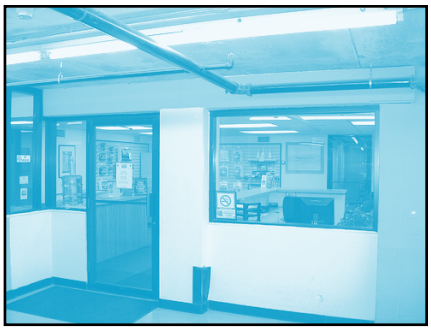
TSSA Legal Update

A Texas Self Storage Association Publication

Spring/Summer 2008 Volume 4 • Issue No. 1

Commercial Leases and "Office-Warehouse" Leases: Not the Same as Self Storage!

Occasionally self-storage owners will either lease separate space that is solely "commercial" office or retail space, or lease what is typically referred to as "office-warehouse" space. Many people don't realize that this type of leasing is an entirely different "animal" than self storage. It is important not to confuse the two and to use the appropriate legal documents for the commercial or "office-warehouse" environment. The standard TSSA rental agreement is solely appropriate for a "pure" self-storage setting, and is not an appropriate document for use in a "standard" (non-self storage) commercial setting or "office warehouse" setting. This article will summarize the respective laws applicable to self storage and commercial landlord/tenant (non-self storage) leasing situations.



Self-storage Leasing

The term "self-service storage facility" is clearly and narrowly defined in Chapter 59 of the Texas Property Code. It is defined as "real property that is rented to be used exclusively for storage of property and is cared for and controlled by the tenant." So, in order to fall under Chapter 59 and be able to use the foreclosure and other lien procedures of Chapter 59, you must be renting real property to be used exclusively for storage (not to be used for office or retail) and the property must be cared for and controlled by the tenant. This is normally interpreted to mean that only the tenant and those to whom he gives the key have access. (The facility does not retain a key, does not retain a master key, etc.) Chapter 59 is only applicable to "self-service storage facilities." So, unless your rental situation falls under the definition of self-service storage facility, you may not utilize the provisions of Chapter 59. If you use the Chapter 59 foreclosure procedure, for example, on a non-self storage commercial lease, you will subject yourself to significant liability because Chapter 59 is not applicable to any leasing situation other than self-storage.

Other Commercial Leasing

The laws that apply to non-self storage commercial leasing can be found primarily in Chapters 54 and 93 of the Texas Property Code. You can find these statutes behind the "Business, Property and Tax Laws" tab in the TSSA *Goldbook*©. As compared to self-storage, there are different procedures with regard to foreclosure, lockout rights, and numerous restrictions applicable under these statutes. Chapter 59 (Section 59.003) provides that Chapter 54 of the Texas Property Code, subchapter B (the commercial landlord/tenant lien statute) is not applicable to a self-service storage facility, and this prevents "overlapping" and conflicting laws from applying to self-service storage facilities.

Chapter 54 governs non-self-storage commercial leases. Among the differences between Chapter 59 and Chapter 54 are the following: Chapter 54 gives the landlord a lien, but only for rent that is due. In contrast, the Chapter 59 statute gives landlords a lien for all amounts that come due under the lease, not just rent. Chapter 54 provides that a lien is unenforceable for rent on a building if the rent is more than six months past due, unless the landlord files a lien with the county clerk. The self-storage statute (Chapter 59) contains no such filing requirement. In Chapter 54, there are certain items that are exempt from foreclosure. In contrast to Chapter 59, where nothing is exempt

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Q: *We have a unit in lien status for delinquency. Upon taking inventory of the unit, the property manager deemed the inventory to be junk (it appeared to satisfy the definition in TSSA lease paragraph 26). Because the tenant was delinquent, we removed his lock for the lien inventory and the manager thought that the space clearly contained nothing of value to the ordinary person. Out of caution, we sent the tenant Form MISC-3 from the Goldbook© Appendix CD, the "Notice of Abandonment," telling him that his items would be deemed abandoned if we did not hear from him by the last day of the month.*

In response to our letter, the tenant's daughter called and said she would be putting a check in the mail via overnight mail. No check ever came in and the end of the month passed. We then mailed a letter to the tenant saying that the items are now deemed abandoned since there had been no check received from the tenant. Six months after all of this started and well after we had thrown away the items, we received a check for the amount owed. What do we do now?

