

Your TDS guide to:



# How the Tenant Fees Act will affect tenancy deposits



# Contents

<b>What is the Tenant Fees Act?</b>	<b>03</b>
When does the Tenant Fees Act apply?	03
How the Tenant Fees Act will affect tenancy deposits	03
What fees are banned?	04
What fees are allowed?	05
Enforcing the legislation	06
How does the legislation affect holding deposits?	06
Refunding a holding deposit	06
Keeping a holding deposit	06
How does the legislation affect tenancy deposits?	07
Are all deposits capped?	07
What about existing tenancies with a deposit for more than the permitted amount?	07
How will agents and landlords refund excess deposits protected in the Insured scheme?	07
How will agents and landlords refund excess deposits protected in the Custodial scheme?	08
TDS' approach to the Tenant Fees Act	08
What about pet deposits?	11
Can tenants be charged a fee for being allowed to keep a pet?	11
Is there anything to stop an agent advertising a property at two different rents (one for tenants with a pet and a lower one for tenants without a pet)?	11
If the tenant wants a pet during the tenancy, can a landlord increase the rent to cater for it?	12
Could the first fixed term tenancy agreement include a provision to say that if the tenant wants a pet the rent will increase by x%?	12
In summary...	13
Top tips	13

# What is the Tenant Fees Act?

The Tenant Fees Act restricts what money landlords and agents can ask tenants to pay in addition to rent. The Act also limits the amount that can be charged as a tenancy deposit. Certain fees and charges are 'permitted payments'. Everything else is a 'prohibited payment'. Landlords and agents can still charge tenants for the proper and reasonable cost of making good damage or other breaches of their tenancy agreement but normally only at the end of the tenancy.

## When does the Tenant Fees Act apply?

The Act applies to all Assured Shorthold Tenancies (ASTs) other than social housing and long leases. It also applies to tenancies of university-owned or managed student accommodation and licences to occupy housing in the private rented sector (PRS). For convenience, we will refer to them all as 'tenancies', and the occupiers as 'tenants'. Remember, the Act will only apply in England, although other administrations may have, or introduce, legislation with a similar effect.

- Fees charged in relation to tenancies that are in existence on 31 May 2019 do not have to be re-paid.
- Landlords and agents can continue charging fees included in existing tenancy agreements until 31 May 2020. After that date the tenancy term requiring the payment will become null and void. Payments taken after that date, which fall foul of the legislation, should be returned within 28 days. If not, they are treated as a prohibited payment.
- The Act will apply to all new tenancy agreements entered into on or after 1 June 2019, and renewed tenancies arising on or after that date.



## How the Tenant Fees Act will affect tenancy deposits

The Tenant Fees Act comes into force on 1 June 2019. It will apply to:

- Agents and landlords in England
- New Assured Shorthold Tenancies and renewed tenancies (excluding statutory periodic tenancies for a period of 12 months) that arise after the legislation comes into force.

This guidance explains key provisions of the Act and how they will affect tenancy deposits.

## What fees are banned?

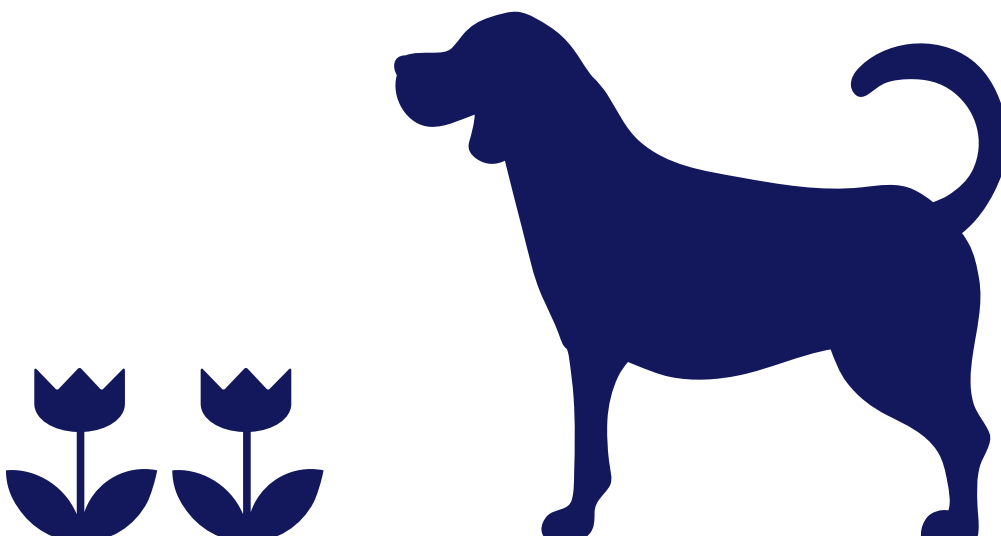
Payments required, as a condition of granting, renewing or continuing a tenancy (or as a condition of making the arrangements for those things) will not be allowed. This means that most up-front charges to tenants and licensees, apart from the deposit and rent, will be banned.

