



## Top 10 Questions about the New Texas Late Fee Law

In response to the many questions TAA has received regarding the new late fee law, we've categorized questions into the following top 10 topic areas. If you have fact-specific questions that aren't addressed, you'll want to consult your attorney for assistance.

### 1. DOES THE NEW LAW ESTABLISH A MAXIMUM LATE FEE?

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No, Texas law does not set a maximum amount that can be charged for late fees. Rather, Section 92.019 of the Property Code requires that, among other things, late fees be reasonable. The revised late fees law defines "reasonable" fees as those that are (1) equal to or less than a certain percentage of rent or (2) not greater than the uncertain damages related to the late payment of rent, including costs, expenses and overhead.

### 2. WHAT DOES THE "SAFE HARBOR" PROVISION MEAN?

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A significant improvement of the revised late fees law is the establishment of a "safe harbor." The "safe harbor" means that fees meeting that standard are presumed to be reasonable and lawful, assuming other requirements of the law are met. Staying within the safe harbor should limit liability, and if challenged in court, would be a matter of proving that the fees collected were within the appropriate safe harbor limits for the property.

#### Safe harbor guidelines:

- For apartments (specifically, structures that contain 5 or more dwelling units), owners who collect no more than 10 percent of the rent for a late fee in any given month are within the safe harbor.
- For single-family homes and all other structures that contain less than 5 dwelling units, owners who collect no more than 12 percent of the rent for a late fee in any given month are within the safe harbor.

Owners may choose to set late fees at a higher amount than the percentages found in the safe harbor, but to show that the fee is reasonable they must demonstrate that the amount of the late fees collected is not more than the damages related to the late payment based upon the factors discussed in question #1.

### 3. WHAT IS THE EFFECTIVE DATE OF THE NEW LAW?

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The new law takes effect September 1, 2019 and explicitly applies only to late fees under a lease entered into or renewed on or after September 1, 2019. A late fee under a lease entered into or renewed before September 1, 2019 is governed by the old law. It does not apply retroactively to leases in effect before the September 1 effective date.

For example, if a lease was signed by the resident on 8/5/19 and by the owner on 8/7/19, and the lease term begins on 9/4/19, the late fees under such lease would be governed by the old law and the owner may use the old TAA lease form.

However, if a lease was signed by the resident on 8/28/19 and by the owner on 9/1/19, and the lease term begins on 9/4/19, the late fees under such lease would be governed by the new law and the owner should use the new TAA lease form.

**Bottom line:** For leases and renewals signed by owner and all residents before September 1, 2019, the old law applies. Late fees under a lease entered into on or after September 1, 2019 will be governed by the new law and the new TAA lease form should be used. The date when the parties have signed the lease is what matters - not the date the lease term begins.

### Month-to-month leases, lease renewals and roommate changes

- For month-to-month leases, the renewals entered into on/after September 1 will be governed by the new law. Remember that Paragraph 3 of the TAA Lease specifies that the Lease will automatically renew on a month-to-month basis unless either party gives a certain amount of notice. If residents do not advise you of their move-out date within the required notice period, it will automatically be extended on a month-to-month basis, until the residents or the property owner gives the appropriate notice to end the lease.
- Be particularly mindful that the old lease may start assessing late fees on the 3rd so if it renews month-to-month after September 1, 2019, it will be **out of compliance** with the new law which requires a late fee be charged no sooner than the 4th.
- Owners should review their late fees policies and give residents written notice of any lease changes including changes to their late fees policies. If owners give such notice at least five days before the advance notice deadline in Paragraph 3, the current lease will automatically continue on a month-to-month basis with the specified lease changes.
- However, it is prudent for members to use the most current TAA Lease form or execute new leases instead of one-page renewals for maximum owner protection. **As of August 28, the Lease Contract Renewal will be disabled in the TAA Click & Lease Program and discontinued in printed format to ensure leases entered into before September 1, 2019 can't be renewed under the new law.**
- TAA's Lease Contract Amendment to Add or Change a Roommate During Lease Term will include the new late fee language from the lease to ensure members don't add someone to an old lease without the new late fee language in place.

