NEW LAWS REQUIRE LANDLORDS TO ANALYZE TENANT COMMUNICATION SYSTEMS TO MEET LEGAL REQUIREMENTS

The Colorado General Assembly passed multiple landlord tenant bills this session. Two of these Bills (The Warranty of Habitability or "WHB" and the Bed Bug Bill or "BBB") create significant ongoing communication requirements for landlords. The WHB is effective August 2, 2019, and the BBB is effective January 1, 2020.

Current landlord tenant communication systems probably do not allow landlords to comply with these new legal requirements or put landlords in the best position to defend claims under these new laws. Accordingly, landlords should analyze their tenant communication systems to minimize liability under the new laws. To assist in this analysis, this month we explain the statutorily required communications and the pros and cons of potential communication solutions.

Under the 2019 WHB, tenants are required to provide landlords written or electronic notice of conditions that could constitute a breach of the warranty of habitability if not remedied. When the tenant provides written or electronic notice of a warranty of habitability issue, the landlord becomes obligated to respond within twenty-four hours. The landlord's response must indicate the landlord's intentions for remedying the condition, including an estimate of when the remediation will commence and when it will be completed.

Similar to the WHB, HB19-1328 or the BBB mandates various communications between tenants and landlords. First, the BBB requires a tenant to promptly notify the tenant's landlord via written or electronic notice when the tenant knows or reasonably suspects that the tenant's dwelling unit contains bed bugs.

After receipt of notice, a landlord must have the unit inspected by a qualified inspector within ninety-six hours. Additionally, the law requires the landlord to provide the tenant reasonable written or electronic notice of landlord's intent to enter to inspect for bed bugs at least forty-eight hours in advance. However, the lease may provide for a different minimum notice time or waive the notice requirement. All leases should waive the notice requirement in the lease to avoid scheduling issues. Even if notice is waived in the lease, landlords should still provide at least some electronic notice of inspection to prove landlord's compliance, as a courtesy to the tenant, and to avoid scheduling conflicts with the tenant.

Both new laws refer to electronic notice. Both the WHB and the BBB define electronic notice the same. "Electronic notice means notice by electronic mail or an electronic portal or management communications system that is available to both a landlord and a tenant." However, landlords can't force tenants to provide electronic notice and tenants could provide old fashioned written notice either by hand delivery, mail, or another courier.

Both new laws also specify where tenants are to send electronic notice. “A tenant who gives a landlord electronic notice of a condition shall send such notice only to the e-mail address, phone number, or electronic portal specified by the landlord in the rental agreement for communications. In the absence of such a provision in the rental agreement, the tenant shall communicate with the landlord in a manner that the landlord has previously used to communicate with the tenant. The tenant shall retain sufficient proof of delivery of the electronic notice.”

The new laws do not mandate that landlords designate where tenants send statutory communications. However, designating where communications are sent is critical for landlords to comply with both the WHB and the BBB, and to be able to defend claims brought under both laws. If landlords don’t designate, tenants could send WHB or BBB communications to any number of emails or phones. This creates problems. The recipients of such communications may not realize their importance or simply ignore them all together (that’s maintenance’s job). If these claims end up in court, a landlord will have difficulty assembling necessary proof of required communications if they are scattered on multiple mobile devices or over multiple email accounts.

For these reasons, all landlords should take advantage of the WHB and BBB provisions by immediately changing their leases to direct tenants where to send electronic notice. As soon as your lease is changed, you are covered going forward. However, Landlords should consider addressing the “GAP lease” issue under the new laws. GAP leases are existing leases that don’t expire until after August 2, 2019, the effective date of the WHB (or in the case of the BBB current leases that don’t expire until after January 1, 2020).

Some GAP leases may direct tenants where and how to communicate regarding maintenance requests. However, GAP leases do not contain language directing tenants where to send WHB or BBB related communications. As a result, tenants could send statutory notices to a wide range of communication channels making it difficult for landlords to comply with these new laws.