Payments that tenants and licensees must make to third parties as a condition of the tenancy (such as a regular gardener or cleaner during the tenancy) are also banned – but the ban does not apply to the tenant having to pay for utilities or council tax.

Examples of fees that are not allowed under the Tenant Fees Act can include:

- Referencing and credit checks
- Inventories, check-in and check-out reports
- Flea treatment as a condition of allowing pets in the property (whether fleas are present or not)
- Payments for cleaning or gardening services required during the tenancy
- Other administrative charges
- Renewing a tenancy
- Separate contents insurance

The cost of these things can be included in the rent, but the first instalment of rent must not be any higher than later instalments.



## What fees are allowed?

The only things that agents or landlords will be able to charge for in advance of the start, or on renewal, of a qualifying tenancy or licence are:

- ✓ **Rent**
- ✓ **A refundable tenancy deposit**
  - this is capped at no more than five weeks' rent where the annual rent is less than £50,000, or six weeks' rent where the annual rent is £50,000 or more.
- ✓ **A refundable holding deposit**
  - this is capped at no more than one week's rent.
- ✓ **Payment for changing or assigning a tenancy when requested by the tenant**
  - this fee is capped at £50 unless the landlord can show that greater costs were incurred.
- ✓ **Payment for early termination of a tenancy when requested by the tenant**
  - if a tenant requests to leave before the end of their tenancy they can be charged an early termination fee, which must not exceed the financial loss that the landlord has suffered in permitting the termination or reasonable costs that have been incurred by the agent in arranging for the tenant to leave early.
- ✓ **Payment that is required if the tenancy agreement says the tenant will be charged for:**
  - losing a key or other security device (restricted to the reasonable cost of replacement);
  - rent which is overdue by more than 14 days (limited to interest charged at an annual rate of 3% above the Bank of England base rate).

The landlord or agent must give written evidence of these charges to the person liable to pay them.

- ✓ **Other permitted payments are charges for:**
  - Council tax;
  - the provision of utilities, e.g. gas, electricity, water, if the tenancy agreement provides for these;
  - energy efficiency measures under a Green Deal plan if the tenancy agreement provides for this;
  - a television licence;
  - communication services, e.g. telephone, internet, cable/satellite television.
- ✓ **Payments charged as an alternative to some other lawful requirement. We believe these will include things like:**
  - Deposit replacement insurance products as an alternative to a tenancy deposit;
  - Guarantee insurance as an alternative to providing a guarantor.

Payments in this category must not be charged "instead of" the other requirement. The tenant has to be offered the choice. If a tenant is not given a choice between a normal deposit and a replacement insurance scheme, for example, then the insurance premium will be a prohibited payment.

## Enforcing the legislation

- Tenants who have made prohibited payments are entitled to an immediate refund if they ask for it.
- Trading Standards can order a landlord or agent to repay a prohibited payment – together with interest.
- Trading Standards can impose a financial penalty of up to £5,000 for each breach of the legislation.
- Repeated breaches of the legislation are a criminal offence, which can lead to unlimited fines and/or banning orders.
- A section 21 notice seeking possession of a property let on an Assured Shorthold Tenancy cannot be used until any prohibited payments have been returned to the tenant.

For further guidance, contact your local Trading Standards Department.

## How does the legislation affect holding deposits?

The legislation allows agents and landlords to take a refundable holding deposit capped at no more than one week's rent.



### Refunding a holding deposit

The holding deposit must be refunded within 7 calendar days if:

- the parties enter into a tenancy agreement, unless it has been agreed to use the holding deposit towards rent or the tenancy deposit;
- a tenancy agreement is not entered into for reasons that are within the landlord/agent's control;
- a landlord decides not to let to the tenant;
- a tenancy agreement is not entered into by the statutory deadline – this is 15 calendar days from receipt of the holding deposit unless a longer deadline has been agreed with the tenant.



