Chapter 4

RENTAL AGREEMENTS OR LEASES

Once the tenant has found an apartment or house to rent, an agreement must be reached with the landlord. Remember, the terms of such an agreement are part of the deal between the tenant and the landlord, and the terms should be negotiated in the same way as the purchase of a car. When a car is bought or sold, the agreement is set out in a written contract. In the landlord-tenant world, that contract is called a *rental agreement* or a *lease*. The law requires the landlord to provide a signed written rental agreement to the tenant (NMSA § 47-8-20(G)).

The next sections of this guide will describe things to watch out for when negotiating and signing a rental agreement or a lease.

A. Periodic vs. fixed-term tenancies

There are several important things to remember about the contract for the rental dwelling. The first thing is that the tenant and landlord are agreeing to rent for some length of time. It may be a week, two weeks, a month, six months, a year, or even longer. The tenant and the landlord need to know what that length of time—the *term*—will be.

The most common type of rental agreement is a month-to-month tenancy, which is often called a *periodic tenancy*. This type of agreement allows the tenant to live in the dwelling for a month at a time. At the end of the month, the landlord may decide that he or she wants the tenant to move out or wants to raise the rent or change other conditions of the tenancy. In a month-to-month tenancy, the landlord must give the tenant a written notice at least thirty days in advance for any changes in the rent or conditions (NMSA § 47-8-15(F)), or to end the tenancy (NMSA § 47-8-37(B)). If the tenant wants to move, he or she must give the landlord at least thirty days written notice (NMSA 47-8-37(B)). If the tenant gives less than thirty days notice, the tenant can be held responsible for the following month's rent (NMSA § 47-8-35).

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Some rental agreements are for less than a month. These are still periodic tenancies, but all the time limits for notice are equal to the length of the term (NMSA § 47-8-15(F)). For example, if the tenant and the landlord agree that the term is two weeks at a time, the landlord must give the tenant two weeks notice to move or to raise the rent. The tenant must give the landlord two weeks notice if the tenant intends to move.

The term the tenant agrees to is always important, and the parties should have a clear understanding of what the tenant and the landlord have agreed on. This is very important when someone is renting a room in a hotel or a motel. If the tenant is renting a hotel or motel room for more than a week as their main place to live and the tenant pays rent on a weekly basis, then the tenant has a periodic tenancy (NMSA § 47-8-15(C) and NMSA § 47-8- 3(F). This can be important in giving the tenant rights under

the Uniform Owner-Resident Relations Act. A person who is simply stopping at a hotel or motel while visiting or passing through town is not a tenant, and the person has few rights if the owner decides to have the person leave (NMSA § 47-8-3(V)). If you intend to stay in a hotel or motel for a more extended time than a couple of days, be sure to inform the hotel or motel that you intend to be living there as a resident and not just a short-term visitor. The hotel or motel is not required to allow you to establish a residency. The hotel or motel can require daily payment in order to ensure that the occupancy remains temporary.

A *definite term* or *fixed-term* tenancy is one where the tenant and the landlord have agreed that the tenant will be renting for a specific period of time. This type of agreement is usually for six months or a year. The tenant may still be paying rent each month, but the tenant has the right to stay for the full term without a rent increase or other changes (NMSA § 47-8-15(F)). In this type of tenancy, the landlord cannot make the tenant move out during the term of the lease unless the tenant violates the agreement (NMSA § 47-8-40). The landlord cannot raise the rent during the period of the lease. If the tenant and the landlord agree that the tenant will be staying for an additional fixed term when the lease ends, the landlord must give notice of any rent increase in the new agreement at least thirty days before end of the current lease (NMSA § 47-8-15(F)).

In thinking about whether a periodic tenancy or a fixed-term tenancy is best, the parties should consider several issues. In a fixed-term tenancy, the tenant has the right to stay for the full term and the rent will not be increased during that term. However, in a fixed-term tenancy, the tenant may owe the landlord rent for some of the rental term if the tenant decides to move out before the term ends. The landlord will not be able to terminate the lease until the end of the lease term and loses flexibility in how the property is used. In a periodic tenancy, the tenant has more flexibility in ending the tenancy, but neither party has the security of a fixed-term agreement.

