INSIDE THE LAW

Summer 2019

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PART TWO: RETURNING THE SECURITY DEPOSIT

RESIDENTIAL SECURITY DEPOSIT LAW TIPS FOR THE DEVELOPER WHO SELF-MANAGES RESIDENTIAL APARTMENTS

By Nelson Luz Santos, Esq.
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In my previous article, I outlined the potential pitfalls in accepting and holding a security deposit from a residential tenant in Massachusetts. As an owner/landlord, your goal is to maximize your return on investment. The failure to comply with the specific technical requirements of the security deposit law will ultimately eat into your bottom line. The main intent of the Security Deposit Law *G.L. c. 186, § 15B* (hereinafter "the Security Deposit Law") is to protect tenants *and* landlords. It allows landlords to have funds available to repair unreasonable wear and tear caused by tenants, and it limits the landlord's ability to collect excessive or unreasonable fees from tenants at the inception of the tenancy. As outlined previously, collecting and maintaining a security deposit is driven by procedures and rules-driven. So is the process of returning a security deposit. This article focuses the process of returning a security deposit properly.

The general rule of thumb is that a landlord must, within thirty days after the tenant moves out at the end of the tenancy, return the tenant's security deposit with all interest accrued, less deductions for unreasonable wear and tear and unpaid rent.

1. DEADLINE TO RETURN SECURITY DEPOSIT:

a. Landlords must return the security deposit within thirty days after the termination of occupancy under a tenancy-at-will or the end of the tenancy agreement in full or return to the tenant the security deposit less proper deductions. See *G.L. c. 186, § 15B(4)(i-iii)*.

2. WHAT YOU MAY PROPERLY DEDUCT FROM THE SECURITY DEPOSIT:

a. According to *G.L. c. 186, § 15B(4)(i-iii)*, the landlord may be able to deduct the following items from the security deposit:
   i. Unpaid rent or water charges,
   ii. An unpaid increase in real estate taxes which the tenant is obligated to pay (requires a tax escalation clause that conforms to the requirements of section 15 C), and
   iii. 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.

b. NOTE: Reasonable wear and tear is not necessarily easy to define and the statute does not provide examples. Generally, gaping holes in walls, gouged floors, broken trim/paneling or doors, and clogged kitchen drains due to improper use are *not* considered reasonable wear and tear. But scuffed entryway floors/carpet, faded paint, dirty window shades, and pinholes from picture frames *are* normal wear and tear. It is important for landlords to itemize and take photos of the premises before and after tenant occupancy for comparison. It is helpful to be armed with the facts.

3. HOW TO DEDUCT PROPERLY FROM THE SECURITY DEPOSIT:

a. *G.L. c. 186, § 15B(4)(i-iii)* provides additional strict guidelines on what procedure must be used in returning the security deposit:
   i. Regardless of deductions, the landlord has thirty days from the date the tenant vacates to provide an itemized list of damages.
   ii. This itemized list must be sworn to under the pains and penalties of perjury. Many landlords forget this step, possibly subjecting themselves to damages even when everything else has been done correctly.
   iii. Itemization must be explicit in stating the damage and repairs necessary. This requires evidence such as estimates, bills, invoices, and receipts indicating the estimated cost or paid cost of repairs. It is also best practice to have evidence of the cost to repair come from a third-party licensed professional such as a contractor not related to the landlord.

This may seem relatively simple, but a landlord who fails to comply with the law is subject to treble damages under *G.L. c. 93A. Goes v. Feldman 8 Mass. App. Ct. 84, 391 N.E.2d 943 (1979)*. Also see *940 C.M.R. § 3.17(4)*. Therefore, when your building enters the property management rental stage, make sure you comply with the Security Deposit Law and consult with counsel who can help you through this process for your continued success. **FT**

CONSTRUCTION CONTINUES ON QUALIFIED OPPORTUNITY ZONE REGULATIONS

By Michael P. Duffy, Esq.
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On April 17, 2019, the U.S. Department of the Treasury released its second set of proposed regulations (REG-120186-18) concerning the rules for forming and operating so-called Qualified Opportunity Zone investments. The proposed regulations update guidance issued late last year and provide much-needed clarity on many issues related to using Qualified Opportunity Funds (QOFs) to accommodate real estate investors.