### Keeping a holding deposit

A holding deposit can only be retained where a prospective tenant:

- does not have a right to rent under the Immigration Act 2014, provided the landlord/agent did not know, and could not have been expected to know, before accepting the holding deposit;
- provides false or misleading information, which the landlord is reasonably entitled to consider in deciding whether to grant the tenancy, because this materially affects their suitability to rent the property;
- decides not to enter into the tenancy agreement or fails to take all reasonable steps to enter into an agreement.

## How does the legislation affect tenancy deposits?

The legislation does not prevent a landlord (or agent acting on the landlord's behalf) from taking tenancy deposits. As is the case now, a tenancy deposit is money held by the landlord/agent as security during the period of the tenancy and reserved for any damages or defaults on the part of the tenant. Deposits for Assured Shorthold Tenancies still need to be protected in a government-approved tenancy deposit protection scheme. Deposits for other types of tenancy do not have to be protected.



### Are all deposits capped?

The cap on tenancy deposits does not apply retrospectively and only applies to new or renewed tenancy agreements which are entered into on or after 1 June 2019.

### What about existing tenancies with a deposit for more than the permitted amount?

- There is no requirement to refund deposit amounts exceeding the applicable 5 or 6 week limit, where a fixed-term agreement entered into before 1 June 2019 becomes a statutory periodic tenancy.
- Where a tenant renews their tenancy by signing a new fixed term agreement on or after 1 June 2019, any amount of their existing deposit which exceeds the applicable 5 or 6 week rent limit for the new tenancy must be refunded.



### How will agents and landlords refund excess deposits protected in the TDS Insured scheme?

Agents and landlords will be able to use their member dashboard to:

- select the "Renewed" function and enter a new fixed term tenancy end date;
- update the deposit protection at the point of paying the excess back to the tenant, to show the reduced deposit amount that will be protected with the scheme;
- pay a new deposit protection charge (independent landlord members only).

The new deposit protection certificate produced by TDS will show the new protected amount. There is no need to re-serve Prescribed Information.



## How will agents and landlords refund excess deposits protected in the Custodial scheme?

Agents and landlords will be able to use the 'change deposit amount' function on their member dashboard to indicate the amount of any deposit to be returned to the tenant(s). Where multiple tenants are involved, the lead tenant will confirm the amount of the deposit refund to be paid to each tenant and provide their bank details.

The new deposit protection certificate produced by TDS will show the new protected amount.

There is no need to re-serve the Prescribed Information.

## TDS' approach to the Tenant Fees Act

The legislation will not affect a landlord's entitlement to recover damages in relation to deposit disputes for a breach of the tenancy agreement. Damages can still be claimed by way of a deduction from the tenancy deposit or through a court order.

TDS will continue to consider claims for deposit deductions based on the loss suffered by an agent/landlord as a result of the tenant's failure to comply with the tenancy agreement. TDS will not necessarily insist on proof that a cost claimed by the agent/landlord has actually been paid by them. Estimates will be sufficient, but agents/landlord will still need to demonstrate the reasonableness of any amount claimed.

Below are some common examples of deposit deductions, and TDS's approach for fees charged in relation to Assured Shorthold Tenancy agreements entered into on or after 1 June 2019, and statutory periodic tenancies arising on or after that date.

### Tenancy set-up and renewal fees

Agents/landlords cannot charge a tenant for these. If the tenancy agreement was entered into before 1 June 2019 and the tenant agreed in their contract to pay certain renewal fees, the fees can be charged for a statutory periodic tenancy arising on or before 31 May 2020, but not for the renewal of a fixed term tenancy.

### Check-out fees

Agents/landlords cannot charge a tenant for these. If the tenancy agreement was entered into before 1 June 2019 (or a statutory periodic tenancy arose before that date) and the tenant agreed in their contract to pay exit fees, such as check-out or inventory fees, the fees are payable but only up until 31 May 2020.

### Damages for breaches of the tenancy agreement

The legislation will not affect a landlord's entitlement to recover damages for breach of the tenancy agreement by way of a deduction from the tenancy deposit or otherwise. As happens now, TDS will check that the tenant had an obligation, that the tenant failed to meet the obligation, and that the landlord/agent suffered loss as a result. The amount claimed must be reasonable, and the landlord/agent must do what they reasonably can to keep that loss to the minimum.





### Time spent carrying out work

Landlords or agents will not be able to charge for their time spent completing work as a result of a tenant's breach of the tenancy agreement. In exceptional cases, it may be appropriate, but the landlord or agent must show that they have incurred business costs as a result of the default. If it concerns an agent, the agent must show that they have provided a service which is exceptional to the day-to-day management responsibilities undertaken on behalf of the landlord.