A: If the tenant still owes you money (he has not satisfied the debt that led to the lien process) there would be nothing wrong with applying that check to the balance due. You may wish to apply the check to the balance due and refund any excess amounts, with a letter explaining the transaction. Hopefully you have witnesses who viewed the items when the storage unit was open and you took pictures of everything that was in the unit to counter any claims that the goods in the unit were valuable (of value to the ordinary person). Failure by the tenant to make good on his debt for many months would also seem to be evidence of an intent to abandon, in my opinion.

Q: *When getting lienholder information on vehicles, is the information from www.publicdata.com or another similar website the same as requesting the information from the County Tax Office or Texas Department of Transportation? The documents provided from www.publicdata.com indicate that the information is identical, and it is easier to get. Is this OK?*

A: For the most part, information from www.publicdata.com or other websites should match TxDOT records. However, these websites have been known to have outdated information. I have heard of examples where the records were at least six months outdated on some websites. The lien foreclosure statutes require you, when foreclosing on a vehicle, to give notice to "the last known registered owner and each lienholder of record" with TxDOT. The risk in using www.publicdata.com or another similar website is that you might be receiving outdated information, and thus you might send a notice to the wrong owner, the wrong lienholder, or have other such potential problems. It is a business decision as to whether you want to take the risk of relying on potentially outdated information when sending your special foreclosure notices to owners and lienholders of record.

Q: *When we are updating from an earlier version of the TSSA Lease to the current version, what needs to be completed on the new lease? Every space, or only the items that have changed since the original lease? Can we fix errors we made on the original agreement with the new agreement?*

A: If you are updating to a completely new lease version, rather than just changing one or more terms in a lease (such as the rental amount), then it is best to fill out all information on the first page of the lease, just as if you were executing a new lease with a new tenant from scratch. With regard to fixing errors you had made on the original lease, you can do that, and any changes you would like to make on the new agreement, as long as you give 30 days notice to the tenant. For example, if any dollar amounts are to be changed by the new lease, the TSSA lease requires at least 30 days notice to the tenant before the new contract becomes effective. This 30-day notice is required so that if the tenant is not amenable to the new terms, the tenant can give you notice that he is vacating, and he can vacate before the new terms take effect.

Q: *A tenant sued in Brazoria County for $5,000 in damages due to a leak next to her unit. Our facility prevailed in court. Now the tenant has filed the same suit in Harris County for an even larger sum of damages. Can the tenant do this, and what should I do now?*

A: If the same issues have been decided in a different court, the tenant cannot file the same action in a different court to have "another day in court." I would suggest hiring a local attorney in Harris County, providing that attorney a copy of the final judgment from Brazoria County, and asking the local attorney to request that the Harris County court dismiss the case because it has already been "finally adjudicated." As far as finding an attorney, there are very few attorneys that specialize in self-storage law, but I would suggest that you seek out a real estate attorney familiar with commercial landlord/tenant law, and he or she can hopefully get up to speed quickly on self-storage law.

Q:. *If law enforcement provides a search warrant and they open the unit, are there any specific laws or rules regarding possession of the unit? Is there a form we can have them sign that states once law enforcement*

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has entered the unit, they will be responsible for the rent or responsible for removal of the goods inside?

A: No. Law enforcement has no ongoing responsibilities once they open a unit. Regardless of whether law enforcement opens the unit, the tenant has the ongoing responsibility to pay the rent until the lease is terminated (whether the tenant follows the process to terminate the lease, or the lessor terminates the lease through eviction/foreclosure, etc.).

Per paragraph 19 of the lease, once a law officer has opened the space, you have the right, but not the obligation, to place a lock on the space when the law officer is finished. The officer himself or herself may choose to lock the space, and this is expressly allowed under paragraph 19 of the TSSA lease. Per paragraph 18 of the TSSA lease, if the tenant's lock is removed by a law officer carrying out a search warrant (and in many other cases when the tenant's lock is removed) the tenant is responsible for the lock removal charges under paragraph 4(i) of the TSSA lease. You as lessor also have the duty to notify the tenant by regular mail or phone if any entry or relocation authorized by paragraph 18 (emergency access, access due to criminal activity suspicion, access due to your seven day request for access, or access due to lien rights), but you have no duty to notify the tenant upon entry by a law officer.

