

COMMERCIAL EVICTIONS IN OREGON: FIVE PITFALLS TO AVOID

With the number of defaulting tenants on the rise, you may find yourself leaping through Oregon's complicated FED ("forcible entry and wrongful detainer") statute for the first time (ORS 105.105 et seq.). Although commercial evictions are not particularly difficult, unique rules may trap the unwary. This article summarizes five of them.

1. Satisfy any prefiling notice requirements. The Oregon rule on prefiling notices in commercial cases based on a failure to pay rent is this: A landlord may commence an FED proceeding against a commercial tenant without prior written notice so long as the tenant fails to pay rent within ten days after it becomes due and payable, unless the lease provides a longer time or imposes a notice requirement. ORS 91.090; ORS 105.115(1)(a). (This rule is decidedly different from the rule in residential cases, which typically requires a prefiling notice in every case, regardless of the lease's language.)

Notwithstanding this general rule, there is no harm – and potentially a benefit – in giving a prefiling notice if the landlord's timeline permits. It avoids scrutiny from judges, who are accustomed to seeing prefiling notices in the residential cases that dominate their dockets. In addition, prefiling notices can foster a dialogue that results in a cooperative resolution without litigation.

If your client's lease does require prefiling notice, be sure to strictly comply with the service requirements of the lease's notice provision. Leases often require that written notices be sent to a particular location or person. Transmission technicalities are precisely the kinds of issues that get litigated in eviction court. Minor

technical failures (e.g., the wrong person, address, or service method) can result in a loss for your client. Even worse, an unfavorable ruling against the landlord will frequently allow the tenant to procure a judgment for attorney fees under the lease.

In non-rent default situations (e.g., a tenant holds over beyond the term), additional notice requirements may apply in commercial cases even if the lease does not require any prefiling notice, depending on the nature of the tenancy at issue. (See ORS 105.115; 91.110.)

2. Use the right form of summons and complaint. For commercial FED proceedings, the complaint must be "substantially" in the form required by ORS 105.126. (Compare to ORS 105.124 for residential tenancies.) Many counties have preprinted forms for landlords to use, although attorney-drafted forms are widely accepted by Oregon courts. An FED complaint is sufficient if it: (a) describes the premises with "convenient certainty"; (b) alleges that the defendant is in possession of the premises; (c) alleges that the defendant entered into possession with force or unlawfully holds possession with force; and (d) alleges that the plaintiff is entitled to possession of the premises. ORS 105.123.

The form of summons is different in eviction court from that used in most civil cases. (See ORS 105.113.) The FED summons serves as a scheduling device and contains special language. Specifically, it contains a blank line on which the FED clerk inserts, at the time of filing, the time and date of the first appearance. When the summons is served on the tenant, the tenant will

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know when to come to court. The summons also contains warnings and instructions to the tenant that are unique to eviction court. If you use the wrong summons, your action may never get scheduled and may be subject to dismissal.

3. Properly serve the summons and complaint. After waiting out any applicable notice period and confirming that the tenant has not cured the default, the landlord may file its FED complaint. If you are not using a local form with built-in carbon copies, file the original summons and complaint with additional copies per ORS 105.135. The clerk will then mail one copy to the tenant(s) per ORS 105.135(3)(a). The landlord's filing fee in Multnomah County is \$197 (plus additional fees if there are multiple defendants). Additional fees may be required from the landlord depending on where the case goes after filing. Consider calling the FED clerk to verify the proper fee.

The Multnomah County Sheriff will serve the landlord's summons and complaint for \$36. (Higher fees may apply to serve multiple defendants, and private process servers may be used.) By statute, the service must occur by the end of the next judicial day for your action to be effective. (ORS 105.135(3)(b).) The court will also mail a copy of the summons and complaint to the property specified in the summons, as required by ORS 105.135(3)(a).

Consider using a private process server rather than the sheriff. If you go this route, be sure that the process server knows the special service requirements for FED proceedings (ORS 105.135). In general, those requirements contemplate personal service on the tenant; if the defendant is not "available for service," service may be accomplished "by attaching a true copy of the summons and complaint in a secure manner to the main entrance to that portion of the premises of which the defendant has possession." ORS 105.135(3)(b).

Problems can arise when the tenant has separate mailing and physical addresses. If the FED service method is posting, it must be accomplished at the leased premises. Service by posting at the tenant's registered agent's office is insufficient if it is a place other than the leased premises. To avoid debate, consider serving at both locations.

Tell your process server to execute and return the proof of service to you as soon as possible. File your original proof of service with the court as soon as possible, as required by ORS 105.135(5). Also consider bringing a copy of your proof of service to any hearing, as the original proof of service may not have reached the court's file by the time the clerk assembles the files for the first appearance. (The court is dealing with these cases by the dozens and may not have all your paperwork in order.) In Multnomah County you must also file a completed declaration that the defendant is not in the military, a minor, or incapacitated. This declaration may not be required if the

defendant is a corporation or an LLC.

4. Understand the three-step process. The first step is the first appearance, which combines reporting the status of the case and mediation. The parties show up at a "cattle call" hearing, and the judge or a clerk tells all the parties in the room to try to work things out. If one party to an FED action doesn't show up, the other side wins. If you resolve your dispute, you pen a deal and the case may be conditionally dismissed. If the tenant then fails to perform as agreed, the landlord can obtain a "push-button" eviction by filing a declaration of noncompliance. If you can't work things out, a trial is scheduled for a later date (generally 7 to 15 days). The trial is the second step, and either party can request a jury. The third step, assuming the landlord procures a judgment of restitution, involves enforcement of the judgment: the landlord is entitled to a notice of restitution (which gives the tenant four days to move out of the premises) and a writ of execution (which instructs the sheriff to assist the landlord with removal of the tenant). (See generally, ORS 105.153; ORS 105.156.) The landlord may also be entitled to a judgment for attorney fees based on contractual lease provisions and ORCP 68.

5. File in the right county! Don't rely on a "Portland" or "Lake Oswego" address – county lines don't always match up with common assumptions. Talk with the client and check a map. If you file in the wrong county, your case will (or should) be dismissed. See ORS 105.110; ORS 14.040(5).

For a more detailed discussion of commercial eviction procedures, consult *REAL ESTATE DISPUTES* (Oregon CLE 1993 & Supp 2002). Readers are also welcome to contact the author for free CLE materials on this topic.

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