### Contractor call-outs

Where a contractor has been called out due to tenant fault, such as a plumber having to fix a drain blocked with cooking oil, the tenant cannot be charged. Furthermore, the tenant cannot be directly charged for not allowing a contractor access to the property. This means that in the immediate, the landlord will have to pay.

However, landlords and letting agents can include a clause in the tenancy agreement for the cost of contractor call-outs as the result of a tenant's fault, and for missed contractual appointments, to be deducted from the security deposit. If a clause covering these issues is not present, the costs cannot be taken from the deposit.

### Charges for the late payment of rent

An agent/landlord can claim interest on late payments of rent, provided the rent is more than 14 days overdue (see page 10). Landlords and agents may be able to claim, as damages, charges they incur as a result of any late payment, but we will need to see proof that the charges have been incurred, and the charges themselves will need to be reasonable. The following are examples of charges that are likely to be considered **unreasonable**:

- Any charge that exceeds the loss suffered by the landlord because of the late payment.
- £25 fixed penalty charge for any late payment of rent which is 7 days or more overdue.
- Interest must be paid at 8% above the bank's interest rate on any payments overdue by 7 days or more.
- A charge of £3.50 per day plus VAT shall be levied and fall due each day the account is in arrears. This is calculated from the next working day after the date that the funds were to be received until all arrears have been settled.
- Should it be necessary to send a letter with regards to late payment of rent, these are chargeable to the tenant at a rate of £35 plus VAT.
- Personal visits are charged at £75 plus VAT.
- Any rent paid other than by standing order will incur a charge of £50 plus VAT per payment.

## Interest for the late payment of rent

An agent or landlord (but not both) can charge interest on rent if it is more than 14 days overdue. Interest must not be charged at a rate of higher than 3% above the Bank of England base rate, and must be calculated on a daily basis from the date when payment should have been made until the date payment is made.

## Changes to a tenancy

A change to a tenancy is any reasonable request to alter a tenancy agreement, after the tenancy agreement has become binding. Examples of commonly-requested changes are:

- to be able to keep a pet at the property;
- to change one of the tenants on a joint tenancy;
- to be given permission to decorate or alter the property.

A charge can be made for any other amendment which alters the tenant's obligations in the agreement.

A reasonable charge here is up to £50 (inc. VAT). A higher claim can be made but the agent or landlord must show why it was reasonable to incur a greater cost.

Landlords and agents must not charge fees for variations to their standard-form tenancy agreement that a prospective tenant requests before the tenancy agreement has become binding. If a prospective tenant wants a tenancy agreement to be amended before it has become binding (for example to allow pets or smoking) the landlord/agent must not charge a fee, but may charge a higher rent to reflect the additional wear and tear.

## Early termination fees

Claims for deposit deductions can still be made in connection with the early termination of the tenancy if a tenant has requested this (other than when exercising a break clause in accordance with the terms of the tenancy agreement).

For example, an agent/landlord may agree to early termination on the condition that replacement tenants are found. In this circumstance, the agent/landlord can claim from the deposit the costs associated with re-advertising the property or referencing new tenants etc. provided evidence is supplied to confirm that the claim and its amount are reasonable. If a suitable replacement tenant is found, the agent/landlord will only be permitted to charge rent until the new tenancy has started. Landlords are only entitled to recover rental payments that the outgoing tenant should have paid to the extent that the replacement tenant will be paying a lower amount. An agent may only charge an early termination fee that does not exceed their reasonable costs.





## What about pet deposits?

The Tenant Fees Ban limits the value of tenancy deposits to five weeks' rent for annual rentals of under £50,000. A deposit of six weeks' rent will apply where the annual rent is £50,000 or more. This is likely to mean that taking an increased deposit where a tenant wants to keep a pet could be a thing of the past. What are the alternatives?

### Can tenants be charged a fee for being allowed to keep a pet?

It will depend on when this happens. If a tenant enters into a “no pets” tenancy agreement, then asks the landlord to change that agreement so that pets are allowed, the landlord is entitled to charge a fee for this change. The fee is to reflect the work involved in making any necessary changes to the tenancy. It is not a fee for covering things like cleaning and flea treatment - that is not allowed. The Tenant Fees Act limits the tenancy variation fee to the greater of (a) £50 (inc. VAT) and (b) the reasonable costs of making the change to the tenancy agreement.

If a tenant asks to change the terms of their tenancy agreement, the landlord can make their consent to those changes conditional on the tenant paying a higher rent. If the tenant is not willing to pay the higher rent, the landlord could refuse permission to keep the pet.