Q: *We have an elderly tenant who keeps his rent paid six months in advance and rides his bicycle to our facility often to check on his two units. Apparently he has no family he stays in touch with and does not even know where they are, so we have no emergency contact or next of kin information. What should I do if I don't hear from him, or he just stops showing up, and rent becomes delinquent?*

A: Even if the person is not listed as an emergency contact under paragraph 1 of the TSSA lease, a tenant's brother, sister, spouse, parent or child over 18 may have access to the tenant's space at your option if they sign an affidavit that the tenant is deceased (or incarcerated, missing or incapacitated). The first thing to do if a tenant of this description "goes missing" and his rent gets behind would probably be to try to contact the probate court to see if a will has been filed and contact the administrator of the estate.

If that does not turn up any good leads, then I would try to do a search for any family he may have. More advice in this area can be found in the legal article "When a Tenant Dies," behind the Legal Articles tab of the TSSA *Goldbook*©. If you are comfortable doing this, you may also consider asking the tenant for an emergency contact, or if you would rather, you and he could agree to insert a special provision into his lease in an addendum to the lease or in the "Special Provisions" paragraph (paragraph 6) of the lease, wherein the tenant gives instructions such as, "If my rent remains unpaid for one month, the facility is authorized to turn over all contents of my unit to my friend Bob Smith." Both a facility representative and the tenant should initial any changes made to the lease.

Q: *I am in the process of foreclosing on a boat. I am requesting ownership/lienholder information from the Texas Parks and Wildlife Department (TPWD), and noticed that TPWD form accepts either the HIN number (the number etched into the hull of the boat) or the serial number from the registration sticker on the boat. Which should I use?*

A: Whenever possible, it is advisable to use the HIN number etched into the boat. This is because it is possible that the registration sticker has been stolen or otherwise improperly transferred to the boat. While TPWD will accept either the HIN or the serial number on the registration sticker for the purposes of giving you ownership and lienholder information, when a buyer buys the boat from you at a foreclosure sale, the buyer is required to submit a pencil tracing of the HIN number to TPWD in order to obtain title. If the HIN number does not match the serial number, then it opens a bit of a can of worms, as your facility has done nothing "wrong," but probably has not given notice to the real owner of the boat, but rather to the owner of the boat whose registration sticker was stolen or improperly applied to the boat in your facility. It is always recommended that you not make any guarantees or warranties with regard to a buyer's ability to obtain title to a vessel, boat, outboard motor, vehicle, or trailer. It is recommended that this specifically be placed in your auction rules. However, understandably you will want to maximize the chance that anyone purchasing from you will be able to obtain title to a vehicle, boat, vessel, trailer or outboard motor, so it would make sense to, whenever possible, utilize the HIN number when obtaining ownership and lienholder information on a boat.

Q: *If I have leased to a tenant who is active-duty military, and have not required this tenant to sign a waiver of the tenant's rights under the Servicemember's Civil Relief Act (SCRA), may I raise the tenant's rent during the lease term utilizing the TSSA lease provision allowing me to do this upon 30 days notice to tenants?*

A: No, the SCRA prohibits this. The SCRA provides that unless a waiver is signed, you may not modify a contract or lease (without the tenant's written consent). This would apply to any lease modification, be it a rule change, rent increase, updating the tenant to a new TSSA lease version, etc. Quite simply, you may not make any changes at all to an active-duty servicemember's lease without the servicemember's written consent unless the servicemember has signed a waiver that complies with the SCRA's waiver requirements.

Any waiver must be in a separate document (it cannot be part of the language of the lease, it must be an addendum), and must contain certain language. The TSSA military waiver (form ADD-4) may be used for this purpose should TSSA members choose to request that their military tenants sign a waiver.

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Vehicle/RV Leasing

Vehicle/RV Leasing: Choosing the Right Legal Documentation

If you are a TSSA member who offers vehicle, boat, and RV storage at your facility, you have a choice among TSSA leasing forms to use. You may either use the TSSA "Vehicle, Trailer or Boat Self-Storage Rental Agreement" (referred to in this article as the "RV lease"), a lease expressly designed for this type of leasing, or you may use the "regular" TSSA lease coupled with the appropriate TSSA Vehicle or Boat addendum (TSSA Appendix CD forms ADD-10 and ADD-11, respectively). This article will outline the pros and cons of using the respective forms.

Vehicle, boat, and RV storage presents unique potential hazards and challenges, and it is appropriate and advisable to utilize forms expressly geared toward this type of leasing. Throughout this article, reference to "vehicles" will mean reference to vehicles, boats, motors, and trailers.