B. Oral agreements

There are a lot of important legal issues about the rental agreement even in an area as simple as how long the rental term is. If the agreement is not in writing, there can be serious misunderstandings between the tenant and the landlord. For example, the landlord rents a place to the tenant for a month at a time, and the tenant tells the landlord that he or she will be there for six months. If the agreement about the term is not in writing, then it will be difficult to prove in court that the term was six months as opposed to month-to-month.

Although New Mexico law requires a written rental agreement or lease (NMSA § 47-8-20(G)), some landlords don't use them. Usually, a landlord who refuses to give the tenant a written rental agreement is a landlord the tenant may have trouble with down the road.

Oral leases are still enforceable. If you pay rent to a landlord for your residence, you are a tenant and the Uniform Owner-Resident Relation Act gives you rights as a tenant whether your lease is written or oral. It is often difficult to enforce those rights when the tenant does not have the rental agreement *in writing and signed* by the tenant and the landlord. If the tenant starts to have problems with the landlord, and the tenant does not have a written rental agreement, it is very important that the tenant immediately seek legal advice. It is also important for both the landlord and the tenant to have a copy of the signed agreement. Although this does not happen frequently, landlords have called the police and claimed that the tenants were trespassers when the tenant did not have a written rental agreement.

Certain agreements related to a tenancy are not enforceable unless they are in writing, such as an agreement that the tenant will make repairs to the property (NMSA § 47-8-20(C)).

C. Written leases

A written rental agreement sets out the promises the landlord and the tenant make to each other. In most cases, promises the landlord made at the time the tenant moved in or afterward will be difficult to enforce if they are not in the written lease or in an attachment to the lease. The tenant should make sure all agreements that were important to the tenant are put in the lease. For example, if the landlord promised to provide new locks or fix a fence, the promise should be made part of the lease. Think of putting promises in writing as a way to avoid disputes later on.

A written fixed-term lease is usually the best deal for the tenant and the landlord. It offers the security of both continued occupancy and unchanged rent. When the tenant and the landlord agree to a fixed-term lease, the parties have made a commitment to each other for an agreed-upon period of time.

It is important to remember that the tenant's promises are also part of the agreement, and a written lease sets out what the tenant has agreed to do. For example, when two roommates co-sign a lease, either one can be held responsible for the entire rental agreement.

D. Rules and regulations

Many landlords, especially in large apartment complexes or mobile home parks, will have Rules and Regulations in addition to the lease. The Rules and Regulations are part of the lease and should be read just as carefully as the lease agreement. If there are Rules and Regulations, the tenant should receive a copy at the same time that he or she receives a copy of the lease (NMSA § 47-8-23(F)). Violations of the Rules and Regulations can be a basis for notices of termination of the tenancy. The landlord can change the Rules and Regulations during the lease term but must give reasonable notice to the tenant of the proposed change, and the proposed change must not substantially modify the tenancy (NMSA § 47-8-23(F)).

E. Lease provisions

One of the main reasons to insist on a written lease is that there is so much involved in an agreement to rent a house or apartment. However, just because there is a written lease does not mean the tenant's worries are over. The tenant needs to read the lease, be sure that he or she understands everything in it and try to make the best deal possible.

1. Form leases

Most landlords use form leases. These are preprinted forms that have been prepared for a landlord to use with all tenants. These forms will have blank spaces to be filled in for rent, deposits, number of occupants, etc. Make sure all the blank spaces are filled in or appropriately marked "n/a" (not applicable). While leases are often difficult to read, it is still important that both the landlord and the tenant read the lease and sign it. Also, if there are provisions in the lease that the tenant did not agree to or the tenant does not want, the tenant should try to get those provisions removed before signing the lease. If the lease is signed with those provisions still included, the tenant will be bound by them. When any changes are made on the lease form, both the landlord and the tenant should initial the changes.

Landlords can obtain information about leases from the Apartment Association of New Mexico, located in Albuquerque (phone 505-822-1114 and on-line at www.aanm.org).

