

The Deregulation Act 2015 – changes to the section 21 possession process

Following on from our previous briefings on the Deregulation Act (“the Act”) (an [overview](#) of the prospective changes, and specific notes on [tenancy deposits](#), [short-term letting](#) and [retaliatory eviction](#)), we can now look at how the Act may affect landlords wishing to recover possession of an Assured Shorthold Tenancy (“AST”) property under section 21 of the Housing Act 1988.

Most landlords will be broadly familiar with the process for terminating ASTs and the two-month notice that must be given under section 21 of the Housing Act 1988. The Explanatory Notes for the Act say that the changes to the section 21 procedure aim to make the “no-fault” eviction process more straightforward for both landlord and tenant. In some respects this appears to have been achieved, but there are a number of new restrictions that landlords will need to get to grips with and some areas where following the correct procedure may not be as simple as it first appears.

Section 21 notices

The new rules discussed below will apply to ASTs granted on or after 1 October 2015 in England only. From 1 October 2018, except for the requirement for the landlord to provide prescribed information about the rights and responsibilities of the landlord and tenant under the AST, the new rules will apply to all ASTs.

Before serving notice: new requirements for landlords seeking possession

The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 (“the Regulations”) specify certain steps a landlord must take before they can serve a section 21 notice. These apply in England only and are additional to the existing requirements regarding protection of tenants’ deposits and retaliatory eviction discussed in earlier briefings, and the obligation to obtain a licence if the property is an HMO or falls within a selective or additional licensing scheme.

A landlord can serve a section 21 notice to recover possession only if they have fulfilled the prescribed legal requirements and provided prescribed information about the rights and responsibilities of the landlord and tenant under the AST. The prescribed legal requirements are to provide an energy performance certificate (“EPC”) and a copy of the gas safety certificate for the property. Provision of these documents is already required by other legislation, so this should not prove too onerous for landlords and agents.

In addition, landlords or those acting on their behalf must supply a copy of the Department for Communities and Local Government (DCLG) leaflet [‘How to rent: the checklist for renting in England’](#). Sensibly, landlords do not have to provide a copy of the DCLG leaflet if they have already provided a copy of the current version under an earlier tenancy. Neither do they need to provide a new version of the leaflet if it is revised during the tenancy but it seems that they will have to serve the new version on renewal. Landlords who wish to reduce paperwork will be pleased that the Regulations allow them to provide the leaflet by email, but only if the tenant has previously confirmed they are content to receive notices in this way.

The Regulations do not specify when the EPC, gas safety certificate and how to rent leaflet must be provided. So landlords just have to ensure that all three documents have been provided by the time that a section 21 notice is issued. However, landlords must still comply with the Gas Safety (Installation and Use) Regulations 1998 which require that a copy gas certificate is provided to tenants within 28 days of issue, even though meeting this deadline is not a condition of serving a section 21 notice.

Time limits on serving notice at the start of a tenancy

As discussed in our previous articles, the Act introduces some new limits on a landlord's ability to serve a section 21 notice at the start of an AST. For new and renewal ASTs (as long as the parties and property remain the same), a landlord cannot serve notice within the period of four months beginning with the day on which the original tenancy began.

It should also be noted that these time limits do not apply to statutory periodic tenancies arising under s5(2) HA 1988 (i.e. those arising where a tenant has remained in occupation after a fixed term AST has expired). So it appears that where a statutory periodic tenancy follows on from an original fixed term AST of less than four months, notice could be served any time after the end of the fixed term of the original tenancy, even if this is before the four month minimum period.

New standard form for a section 21 notice

The most notable change coming out of the Regulations is the introduction of a new standard form for serving a section 21 notice. This brings section 21 into line with section 8, which already provides for a prescribed form to be used where possession is sought on Housing Act grounds, e.g. rent arrears.

When seeking possession under section 21, 'Form 6A - Notice seeking possession of a property let on an Assured Shorthold Tenancy' ("the Form") must be used for all ASTs created on or after 1 October 2015. The Form can also be used, but is not mandatory, for periodic tenancies which have come into being after this date and which were fixed term ASTs created before 1 October 2015.

The introduction of a standard form should be welcome news to landlords. Coupled with the relaxation on specifying a particular calendar date in the notice, the potential for making mistakes in the notice is dramatically reduced. Landlords will have to ensure they are using the latest version if and when changes are made.

Landlords will also need to ensure a sufficient period of time is given to allow for service, if serving by post (the guidance in the Form is misleading in this respect; suggesting that two days will always be sufficient). A general form of words (the saving formula) can no longer be used to protect an otherwise deficient notice so landlords will need to ensure that they obtain evidence of the date of service and serve a new notice if it results in an insufficient period of notice being given.

Only time will tell whether tenants will find new arguments to resist possession proceedings brought on the basis of the new prescribed form.

New time limits for court proceedings under section 21

From 1 October 2015 onwards there are new time limits for issuing proceedings for possession in England. Proceedings to obtain an order for possession must start within six months beginning with the date on which the section 21 notice was given, in most cases.

Where the law requires a longer period of notice (e.g. periodic tenancies where rent is payable quarterly, six monthly or annually), proceedings must start within four months of the date specified in the notice.

Confusingly, the guidance on the new Form regarding validity gets this wrong. Paragraph 3 of the Form suggests that the section 21 notice is only “valid” for four months from the *date of issue* for all periodic tenancies. If this were right, a notice served in relation to a periodic tenancy where rent is payable annually would cease to be valid two months before it expired. We have brought this to the attention of the DCLG but, until it is corrected, it will cause confusion amongst landlords, tenants and judges alike.

Comment

The Regulations commit the government to a review of their effectiveness in the next five years so there is potential for the section 21 process to continue to evolve over the coming years. And as the courts interpret the new rules, we hope some processes should become clearer. For example, where repayment of advance rent is due, the court is required to order repayment at the same time as making a section 21 possession order. As a tenancy does not actually end until the court bailiff carries out an eviction, it is unclear how courts will be able to calculate and issue a rent repayment order before that eviction takes place.

Landlords need to make sure they are familiar with the new time limits and also the new steps required before serving a section 21 notice. They will not only need to serve the various documents and notices but they will need to obtain evidence that they have done so.

Landlords (and their agents) will welcome the new Form for serving notice but, as discussed above, there is a risk that a standard form creates a false sense of security. Each individual situation will still need careful consideration to ensure that notice is served correctly and can be relied on to secure possession.

There are now so many hurdles for landlords to overcome in what should be a straightforward process that landlords – particularly accidental landlords – are bound to slip up. It is clearly important for landlords to be compelled to comply with their legal obligations but it is hard to see why the enforcement of those obligations should be linked to the section 21 process. It is counter intuitive that a tenant whose landlord wants the property back will receive information in great abundance about a tenancy that is shortly to be terminated whereas a tenant whose landlord does not require possession has no real compulsion to provide it.

For further information please contact:

Ed Cracknell
Senior associate
+44 (0)20 7440 4818
Ed.Cracknell@russell-cooke.co.uk

Stephen Small
Solicitor
+44 (0)20 7440 4845
Stephen.Small@russell-cooke.co.uk

This material does not give a full statement of the law. It is intended for guidance only and is not a substitute for professional advice. No responsibility for loss occasioned as a result of any person acting or refraining from acting can be accepted by Russell-Cooke LLP. © Russell-Cooke LLP. September 2015

www.russell-cooke.co.uk