For the most part, most paragraph numbers, wording, and formatting of the RV lease parallel the original TSSA rental agreement language. Here is a summary of some of the more important language that is in the RV lease and not in the "regular" TSSA lease. Also described below are the differences between the RV lease and the vehicle/boat addenda designed to be used with the "regular" lease.

In general, the TSSA RV lease contains more landlord protections and helpful vehicle-specific information than the addenda, simply due to space constraints.

Vehicle Information

The first page of the RV lease provides fill-in-the blank spaces for all of the important registration and title information that you will need for boats, vehicles, trailers, and motors. The TSSA addenda, ADD-10 and ADD-11, contain similar blanks, but is more condensed. In both the RV lease and the addenda, there are blanks for the tenant to fill in the estimated value of the vehicle, boat, trailer, or motor. It is important to have all the information called for in the blanks when leasing this type of storage.

Additional Charges

Paragraph 4 of the TSSA RV lease deals with charges that may be assessed to the tenant. Because there are additional charges that may be assessed to a tenant under the RV lease, paragraph 4(h) of the RV lease references a charge per day (referenced in RV lease paragraph 40(c)) for each day that the tenant is not parked in accordance with the RV lease parking requirements (parked over the line, etc.). The addenda contain no such charges and no specific parking requirements. Paragraph 18(6) of the RV lease also allows you to request that the tenant move his vehicle, and paragraph 4(g) of the RV lease says that if he does not, you may charge him a daily fee. The addenda provide a method to allow you to move the tenant's vehicle upon notice, but do not provide a charge for a tenant's failure to move his vehicle.

Dollar Value Cap

Paragraph 20 in the "regular" TSSA lease addresses nonliability and release for loss or injury. The language in the RV lease is virtually identical to that of the original lease, with the exception that the maximum dollar value of items that may be stored in a unit (or parking space) has been increased from $5,000 to $20,000. The addenda do not contain similar language regarding the $20,000 cap (but rather, the "regular" lease provision containing a $5,000 cap would apply in absence of a rule or special provision otherwise).

Parking Rules

Paragraph 36(f) of the RV lease is an entirely new paragraph (not in the "regular" TSSA lease) regarding "Use of Premises." It provides that only the vehicles listed on the first page of the lease can be stored on the premises (so you should always have all of the relevant information on the vehicles at your premises) and that unauthorized vehicles may be towed at the owner's expense. It prohibits storage of oil, gas, or other such substances except those contained in the operating parts of the vehicle. It prohibits storage of extra tires, batteries, or other such items. It requires the tenant to shut off all LP gas, propane, and butane tanks during storage of a vehicle, and prohibits the tenant from residing in the vehicle for any length of time. The addenda do not contain similar provisions due to space constraints.

Paragraph 40 of the RV lease is also an entirely new paragraph, and generally speaks to where and how the tenant may park his vehicle. It provides that the tenant must park between any parking stripes of his space, or otherwise comply with the facility's parking instructions. It prohibits the tenant from blocking access to any other space. It outlines remedies in the event the tenant parks incorrectly. In this event the

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Special Foreclosures

Junk Vehicle and/or Car Parts: How Do I Sell Them?

Occasionally, when self-storage owners open a unit for inspection prior to a self-storage foreclosure sale, the owners will find various car parts. It can be difficult, if not impossible, to utilize the "special" (Chapter 59 combined with Chapter 70) foreclosure procedure that is required for vehicles, because this special procedure necessitates having a VIN number so that the owners and lienholders of record can be traced.

There is no statute specifically addressing the issue of self-storage sales of car parts found in a unit, but TSSA has recently confirmed with the Office of the General Counsel for the Texas Department of Transportation (TxDOT) that the "special" foreclosure procedures need only be used when you are selling a vehicle or vehicle parts containing a "base" or "frame" so to speak. Generally the base, or frame, is the only part of the vehicle with a VIN number. So, for a car or other vehicle (including a motorcycle), if parts are found in a unit unattached to a frame, the "regular" foreclosure procedure, utilizing solely the procedures of Chapter 59, should be followed.

For example, when a self-storage facility is selling the following items at a foreclosure sale, only the "regular" Chapter 59 procedure need be used: motors, doors, windows, bumpers, and all other similar items/parts not attached to a vehicle base or frame. If you have a situation where you have a vehicle frame to sell, but cannot find a VIN number on it, contact local law enforcement—they can often find VIN numbers in "secret" places, as they are privy to this information and should have a book outlining different models and makes, and where alternate VIN numbers are located on them.