Landlords can’t unilaterally alter current tenant leases. However, landlords can direct tenants where to send notices. To address the GAP lease issue landlords can let tenants know where to send communications. Landlords can accomplish this by publishing a simple statement to tenants: effective August 1, 2019, you should send us any statutorily required notice to us at the online tenant/ maintenance portal or at [insert appropriate email address].

Giving notice to GAP lease tenants should substantially increase tenant compliance. When tenants direct communications to a single source, landlords are in a better position to comply. The disadvantage is that you can’t make GAP lease tenants comply and some will not. Further, some landlords may be concerned that publishing a statement will increase tenant claims. This is for individual landlords to determine. However, in our experience, the red flag theory is overhyped. Tenants either have an issue or they don’t, and the ones that tend to file claims are going to do so no matter what you do.

Many landlords already have electronic communication systems designed to handle tenant maintenance requests. If you don't, you will need to set one up right away. If you have a communication system, you will need to analyze its capabilities to meet statutory requirements. If you have a system, you may want to consider the advantages of deploying a second communications channel specifically designated for statutory notices.

We already have a communications channel for maintenance requests, so why would we want to set up a second channel? A second designated communication channel for WHB and BBB communications has several advantages that you may not have considered.

If you have a maintenance communication pipeline, it already has a certain flow because tenants are currently using it to make maintenance requests. When WHB and BBB communications are added to this flow, they may become indistinguishable from routine maintenance requests. Since both laws mandate specific action by a landlord when a tenant gives electronic notice, somebody is going to have to monitor the communication pipeline, identify the WHB and BBB requests, and initiate the proper response. Since tenants won't necessarily accurately label maintenance requests and your current pipeline regularly has hundreds or thousands of maintenance requests, this could be a formidable task.

These issues are potentially solved by having a second communications channel specifically designated for WHB and BBB claims. With a second channel, staff doesn't have to pick out the WHB and BBB claims from routine maintenance claims. A second designated channel also has another significant advantage. Liability under both the WHB and the BBB is initiated by the tenant giving "proper" notice. If the tenant doesn't send the notice to the designated electronic address, the tenant hasn't given proper notice and landlord's obligations and liability doesn't commence.

However, several potential problems could arise with running a second communications pipeline designated only for statutory notices. Tenants may not be able to distinguish between routine maintenance claims and statutory claims (WHB and BBB). As a result, tenants may clog your statutory pipeline with routine maintenance claims. Running a second pipeline may be difficult to establish and maintain. Vendor system limitations may be an issue. Onsite teams and management personnel are already asked to do more and more. Is it worth burdening them further by creating and maintaining a second pipeline?

OK, your communication system is funneling statutory communications to where you have designated. Now you need to respond. The WHB's requirement that landlords respond to tenant's initial electronic communication within 24 hours presents difficult challenges. For example, how will landlords respond to a notice received at 10 p.m. on a Saturday or over a long holiday weekend? One solution would be to have someone constantly monitoring this communication channel so that they are in a position to respond. Theoretically, designating a separate communications channel for statutory communications would make monitoring easier because there should be far less communication traffic. Conversely, monitoring a

communications pipeline that has both statutory and routine maintenance requests would appear to be a tall order, given the volume of traffic.

Some clients plan to employ the auto response or an auto responder to respond to tenants' statutory electronic notices. Many landlords have online portals run by the big outfits (such as YARDI and RealPage). These landlords will direct tenants to send statutory notices to these portals. These portals are capable of generating auto responses or automatic replies to the tenant when the tenant sends an electronic notice. Similarly, any email client can automatically respond to incoming emails.

Like other solutions, the auto responder seems to have advantages and disadvantages. Consistently meeting the statutory requirement of responding within 24 hours appears to be the main advantage. However, how this will play out in court remains to be seen. Specifically, the statute requires the landlord's response to indicate "the landlord's intentions for remedying the condition, including an estimate of when the remediation will commence and when it will be completed." A court may hold that an auto response does not comply with the statute because is not an estimate that applies to the tenant's situation but just a generic statement.