2. Provisions against subleasing

Most form leases contain language that prohibits subleasing or assigning a house, mobile home or apartment to other people. Often something like the following wording will appear in a lease:

> *The lessee herein further covenants and agrees that he or she will not sell, assign, transfer, relinquish, encumber or in any manner dispose of this lease or any part of it; also*

lessee further covenants and agrees for him/herself and others not to sublet the demised premises or any part or portion thereof nor in any manner permit the occupancy and use thereof by another or others.

Quite a mouthful, isn't it? It means that the tenant cannot allow anyone else to rent the apartment or to take over the lease. Provisions like this mean that you need the landlord's approval to sublease agreement or to have someone else take over the lease. It is very important that the tenant contact the landlord if the tenant wants to sublease, reach agreement on the sublease, and have the agreement put in writing and signed by the landlord, the tenant and the person the tenant wants to sublet to). This agreement needs to specify who is responsible if the subtenant fails to pay the rent or damages the property. If the landlord does not agree to the sublease, the tenant will be responsible. Even if the landlord does agree, the agreement could still make the tenant responsible for the subtenant.

If the lease requires landlord approval before subleasing a house or apartment, the tenant should make sure it also states that "consent may not be unreasonably withheld for any suitable tenant." Try to get this language in the lease or rental agreement, because it will protect the tenant in the event of a situation where the landlord decides to be unreasonable about the people who can move in or about new terms and conditions for a sublease. Mobile home parks generally require that the buyer of a mobile home located in the park must apply to lease the space the mobile home is on. The buyer does not automatically take over the seller's lease for the mobile home space.

The tenant may not permit roommates or friends to use the unit as a place of permanent residence if the lease prohibits subleasing. But remember that a provision prohibiting subleasing does *not* prevent the tenant from having friends visit as guests in the tenant's apartment or rental house. The tenant is entitled to have a reasonable number of guests stay for a reasonable time. The lease may specify the length of time guests may stay with the tenant in the rental unit.

3. Automatic renewal

A lease may contain language that provides for the automatic renewal of the term of the lease. Such a provision usually states if the lease is not canceled in advance (usually thirty days) of its termination date, then it will renew itself for another term, or it may turn into a month- to-month lease. The tenant should be aware of the language in the lease or rental agreement. Such language may commit the tenant to stay an extra year, or whatever term is in the agreement, when the tenant might not want to stay that long. The tenant should also remember this language when the lease term is about to run out. The tenant must decide whether to stay for another full term. If the tenant doesn't want to stay, written notice must generally be given to the landlord.

Most leases renew on a month-to-month basis. This means that either the tenant or the landlord can end the lease by giving at least a thirty-day notice.

If the tenant leaves after a lease has been automatically renewed, the tenant may owe the landlord rent. The tenant may also lose some of the deposits. (See Chapter 9 on "Moving out" in this guide for more information on rights and duties when a rental agreement ends (NMSA § 47-8-35)).

4. Objectionable clauses in leases

A landlord may want to put many different conditions in the lease, but remember, the tenant has the right to negotiate the best deal possible. Being

sure you understand what is in the written agreement is part of that negotiating process. There are certain things that may not legally be included in a lease agreement. For example, a lease may not include terms and conditions that are prohibited by the Uniform Owner-Resident Relations Act or other laws governing the use of property (NMSA § 47-8-14). The lease may not require the tenant to give up rights under the law (NMSA § 47-8-16). If a lease contains such illegal provisions, the tenant may be able to collect damages and get attorney's fees in a lawsuit if the tenant is harmed by the landlord's attempt to enforce the illegal provision (NMSA § 47-8-48).