Texas Legislature

Proposed "Carried Interest" Tax Law

Several months ago there was a bill in the U.S. Congress that proposed a change to the tax treatment of "carried interest." Carried interest is the interest in the capital gain of a partnership when the partnership sells its property. A "carried interest" is usually given to a general partner in exchange for the "sweat equity" management services and/or general risk being assumed by the general partner in taking part in a real estate venture. It is also known as a "promote." It can happen in any situation where a partner is "given" an interest in a partnership in exchange for expertise brought to the table or other in-kind services. It is a fairly common occurrence in real estate partnerships.

The proposal at the federal level was to change the tax treatment of monies acquired through carried interest from being treated as capital gains to being treated as ordinary income. The legislation was targeted at hedge fund management and Wall Street executives. In reality, this change would have impacted many more entities, including real estate partnerships.

A tax change changing the tax treatment of income derived from a "carried" partner's sale of the entity from a 15% capital gains rate to as high as a 35% income tax rate, would provide a real disincentive for general partners to invest both capital and expertise in real estate ventures. General partners or "in-kind participants" are often the ones bringing the real estate development and management experience to a transaction, making the project "doable."

The U.S. House of Representatives voted in favor of this change in November 2007, as a way to pay for a one-year change in the alternative minimum tax (AMT). Senate Republicans refused to pass AMT legislation that included any tax increases to offset AMT relief, so the carried interest provision was ultimately stripped from the final bill.

Thus, unless legislation changes in the future, carried interest, and the gains derived thereof, will continue to be taxed at the capital gains rate.

Commercial Leases *continued...*

(a self-storage owner has a lien on "all" property in the unit, no exceptions).

With regard to "lockouts" (what is typically called an "overlock" in a self-storage setting), there are also different statutes applicable to the self-storage setting versus the general commercial landlord/tenant setting. Chapter 93 of the Property Code specifies the lockout procedures for non-self-storage commercial tenancies. Under Chapter 93, a commercial landlord may not lock a tenant out unless a tenant is delinquent in paying at least part of the rent. The lockout is only available for nonpayment of rent, not for nonpayment of late fees or other non-rent items. In a commercial (non-self-storage) lockout setting, if part of the rent is due and the landlord exercises his lockout rights, the landlord or his agent must, at the time of lockout, place a written notice on the tenant's front door stating the name and address or telephone number of the individual or company from which a new key may be obtained. The landlord is required to provide a key to the tenant only if the tenant pays the delinquent rent. TSSA publishes a form for any TSSA member to use in the commercial (non-self storage) setting who is legally entitled to lock his tenant out for nonpayment of rent. This is form MISC-5, "Notice to Commercial Tenant Regarding Lockout for Non-payment of Rent." TSSA also publishes a form, MISC-4, entitled "48-Hours Advance Notice to Commercial Tenant Regarding Intent to Exercise Statutory Lockout Rights." This 48-hour notice is not statutorily required for a commercial setting, but many commercial landlords choose to give a 48-hour advanced notice. Some do not because the tenant then has 48 hours to move all of his items out of the rented property and they then have little if any collateral to seize when exercising lien rights. It is simply a matter of preference.

TSSA Lease Not Appropriate for Standard Commercial Leasing Purposes

For a variety of reasons, the TSSA lease is inappropriate for commercial landlord/tenant situations other than strictly self-storage leasing. The lien statutes applicable to self-storage situations versus other commercial leasing situations are very different. The right to overlock and utilize the Chapter 59 procedure in following through with liens and foreclosures is not applicable in a non-self storage setting. Owners who utilize the TSSA lease for non-self-storage situations may inadvertently—if owners follow the rights and remedies outlined in Chapter 59 and the TSSA lease (such as overlock, foreclosure, etc.)—expose themselves to significant liability. Owners should contact their own attorneys to help draft a lease appropriate to their specific commercial tenancy situation. It is virtually impossible to draft a "one size fits all" commercial lease, as every commercial leasing situation is different.

Vehicle/RV Leasing *continued...*

facility may (1) move the vehicle at tenant's expense to allow other tenants access to their space, (2) consider that the tenant is in default (which triggers default rights such as overlock), and (3) charge an additional daily service charge as outlined in paragraph 4(h). The addenda do not contain similar provisions.