OVERVIEW

Broadly speaking, investing in a Qualified Opportunity Zone permits taxpayers to reinvest proceeds received upon exiting one deal into a second QOF investment in order to defer and potentially reduce capital gains realized on the first investment for a period of up to ten years. Furthermore, taxpayer gains realized on exiting the second QOF investment are not taxable if held for a long enough period. The proposed rules have been of particular interest to real estate investors because QOF investments must be located in predetermined economic recovery areas and because, in order to qualify for any benefits, the investors need to be facing large capital gains tax bills no earlier than six months before making the QOF investment.

"QUALIFIED OPPORTUNITY FUND" CLARIFIED

To obtain benefits, taxpayers must invest in a QOF, which ultimately must conduct a business in a designated "opportunity zone" tract of land. Most of the QOF's underlying property must be used in conducting an active trade or business within the opportunity zone, either directly or indirectly through a partnership or corporate subsidiary. The property so used must either have a "first use" within the zone or, in the case of buildings already in service, must be substantially improved by investors within 30 months of acquisition.

The new regulations provide clarity on what a "trade or business" is and confirm that businesses rehabbing and actively renting out property to tenants can indeed qualify as QOFs. The new regulations further provide that a QOF need not have an ownership interest in real property; its activity in the opportunity zone may be conducted through a leasehold interest.

GUIDANCE ON BUSINESS CONDUCTED WITHIN A QUALIFIED OPPORTUNITY ZONE

At least 50% of the income from a QOF-qualifying trade or business must be earned "in" the Qualified Opportunity Zone tract of land each year. The new regulations explain the rules for determining whether income is considered earned inside the opportunity zone in nonretail situations. The 50% income test is met if at least 50% of the time spent by employees and independent contractors of the QOF business is performed within the opportunity zone, if at least 50% of the amounts paid to employees and independent contractors is for services performed within the opportunity zone, or if the tangible personal property and management necessary for the QOF business to generate at least 50% of its gross income are located within the opportunity zone.

GUIDANCE ON INCLUSION EVENTS

The new regulations create standards that can be used to determine whether a transaction will cause QOF investors to suffer from inclusion, i.e., the premature loss of their tax-deferral benefits. Such inclusion events will generally result when an investor reduces his or her equity interest in the QOF or receives a "cash out" of property with a fair market value in excess of its tax basis.

The new regulations provide clarity on what a "trade or business" is and confirm that businesses rehabbing and actively renting out property to tenants can indeed qualify as QOFs.

CLOSING

Real estate investors have been eager to receive comprehensive guidance from the Treasury Department since the legislation creating the Qualified Opportunity Zone rules was signed into law on December 22, 2017. Now, approximately a year and a half later, this guidance is starting to take shape. Although final regulations will not be out until at least the end of the summer, in the notice of proposed rulemaking, the Treasury Department confirmed investors and advisors may rely on the new proposed regulations now in structuring their QOF investments. **FT**

AN EMPLOYER'S PRIMER TO MITIGATING RISKS WHEN PAYING INSIDE SALES EMPLOYEES ON A 100 PERCENT COMMISSION AND/OR DRAW BASIS

By Scott E. Regan, Esq.
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All employers should be aware of the Massachusetts Wage Act. The Wage Act is intended to prevent employers from improperly withholding their employees' earned wages. As detailed below, even a potentially good faith misunderstanding of the law can result in serious consequences for employers. Importantly, the Wage Act also subjects certain corporate officers (e.g., presidents and treasurers) to individual liability for the employer's violations of the Wage Act. Thus, employees may obtain a judgment against the employing entity and certain corporate officials.

Under the Wage Act, a prevailing employee is entitled to an award of treble damages. The employer and/or corporate official, in addition to paying their own attorneys' fees and litigation costs, must also reimburse the employee for his or her reasonable attorneys' fees and costs. Thus, employers and corporate officials face significant risks if an employee proves just a small amount of damages at trial.