Here are some examples of lease provisions that are illegal:

- Any provision that says the tenant does not get a refund of prepaid rent or a deposit (NMSA § 47- 8-18(C))
- Any provision that charges a late fee greater than 10% of the monthly rent (NMSA § 47-8-15(D))
- Any provision that forces the tenant to give up the right to defend himself or herself in court if the landlord seeks to evict the tenant or files suit against the tenant for damages (NMSA § 47-8- 30(A))
- Any provision that says the tenant must give up the right to receive notice of termination or notice of a court action (NMSA § 47-8-33)
- Any provision that says the tenant must give up the right to take the landlord to court (NMSA § 47-8-27.1)
- Any provision that allows the landlord to change the locks at the apartment or otherwise deny the tenant access to the apartment when the tenant owes rent (NMSA § 47-8-36 (A)(2))
- Any provision that allows the landlord to hold the tenant's personal property after an eviction or when the landlord claims the tenant owes rent (NMSA § 47-8-34.1).

A lease that requires the tenant to perform all the landlord's duties to maintain the rental property in a safe condition does not mean the landlord has no duties (NMSA § 47-8-20(E)). Such a lease clause is illegal, unless the agreement on repairs is in writing (NMSA § 47-8-20 (D)) and the tenant gets something of value in return (such as reduced rent, special privileges or wages).

Some lease clauses are not illegal, but they turn out to be very unfair. Courts have the power to change, or limit, any lease provisions that the tenant can show are *inequitable* (very unfair to one of the parties in the lease agreement) (NMSA § 47-8-12). If the tenant feels the lease may contain unfair or illegal provisions, the tenant should quickly seek legal advice.

5. Other important points in a rental agreement

a. Rent

What is the amount of the rent? When is it due? Where, how, and to whom is it to be paid? Be sure what is written in the agreement is what was agreed to. Be mindful that some of these terms may not be in the agreement. If they are not there, the law has its own rules for filling in the missing terms. For example, if there is no rent stated, the rent will be the fair market rental value (NMSA § 47-8-15(A)). If the agreement does not say where or when the rent is to be paid, the law requires it be paid at the rental unit on the first day of each month (or the first day of each week, if the rent is paid weekly) (NMSA § 47-8- 15(B)).

b. Late charges

What are the charges, if any, for late payment of rent? When do the late charges begin? The landlord is not allowed to charge a late fee unless the written lease says he can charge a late fee. Many leases provide a three or five day grace period. This means the late fee is not charged until the third or fifth day of the rental period. If the agreement provides for late charges, the charge may not legally be for more than 10% of the rent that is overdue (NMSA § 47-8-15(D)). For example, if the rent is $500 per month, a charge for late payment may not exceed $50. In addition, the landlord may charge a reasonable fee for returned checks.

The landlord must give the tenant written notice of the late fee on or before the last day of the month following the month in which the late fee was owed, or else the late fee is waived. For example, if the landlord wants to charge you a late fee because your June rent was late, the landlord must give you written notice of the charge by the end of July. If no notice is given, the landlord waives the late fee.

c. Utilities and appliances

Who is responsible for the utilities? If the tenant is responsible, what is the metering system? Will the tenant have a separate meter, a meter shared with other tenants, or a submeter? How will utility costs between tenants on shared meters be divided? If the tenant will be paying for the utilities, it is important to know the date by which the tenant is responsible for transferring the utilities to his or her own name. Sometimes the landlord will have the utilities in his or her name while the apartment is vacant. This can frequently lead to confusion about who is responsible for the utilities and sometimes results in a utility shut-off. The responsibility for the utilities should be spelled out very specifically in the rental agreement.

Sometimes the utilities are included in the rent. If the landlord fails to pay the utility or water bills and the utilities or water are shut off; the tenant may be entitled to a rent abatement (NMSA § 47-8-27.2(A)). The tenant can also choose to pay to have the utilities turned back on. The tenant may be entitled to deduct all costs from the rent and may also be entitled to damages. If the landlord fails to comply with his or her obligation to provide utilities, the tenant can contact the local code enforcement agency. In multi- unit housing, if there is separate utility metering for each unit, a resident is allowed to request a copy of the utility bill for his or her unit. If the unit is submetered, the resident is entitled to receive a copy of the unit's utility bill. When utility bills for common areas divided between units and the costs are passed on to the residents, a resident is entitled to request a copy of all utility bills being charged to the unit. The calculations used as the basis for dividing the cost of utilities for common areas and submetered apartments must be made available to any resident upon request. However, the owner may charge an administrative fee of not more than five dollars for each requested item (NMSA § 47-8-20(F)).

