

Kimball, Tirey & St. John LLP

Abandoned Real Property Primer for California Commercial Property Owners and Managers

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Tenants sometimes vacate without returning keys or notifying their landlord of their intentions. When they do so, it can create ambiguity for a landlord who may not be certain whether the tenant has vacated. What should a landlord do if it isn't clear whether a tenant has abandoned the premises?

A landlord should first attempt to communicate with the tenant to ask whether the tenant has abandoned the unit.

If the tenant doesn't respond, the landlord may choose to post a 24-hour Notice of Intent to Enter the premises, then enter the premises to determine whether the premises has been abandoned. Sometimes the act of posting the notice will cause the tenant to communicate with the landlord. Check to see if the lease allows entry by the commercial landlord. The only reference in California laws regarding landlord right of entry, Civil Code §1954, applies to residential property only.

After entry, if it isn't clear whether the tenant has vacated (for example, the landlord may find some furnishings, but no people, in the unit), then the landlord can either proceed with an unlawful detainer process or utilize the "Notice of Belief of Abandonment" notice procedure provided under California Civil Code §1951.3.

Recent changes in California law allow a commercial landlord to treat real property as being abandoned (and therefore retake possession of it without potential liability) if:

- Rent hasn't been paid for the time period specified in the lease for the landlord to declare a rent default. If the lease is silent on the time period, it is a 3-day period for a notice. Leases sometimes provide for other time periods, such as 3 business days, 5 days or 10 days. (Until July 16, 2018, the notice couldn't be served until rent was unpaid for 14 days.)
- The landlord reasonably believes that the tenant has vacated and doesn't intend to return; and
- A "Notice of Belief of Abandonment" has been mailed, and the tenant hasn't responded within 15 days from the date it was personally served on the tenant sent by overnight courier service or deposited in the mail. (This is a change in the law, which until July 16, 2018, gave the tenant 15 days to respond from the time the notice was personally served, or 18 days from the date it was mailed).

Effective July 16, 2018, there is a new commercial Notice of Belief of Abandonment form, specified in Civil Code §1951.35. If the tenant doesn't respond within the 15-day period, the premises will be deemed abandoned, and the lease will terminate. At that point, the landlord may retake possession of the premises and rekey.

Note that the Notice of Belief of Abandonment processes for residential and commercial properties are different.

Landlords can establish abandonment by other methods (as stated in Civil Code §1951.3(f)), but the procedure established in Civil Code §1951.3 creates one means by which a landlord can establish abandonment.

A landlord should utilize the Notice of Belief of Abandonment procedure only if the landlord has a “reasonable” belief that the tenant has abandoned the unit. Tenants may claim that they did not vacate, and that the landlord should have known that, because (1) keys weren’t returned, (2) the tenant didn’t advise the landlord that the tenant intended to vacate, and/or (3) personal property was left behind. It can be particularly difficult for a landlord to establish that the landlord “reasonably” believed that the tenant had vacated if personal property was left behind.

Tenants may claim that a landlord’s belief of abandonment was unreasonable, exposing the landlord to claims from the tenant. These claims may arise when a landlord is pursuing the tenant for unpaid rent. Because of the expense and uncertainty in defending against these types of tenant claims, conservative landlords may choose to proceed to eviction if it is unclear whether the tenant has abandoned the premises, rather than utilize the Notice of Belief of Abandonment procedure. Although it takes more time to evict a tenant, it is a prudent choice to protect the landlord if it is uncertain whether the tenant has abandoned the premises.

In lieu of the “Notice of Belief of Abandonment” procedure, if the tenant has breached the lease (by failing to pay rent or some other action), a landlord may proceed with an eviction. This will involve first serving a notice to pay rent or quit, and if the tenant fails to comply with the notice, filing an unlawful detainer complaint. Serving a notice will sometimes cause a tenant to communicate with the landlord. An unlawful detainer action can result in a judgment in favor of the landlord for money and possession of the unit. Filing unlawful detainer actions also sends a message to tenants that the landlord intends to enforce its legal rights against non-performing tenants. Proceeding with eviction also avoids tenant claims about whether a landlord’s belief of abandonment was “reasonable”.

A landlord risks a claim from the tenant if the landlord re-takes possession of a unit without:

- Receiving verbal or written confirmation from a tenant that the tenant has vacated; or
- Properly utilizing the “Notice of Belief of Abandonment” procedure; or
- Proceeding with an unlawful detainer action and regaining possession through a sheriff’s lockout.

To reduce the risk of tenant claims, landlords should use one of these methods to regain possession of a possibly abandoned unit.

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