## 4. HOW DO I CALCULATE MY LATE FEES AND REMAIN WITHIN THE SAFE HARBOR LIMITS?

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Three considerations for how you can calculate late fees within the safe harbor for your property:

1. Property Type (number of units for the 10 percent vs. 12 percent maximums)
2. Initial + Daily Fees OR Flat Fee
3. 15-day Daily Fee Cap

### Property type

Section 92.019(a-1) of the Property Code provides two different safe harbors depending on the configuration of your property:

- For structures that contain 4 units or less, a late fee of 12 percent or less of one month's rent is automatically considered reasonable under the statute.
- For structures that contain 5 units or more, a late fee of 10 percent or less of one month's rent is automatically considered reasonable under the statute.

### Initial + daily fees OR flat fee

Regardless of whether you apply the 10 percent or 12 percent safe harbor, the total amount may be charged all at once or broken up into an initial fee and daily fees. The fees set forth in Paragraph 6 of the TAA Lease may also be a percentage of rent or a dollar amount. As long as the total amount collected in any given month is no more than the applicable percentage, the late fees are within the safe harbor and considered reasonable.

### 15-day daily fee cap

Paragraph 6 of the TAA Lease limits the collection of daily late fees to no more than 15 days but also provides a blank that allows owners to limit the number of days a daily fee may be charged.

**Example:** Assuming rent for an apartment is \$1,000, the owner may collect a late fee of up to \$100, or 10 percent of rent, to be within the safe harbor. The \$100 may be charged all at once, on the 4th day of the month, or it could be broken up into, for example, a \$50 (or 5 percent) initial fee plus a \$10 (or 1 percent) daily fee for 5 days.

## **5. HOW DO I SET MY LATE FEES IF I WANT TO EXCEED THE SAFE HARBOR PERCENTAGE LIMITS?**

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Your late fees must not be more than the uncertain damages to the property owner related to the late payment of rent. Each property is unique. Factors may be considered differently based on the property type, ownership/management of the property, market conditions, etc. You should consult the attorney of your choice for advice regarding your specific situation.

### **Factors to consider**

Owners have the option to charge more than the applicable safe harbor percentages, but the amount of the fees may be subject to legal challenge. Under the new law, a late fee in excess of the safe harbor percentage limits is permissible if the amount is reasonable and it is not more than the uncertain damages to the property owner related to the late payment of rent, including direct and indirect costs, expenses and overhead. Many factors may be relevant in determining late fees including administrative expenses, personnel costs devoted to late rent collection, time value of money, predictability of property income and the effect on vendor relationships. Remember that those factors are specific to each property, too.

### **Recommended documentation**

Documenting these considerations is key. You should conduct an individualized assessment as the configuration and needs of properties can vary greatly. For instance, the effort to collect late rent on a single-family residence would vary greatly from that to collect late rent at a 500-unit community. Having a written assessment created in advance will make it much easier to defend your late fee policy if challenged in court.

## **6. WHAT CONSTITUTES “RENT”?**

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Rent is the amount that is stated in the first blank in Paragraph 6 of the TAA Lease. If the “rent” includes other items like fees for parking, pet rent, etc. that is all-inclusive, owners may be able to use the total amount stated in Paragraph 6 to calculate their late fees to stay within the safe harbor.

For example, if the monthly rent for an apartment is \$1,000, which includes parking fees and pet rent, the entire \$1,000 is subject to a late fee. A \$100 late fee could be collected in this hypothetical and would fall within the safe harbor.

If the amount stated in Paragraph 6 does not include all rentable items and the owner breaks out various fees and services other than rent, then such fees should not be considered when determining the amount of “rent” to calculate the late fee.