The landlord is not required to supply any appliances, including stoves, refrigerators, dishwashers, air conditioners or swamp coolers. If the landlord does supply an appliance, then it is the landlord's obligation to make sure that the appliance is in good working condition (NMSA § 47-8-20(A)(4)). The landlord is also responsible for repairs to the appliances. Again, it is a good idea to make sure the lease is specific about the appliances, including any appliances to be supplied by the tenant. If the tenant wishes to install a washer and dryer, or a dishwasher, he or she should get the agreement of the landlord. It is then the tenant's responsibility to remove the appliance at the end of the lease term and restore the premises to their original condition.

If the landlord shuts off the utilities, or removes appliances, as a way to evict the tenant, that is illegal, and the tenant may be entitled to a statutory penalty and damages (NMSA § 47-8-36). (See Chapter 9 of this guide on lock-outs.)

d. Owner or authorized agent

What is the name, address, and telephone number of the person authorized to manage the rental property? What is the name, address, and telephone number of the owner and/or an agent who is authorized to receive notices or service of court papers? The law requires the landlord to provide this information (NMSA § 47-8-19). If the landlord fails to provide it, the tenant does not have to give certain notices to the landlord (for example, a

notice of termination or of rent abatement) (NMSA § 47-8-19(D)).

It is important to have information about where the tenant can reach the landlord or the landlord's agent. If necessary, the tenant can get property ownership information at the county tax assessor's office. (In Bernalillo County: One Civic Plaza NW, Albuquerque NM 87102, phone (505) 222-3700. If the owner is a corporation, its address might be available from the New Mexico Secretary of State (505) 827-3614.) Many county and state agencies now have this kind of information available on websites.

e. Repairs and maintenance

What does the rental agreement say about responsibility for repairs, yard work, trash removal, snow removal, or general maintenance around the apartment or house? Is the tenant being asked to do work or take responsibility in areas that should be part of the landlord's duties to tenants? Are the responsibilities spelled out in the written rental agreement? This is particularly important if the agreement shifts the responsibility for the landlord's duties to the tenant.

Rentals of houses are often treated differently than apartments in this regard. The yard of the house is often considered part of the premises (NMSA § 47-8-3(N)) and thus its maintenance is the tenant's responsibility. Tenants may have to pay for the water necessary to maintain the landscaping around the house. Rentals of apartments, however, almost never include responsibility for outdoor areas.

f. Guests

A landlord may not charge a guest fee for the tenant to have a reasonable number of guests visit for a reasonable time (NMSA § 47-8-15(E)). Remember, though, that what feels "reasonable" to one person may not seem so reasonable to someone else. The lease may contain a provision about guests. Some landlords also have Rules and Regulations in addition to the lease. The Rules and Regulations may contain a policy on guests even if the lease does not. The tenant should also check to see whether the landlord charges a fee for the guests' use of facilities at the rental unit (e.g. laundry facilities, pool, and parking). Fees for these types of things are allowed, and the tenant should find out what the charge will be for guests who want to use these facilities.

g. Pets

A landlord may prohibit the tenant from having pets. If pets are not permitted, the lease should specifically say so. If pets are allowed, the landlord may charge a pet fee (either a lump sum or a monthly amount) and a pet deposit. This is part of the rental agreement and should be set out in the lease. Landlords can have rules about the size, number or type of pets that are allowed.

Landlords must allow service and emotional support animals for persons with disabilities. These can include, for example, seeing-eye dogs, assistive animals for people with mobility impairments and therapeutic animals for people with mental disabilities (42 USC 3604 (f) (3)(B)). If a landlord will not allow a tenant to have a service or emotional support animal, that is a violation of the Fair Housing Act. See Chapter 13 on housing discrimination. The landlord cannot charge "pet rent", a "pet deposit" or any other additional fees for service and emotional service animals. The landlord can, however, charge the tenant for any damage caused by the animal.