2020.

62. Do current tenancies need to be re-written after 1 June 2019?

No, any clauses for existing tenancies that relate to fees will automatically become unenforceable from 1 June 2020. As such, there is no need to amend existing agreements. However, ARLA PropertyMark strongly recommends agents update their tenancy agreements to take account of the Tenant Fees Act for tenancies signed on or after 1 June 2019.

63. Will agents need to refund the excess of a Tenancy Deposit exceeding five (or six) weeks' rent?

Agents will only need to refund excess of a Tenancy Deposit if a renewal tenancy agreement (new Fixed-Term) is signed on or after 1 June 2019 for an existing tenancy. Should a tenancy signed prior to 1 June 2019 become a Statutory or Contractual Periodic, and a deposit in excess of the cap has been taken, this can be retained until the end of the tenancy or a new Fixed-Term Tenancy is signed.

Where deposits have been reduced to the cap, a new Deposit Protection Certificate (but not the Prescribed Information) will need to be issued.

64. Will check out fees that have already been charged for need to be refunded?

Yes, check out fees that have already been charged for need to be refunded within 28 days of 31 May 2020, or when a renewal tenancy is signed after 1 June 2019, whichever is earlier. When a tenancy is renewed (new Fixed-Term) after 1 June 2019, and after 31 May 2020 for existing tenancies, this will be a Prohibited Payment. For this reason, it must be refunded before it becomes a Prohibited Payment.

65. Will agents have to refund Pet Premiums for existing tenancies on 1 June 2019?

No, agents will only need to refund excess Tenancy Deposits on existing tenancies when they are renewed (new Fixed-Term). For tenants with pets, agents might want to consider leaving the tenancy to go Periodic in order to retain the higher deposit rather than renewing the tenancy where they will have to reduce the deposit to the capped amount.

NEW TENANCIES

66. When does an existing tenancy become a new tenancy?

Existing tenancies become a new tenancy when the renewal tenancy is signed, creating a new Fixed-Term agreement.

INVENTORIES

67. Can agents offer an inventory service to landlords?

Yes, agents can offer an inventory service to landlords as the Tenant Fees Act has no impact on what agents charge landlords. However, it may be easier for agents to prove their costs if they use the services of an independent inventory professional (such as a member of ARLA Inventories), as agents are not allowed to charge for their time under the Tenant Fees Act. Using an independent clerk will negate any legal queries around an agent charging for their time.

68. Can a tenant commission and pay for an inventory provider to complete a report on their behalf?

Technically yes, a tenant can commission and pay for an inventory provider to complete report on their behalf. However, it cannot be a condition of the tenancy and agents might want to consider how they will prove they didn't ask a tenant to do this, should a tenant complain to Trading Standards that they were forced to pay for an inventory.

MAINTENANCE

69. Can agents advise tenants to sort out tenant maintenance issues themselves?

Landlords are required to maintain the structure of the building. However, if damage is caused by the actions of a tenant (e.g. flushing nappies down a toilet) the landlord must return the property to a standard fit for human habitation but can immediately charge the costs back to the tenant under the Damages provision within the tenancy agreement. If the tenant does not pay, the landlord can take the tenant to Court, during the tenancy, or after the tenancy, or deduct the costs from a tenant's Tenancy Deposit (assuming this is allowed under a deposit clause in the tenancy agreement).

CLEANING

70. Is a professional cleaning clause allowed?

No, professional cleaning clauses have not been lawful since the Unfair Contract Terms Act 1977. Landlords cannot require professional cleaning; landlords can require the property to be returned in the condition it was at the start of the tenancy. If it was professionally cleaned at the outset of the tenancy, a landlord can expect it to be returned up to a professionally cleaned standard. A tenant is allowed to bring the property up to that standard themselves (for example: they could be a professional cleaner) and therefore, the landlord can only mandate the standards but not how that standard is achieved.

SECTION 21

71. Will the ban on fees have any impact on Section 21 notices?

Yes, landlords and agents will not be able to recover possession of their property under Section 21 if Prohibited Payments have been taken, until such payments have been returned to the tenant.