Unfortunately, employers often realize far too late that their payment practices (even if common in the industry) do not comport with the Wage Act. By way of example, certain businesses have been known to pay their inside salespeople entirely by commissions or draws (i.e., advances on commissions). Under the Wage Act, sales commissions are wages when the commissions have been "definitely determined" (i.e., when they are mathematically determinable) and are "due and payable to the employee" (i.e., when any necessary contingencies for payment have been satisfied).

In *Sullivan v. Sleepy's LLC*, 482 Mass. 227 (2019), the Massachusetts Supreme Judicial Court (SJC) held that inside salespersons who are paid only on draws and commissions must be paid separate and additional overtime and Sunday pay under Massachusetts law. In that case, the plaintiff salespersons worked at retail stores operated by the employers. Like many retailers, the employers paid the salespersons entirely on a commission basis. Specifically, as their compensation package, the salespersons received as their daily pay the greater of (1) their $125 recoverable draw, or (2) earned commissions in excess of $125.

The employees contended that the employers were required to pay them (1) separate and additional compensation under the Massachusetts overtime and Sunday pay statutes, even though the plaintiffs' commission/draw payments always met or exceeded the minimum wage (currently $12.00 per hour) for the first 40 hours they worked, and (2) one and one-half times the number of hours they worked over 40 hours or on Sunday (i.e., overtime pay). Unsurprisingly, the employers countered that the employees had already received all wages to which they were entitled.

The SJC disagreed with the employers and noted that the employees' payment structure never changed based on whether they worked overtime. Thus, while the employers had received the benefit of the employees' overtime efforts (e.g., not having to hire additional staff to complete the overtime work), the employees did not receive the required overtime pay intended to incentivize employees for the burdens of a long workweek. Accordingly, the SJC concluded that the payment arrangement violated the overtime statute and was not permissible unless there were timely separate and additional overtime payments.

In addition, and for similar reasons, the SJC concluded that the Sunday pay statute also prohibits employers from paying covered employees less than one and one-half times their regular rate for hours worked on a Sunday. Consequently, the SJC determined that the employees were entitled to separate and additional pay at not less than one and one-half times their regular rate for hours worked on Sunday. The SJC also iterated that employers cannot remedy Wage Act violations with retroactive payments, because it would ostensibly vitiate the requirement for employers to timely pay their employees all earned wages.

All employers should be aware of the Massachusetts Wage Act. The Wage Act is intended to prevent employers from improperly withholding their employees' earned wages.

The Sullivan case has significant implications for employers that pay certain employees solely on a commission and/or draw basis. Employers should consider consulting with experienced employment law counsel regarding their payment schemes, because determining the lawfulness of an employer's payment policies and practices can be a complicated and fact-intensive process. **FT**

Firm News

SUCCESS! FLETCHER TILTON LITIGATION TEAM AND LONGTIME CLIENT ACHIEVE OUTSTANDING RESULT IN COURT

Attorneys Adam Ponte, Patrick Tinsley & Faith Easter

Middlesex Superior Court, WOBURN, Mass. — May 17, 2019 — Fletcher Tilton litigation attorneys **Adam Ponte** and **Patrick Tinsley** successfully completed a three-day jury trial in Middlesex Superior Court, representing a local real estate developer in its claims against a Boston-based general construction firm. After three days of testimony and argument, the jury unanimously found in favor of the firm's client on counts in breach of contract and intentional misrepresentation, and for violation of Massachusetts General Laws, Chapter 93A, Section 11, the state's law against unfair and deceptive business practices. **Faith Easter**, the lead attorney for CJPM Development, says, "We have represented this client for fifteen years. Because we are a long-standing full-service law firm, our team has both the depth and quality to prevail for our clients across a wide range of legal needs. I congratulate our client and the firm's litigation department for this outstanding result."

Case Citation: *CJPM Development LLC v. Metric Construction of Boston Corporation*, Middlesex Superior Court, No. 1581-CV-05812.

FAITH EASTER RECOGNIZED BY DONOR OF 12.5-ACRE PARCEL TO THE METROWEST YMCA

Representing our client the MetroWest YMCA, attorney Faith Easter helped negotiate and execute the donation of a 12.5-acre land parcel in Ashland to the MetroWest YMCA.