Example: in the past, a landlord's agent charged a £150 fee for allowing a tenant to keep a pet. Under the Tenant Fees Act they could charge a reasonable administration fee for recording the change to the terms of the tenancy (say, £50 as allowed by the legislation). The change to the terms could be to (a) allow pets (of designated descriptions, perhaps) to be kept at the property and to (b) increase the rent (for example by £100 divided between the number of months the tenancy has left to run).



### Is there anything to stop an agent advertising a property at two different rents (one for tenants with a pet and a lower one for tenants without a pet)?

We do not think there is, because two different things are being offered: one tenancy at a rent that reflects a relatively low level of fair wear and tear and the other at a rent that anticipates a higher level of wear and tear. The different rents also reflect supply and demand. In our experience, more landlords do not allow pets than the number who do.

## **If the tenant wants a pet during the tenancy, can a landlord increase the rent to cater for it?**

If the tenancy agreement says “No Pets”, a landlord can say “I will only agree to you keeping a pet if you pay me (say) £10 a month more rent”. If the tenant does not want to pay the higher rent, the landlord does not have to allow the pet.

If the tenancy agreement does not prevent the tenant having a pet, the landlord cannot insist on the tenant paying a higher rent just because the tenant happens to acquire a pet during the tenancy.

It is already the case that a landlord and tenant can agree that the rent will increase during a fixed term tenancy. What a landlord must not do is agree to a fixed term at one rent, then insist on increasing the rent during that fixed term without the tenant’s agreement.

With a statutory periodic tenancy, the position is slightly different. Within 12 months of the expiry of a fixed-term tenancy, either party can serve notice (in the prescribed form) on the other proposing a change to the terms of the tenancy, including an adjustment of rent. The party receiving the notice has 3 months to refer the matter to the tribunal, and if they do not do so, the new terms take effect. In practice, few landlords and tenants follow this formal procedure – they just agree a new rent or a variation to the existing agreement.

After that first year of a statutory periodic tenancy, a landlord cannot normally increase the rent more than once every 12 months. However, if the tenant wants to vary the terms of the tenancy, the landlord can refuse to agree to the variation unless the tenant agrees to pay a higher rent.

## **Could the first fixed term tenancy agreement include a provision to say that if the tenant wants a pet the rent will increase by x%?**

In theory, yes. As outlined above, it can be agreed in advance that rent will increase during a fixed term. It should be possible to make the “trigger” for the rent increase the occurrence of an event (such as the acquisition of the puppy) rather than a calendar date.

In practice however, this type of term in a tenancy agreement could be challenged on the grounds of it operating as a ‘penalty’. It would depend on what the percentage increase was, and whether it applied to some pets only or to all pets. For example, why should someone who wants to keep a goldfish have to pay the same as someone who wants a dog?

## In summary...

1. Where a prospective tenant already has a pet before they enter the tenancy agreement: set the rent for the tenancy at a level that allows for the wear and tear that the pet will cause.
2. Where the tenant gets a pet mid-tenancy: agree a change to the tenancy agreement, charge the tenant for making the change (i.e. the extra paperwork) and make consent conditional on the tenant agreeing to pay a higher rent. The amount of extra rent can then be adjusted to take account of the pet(s) and (just as importantly) the owner's ability to control the pet and care for the home.
3. Where the tenant gets a pet towards the end of a fixed-term tenancy, or during a periodic tenancy: the landlord could make it a condition of giving consent that the tenant signs up for a further fixed period, to make sure that the extra rent will cover the fumigation etc. Otherwise, the tenant could acquire the puppy or kitten and leave after paying the higher rent for just one or two months.
4. Be specific about what pet(s) are allowed: all pets are not alike, and neither are the owners. If you want to be precise, attach a picture of the animal to the tenancy agreement or variation agreement.

And finally – remember that the Tenant Fees Act will not prevent landlords from claiming damages for breach of tenancy agreement, so damage done by pets can still be claimed for. It's just that the amount of money held on deposit to cover those damages will be restricted to a maximum of 5 or 6 weeks' rent. If the deposit isn't enough to cover the damage, landlords will have to consider legal proceedings.

## Top tips



- Review your tenancy agreements to make sure they only require payments from tenants that are permitted by the legislation. Make sure that you have a good quality deposit-use-clause in your tenancy agreement – you can see the TDS examples on our [Insured](#) and [Custodial](#) websites.
- Remember that losses incurred need to be supported with good quality invoices or estimates. Awards are unlikely to be made based solely on an obligation in the tenancy agreement.



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