Unless your auto responder has artificial intelligence, the response language has to be programmed and will always be the same. For example, "We have received your service (maintenance request). We intend to remedy the situation. We estimate that work can commence within three days and will be completed within seven days." In some situations, this may be fine. In other situations, the response may be way off the mark. For example, a flood would obviously require a more immediate response. The auto response may either under promise when immediate action is required, or over promise when the situation is going to take longer to address.

The auto responder cannot differentiate between routine maintenance requests, WHB claims, and BBB claims. If you have a single communications channel (i.e. no designated statutory notice channel), you are now making promises regarding every single maintenance request and in particular when such requests will be completed. Under the WHB, landlord isn't on the hook if the tenant caused the problem. However, an auto response will still promise to complete repairs within a certain time even when the tenant caused the problem.

For these reasons discussed, landlords should at least consider having a second designated channel for statutory claims. The auto responder solution seems much more effective if deployed on a designated communications channel because it eliminates automatically making promises on routine maintenance issues. However, a second channel still has all of the potential issues discussed.

Some clients have discussed a hybrid solution with us. Specifically, tenants are directed to the portal for all communications (WHB, BBB, and routine maintenance requests). When the tenant arrives at the portal, the portal asks the tenant if this is a statutory request under the WHB or BBB. This solution appears promising but is untested. The solution theoretically could

sort out the statutory claims from the torrent of routine maintenance requests. If effective in isolating statutory claims, those more limited communications could now be responded to in a greater detail.

An email system could be programmed along these same lines. Tenant sends email. System responds, “is this a statutory request” (Respond YES or NO)? The email could have an explanation as to what WHB that means. When the tenant’s second email (the answer) is received the system could forward “YES” emails for detailed review and response. The concern with both a hybrid portal or email system is that tenant’s will just say “YES” all the time, thus making every request a statutory
request and defeating the system. Even though this is certainly possible, landlords would be prudent to deploy a hybrid system and evaluate workability. The hybrid communications system seems to give landlords the advantages of a second designated communication channel without some of the major disadvantages (mainly not having to maintain a second system).

Finally, any automated response system may have storage and retrieval issues. In the scenario discussed, the tenant gives the notice thru the portal, and the portal automatically generates a response. This response is sent to tenant at the tenant’s email address. We have all received such emails, and they all say something like “do not reply to this address” or “email address not monitored”. So, in this scenario, where is the tenant’s initial email stored? Where is the reply stored? If the situation went to court, the landlord would need to produce all of the communications involving the WHB or BBB situation. Thus, any communication system has to store all related communications and allow those communications to be easily retrieved for use in court.

Based on our analysis of these statutes and the corresponding communication requirements, the Colorado General Assembly clearly had no idea of the massive burden they were creating when these laws were passed. The General Assembly obviously knows little to nothing about how the rental industry works and more importantly how tenants think and act in the real world.

Landlord’s liability under both laws is initiated by tenant providing notice to landlord. Because the tenant’s notice both triggers landlord’s liability and landlord’s duty to respond, a landlord needs to know when a WHB or BBB notice is sent. Thus, the ability to identify claims and generate required statutory responses are the critical specifications of any communication system. In the short run, no best practices solution has emerged. Time will tell if an ideal solution emerges. In the interim, we advise to think it through, consider the issues that have been discussed in this article, and do what works for you.

Inaction is not an option, otherwise compliance is not possible and legal exposure will be significantly increased. Most of the clients I have talked to are probably going with a single communications channel. Meaning they are going to direct WHB and BBB claims into their existing maintenance communication pipeline. Keep in mind that any SOP has to deal with old fashioned written notice allowed under both laws. This means onsite teams will have to be

trained to recognize written WHB and BBB notices. Regardless of your communication system, in order to comply with the law, landlords need to be able to identify and respond to these statutory claims when they arise.