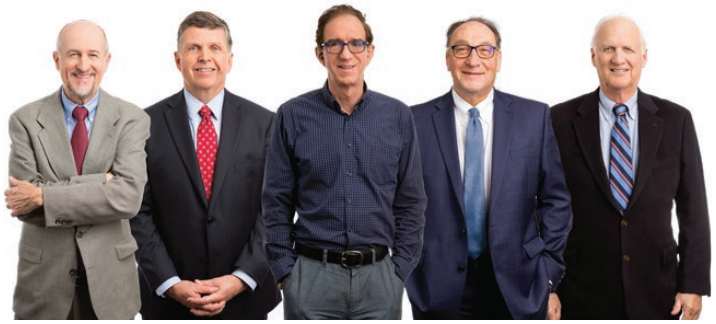
The following article was already picked up by an online publication, The Framingham Source, and contains this glowing endorsement from the land donor: *"Working with Y CEO Rick MacPherson and Y board member Faith Easter from the law firm of Fletcher Tilton to finalize this transaction has been an absolute pleasure and I enthusiastically look forward to beholding the finished product," said Bob Gayner.*

JOIN US IN WELCOMING ATTORNEYS SIFAT AHMED AND CASANDRA OZCIMDER

Sifat Ahmed practices business immigration law, focusing her practice on H-1B specialty occupations. Her professional experience includes dealing with issues such as humanitarian immigration matters and employment-based national interest waiver petitions.

Ms. Ahmed was raised in Saudi Arabia and has previously practiced law in the United Kingdom, Bangladesh, and Belgium, where she worked on commercial, corporate, arbitration, and litigation matters.

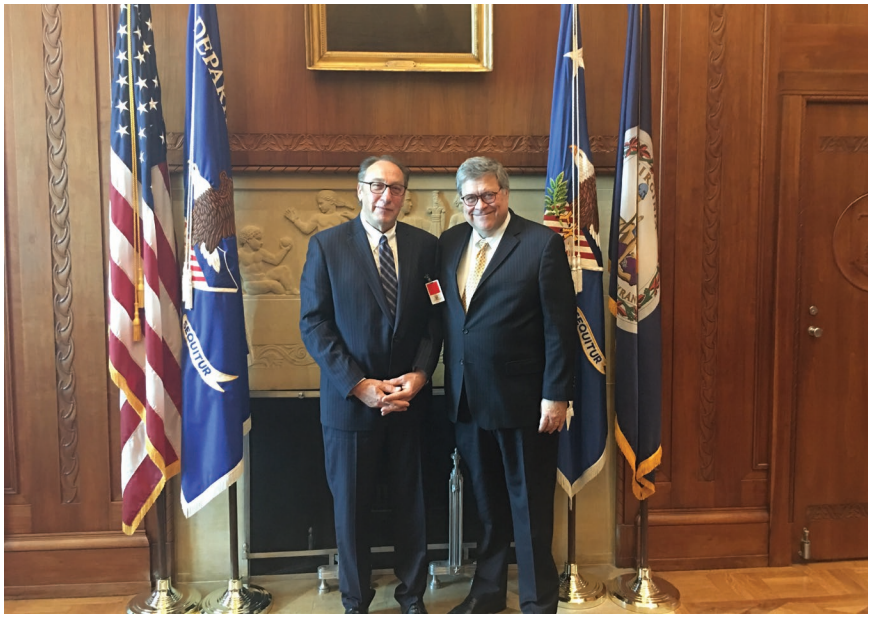
Casandra Ozcimder focuses her practice on corporate and business immigration matters. She counsels companies and their employees on matters related to nonimmigrant and immigrant visa petitions, and assists multinational corporations with employment eligibility verification compliance. In her practice, Mrs. Ozcimder advises clients in a variety of industries, including technology, business consulting, life sciences, and financial services. She also advises companies on best practices related to Department of Homeland Security requests for evidence, Department of Labor audits, and related worksite visits and investigations.