One simple way to clarify this is to specify in Special Provisions in P. 9 of the Lease the fees that are included in rent, such as “the rent stated in Paragraph 6 includes amounts for garage and storage.”

Likewise, if you offer a resident a concession or discount as an incentive or bonus, then you’ll want to make sure the accounting and lease provisions regarding such discount specify the concession is not a reduction in the “rent,” but is instead a credit or discount on the overall charges under the lease.

This is an untested area of the law, so it is important to consult the attorney of your choice in making a policy decision on this issue. Note that in the case of fees for parking or garage spaces, there may be sales tax implications as well, depending on how those are handled.

## **7. HOW DO YOU DETERMINE WHETHER A LATE FEE IS “REASONABLE” IF THE LATE FEE IS IN EXCESS OF THE SAFE HARBOR PERCENTAGE LIMITS?**

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Determining what may be considered a “reasonable” late fee set higher than the safe harbor percentage limits will depend on the facts of each case. Late fees cannot be awarded in an eviction case, and with

few owners choosing to file separate lawsuits for rent and damages beyond evictions, this means late fees are rarely adjudicated in Texas courts.

It is important to note that “reasonableness” varies property to property. Each property is unique. Factors may be considered differently based on the situation, but the statute does give some limited guidance on what can be considered.

Specifically, you may include direct and indirect expenses, costs or overhead associated with the collection of the late payment. Factors that could be considered are administrative expenses, time value of money, predictability of property income and the effect on vendor relationships. You should consult the attorney of your choice for advice regarding your specific situation.

## **8. WHAT IS THE GRACE PERIOD FOR A RESIDENT INCURRING A LATE FEE UNDER THE NEW LAW?**

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Under Texas law, late fees cannot be charged until at least the 4th day of the month (assuming rent is due on the 1st). For example, if rent is due on October 1st, a late fee cannot be legally charged until at least October 4th. Owners are not required to charge a late fee on the fourth—Paragraph 6 of the TAA Lease gives an owner the flexibility to extend the number of days before which late fees will be imposed.

### **Do I have to wait until the 4th to begin the eviction process?**

While owners must wait to impose the late fee, there is nothing that prevents them from taking another action, such as pursuing eviction, as soon as the rent is late.

### **Can late fees be charged if the owner accepts partial payment of rent?**

Late fees may be charged if a resident does not pay rent in full by the due date (the 1st). The new statute clarifies a late fee may be charged if “any portion of the tenant’s rent is unpaid.”

## **9. WHAT HAPPENS IF A RESIDENT CHALLENGES MY LATE FEES IN COURT?**

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If a resident challenged a late fee in court and the owner could prove the late fee collected was within their property’s applicable safe harbor, the property owner would prevail. This could be accomplished by introducing the lease and ledger into evidence, showing that the late fee charged and collected was equal to or less than the applicable safe harbor percentage.

If a resident challenged a late fee in court and the owner was charging a late fee outside the applicable safe harbor, the defense would be more difficult. The judge or jury would look at the late fee collected and the evidence provided by the owner to see if they agreed with the owner that the fee charged was reasonable. This is where you would need to have done an analysis to show why your costs and damages related to the resident’s late payment of rent are equal to or greater than the late fee you are charging, and have evidence to support your claims.

**Penalties:** If an owner violates the statute, he can be held liable for up to three times the amount of the fee charged in violation of the statute, a \$100 penalty and the resident’s reasonable attorney’s fees.

## **10. DOES THE NEW LAW APPLY TO THOSE RESIDENTS WHO RECEIVE GOVERNMENT ASSISTANCE FOR A PORTION OF THEIR RENT? IF SO, HOW DOES THE NEW LAW WORK?**

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Texas law does not address late fees for residents who receive government assistance for a portion of their rent. TAA encourages its members to act in a reasonable manner in charging late fees to those residents who receive government assistance, conduct an assessment of expenses related to collection of the late payment of rent from these properties, and consult with an attorney of your choice in determining your policy.