Richard Barry, Mark Donahue, Dennis Gorman, Frederick Misilo & Phillips Davis

2019 BEST LAWYERS®

Fletcher Tilton is pleased to announce that the following attorneys have been honored as 2019 Best Lawyers based on exhaustive peer-review surveys: Richard C. Barry, Jr. – *Trusts & Estates*; Mark L. Donahue – *Real Estate;* Dennis F. Gorman – *Tax Law, Trusts & Estates;* Frederick M. Misilo, Jr. – *Elder Law;* Phillips S. Davis – *Corporate Law*

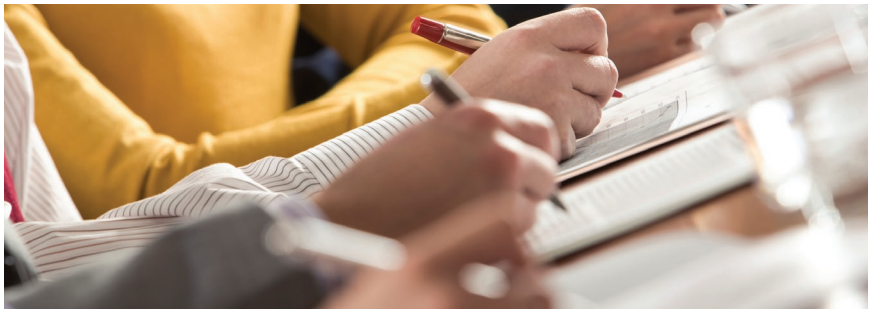


ATTORNEY FREDERICK M. MISILO, JR., PRESIDENT OF THE ARC OF THE UNITED STATES, MEETS WITH U.S. ATTORNEY GENERAL WILLIAM BARR TO DISCUSS THE IMPORTANCE OF CONSENT DECREES TO DISABILITY COMMUNITY

On June 4, Fred Misilo in his role as the current president of The Arc of the United States ("The Arc") met with United States Attorney General William Barr in Washington, D.C., to discuss The Arc's concerns with former Attorney General Jeff Sessions' memo "Principles and Procedures for Civil Consent Decrees and Settlement Agreements" ("Sessions Memo"). Mr. Misilo's meeting with Attorney General Barr focused on the fundamental importance of consent decrees and court-enforceable settlement agreements in achieving systemic change for people with intellectual and developmental disabilities ("I/DD") over the past several decades. In this context, Mr. Misilo explained the ways in which the Sessions Memo will undermine this progress by significantly curtailing the use of these tools.

The Arc—the largest national community-based organization working to promote and protect the civil and human rights of people with I/DD—was founded in 1950 and has more than 600 chapters advocating for more than 1 million people throughout the United States.

Mr. Misilo is chair of the Trusts & Estates department of Fletcher Tilton, with a particular focus on special needs planning. He works primarily from the firm's Worcester, Framingham, and Cape Cod offices.



UPCOMING SEMINARS

ESTATE PLANNING — *Speaker:* Michael Lahti, Esq.

Tues., July 23: 10 a.m. & 1 p.m.
Location: Kirkbrae CC
Lincoln, RI

Tues., Aug. 13: 10 a.m. & 1 p.m.
Location: Blackinton Inn
Attleboro, MA

Tues., Sept. 3: 10 a.m. & 1 p.m.
Location: Lobster Pot
Briston, RI

Thurs., Sept. 26: 10 a.m. & 1 p.m.
Location: Crowne Plaza
Warwick, RI

Wed., Oct. 16: 10 a.m. & 1 p.m.
Location: Connors Center
Dover, MA

ESTATE PLANNING FOR MA-FL SNOWBIRDS

Speaker: Frederick Misilo, Jr., Esq.

Fri., Sept. 13: 8:30 a.m.
Location: Doubletree Hyannis
Hyannis, MA

EMPLOYMENT LAW — *Speaker:* Joseph T. Bartulis, Jr., Esq.

Tues., Sept. 10: 8:30-10:30 a.m.
Location: Verve Crowne Plaza
Natick, MA

Thurs., Sept. 19: 8:30-10:30 a.m.
Location: Cyprian Keyes
Boylston, MA

For details and to register for these seminars and others, visit FletcherTilton.com/seminars-events.

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