Paragraph 40 of the RV lease also makes clear that the facility is not in default if the tenant comes to park in his space and finds it taken by someone else, as long as you provide an alternate parking area. It also provides that you can give the tenant five days notice that his space is now ready for occupancy again and he must move his car back, and if he doesn't move his car back within that five days you can charge him a daily fee as outlined in paragraph 4(h). The addenda do not contain this language. In summary, the RV lease contains many useful provisions that the addenda do not and cannot contain due to space constraints. Among these provisions are: parking rules, charges for violations of these rules, provisions addressing what happens if someone accidentally parks in the tenant's leased space, and provisions requiring only listed vehicles to be parked in the leased premises (no swapping out of cars). The RV lease and addenda both provide blanks for all of the important vehicle information (VIN number, registration number, insurance information, estimated value, etc.). They both allow you to request the tenant to move his vehicle under certain circumstances, and allow you to move the vehicle for the tenant if the tenant does not comply with the request. Members should simply decide for themselves which lease documents—the RV lease or the "regular" lease coupled with the appropriate addenda—is right for their business purposes.

Summary of When to Charge Sales Tax

Self-Storage Sales Tax

As you no doubt know, at the present time there is no sales tax due on the rental of most self-storage units. However, sales tax must be collected and paid on the following items:

1) Vehicles/Trailers

✦ **Rent for vehicle parking storage and rent for trailer parking/storage.**

Even if you know that a vehicle or trailer is only one item of many that are kept in a storage unit, you need to collect and remit sales tax on the entire amount of rent if you collect your rent in a lump sum.

NO tax is collected on boat storage or storage of a trailer with a boat on it, or for related non-parking charges such as returned checks, towing, late payment charges, overlock charges, certified mail fees, etc. if these fees are separately listed/itemized (as they are in paragraph 4 of the TSSA lease).

2) Sales

Most storage facilities offer a number of storage-related products for sale on site as a convenience to their customers. As in any retail business, tax should be collected on these items. And don't forget, people buying the contents of units at auction pay taxes on the sale.*

*Exceptions are sales involving (1) a situation where a buyer delivers you a resale certificate; (2) a situation where a buyer delivers you an exemption certificate; or (3) a situation where a motor vehicle, trailer, boat, or outboard motor is sold. In situation (3), these taxes are paid at the time the motor vehicle, trailer, boat, or outboard motor is registered with the state.

Other items for which sales tax must be collected include:

✦ **Any personal "property" sold/rented from your site.**

This is a technical way of saying:

- ✧ Locks
- ✧ Boxes
- ✧ Plastic bags
- ✧ Labels
- ✧ Packing materials
- ✧ Tape
- ✧ Snack foods, etc.

3) Services

When service providers invoice you, those businesses should be charging you taxes. If they do not, it is in your best interest to remind them to, as you may be held liable. If you want to ensure that you're off the hook, request that they stamp "sales tax included" (simply saying "all tax included" does NOT do the trick!) on the invoice.

✦ **Taxes must also be paid on all real estate services.**

Examples:

- ✧ Installation of new landscaping and landscaping maintenance
- ✧ Cleaning services (maid and porter-type services) as well as heavy duty cleaning of building exteriors, parking lots, etc.
- ✧ Pest control services when services are performed by a licensed pest control operator
- ✧ Trash removal services performed by private firms or individuals

4) Security Services

- ✧ Courtesy patrols
- ✧ (Note: Off-duty policemen or other peace officers that you hire for security services are not subject to sales tax.)

5) Other Services

- ✧ Any debt collection service for which a separate charge is made. For example, if you hire a collection service and pay them a dollar figure for every collection they make for you, tax is due on the cost of that service.
- ✧ Repair and remodeling of your facility. Repair or remodeling work is subject to sales tax. However, please note that "maintenance" work is not subject to sales tax. The difference in the definition of "repair" and "maintenance" is subtle and rather elusive. The comptroller staff has verbally explained the basic difference between the two definitions by stating that "fixing something after it is broken is repair and thus taxable, but inspecting, checking, replacing, or adjusting something on a regularly-scheduled basis before it is broken is maintenance, and not taxable." It is irrelevant whether you call the item maintenance or repair. If it falls under the comptroller's definition of "repair," it will be taxable.

According to TSSA Legal Counsel, if you have not been paying taxes thus far, it is still best to begin paying taxes on current operations. Getting a sales tax permit and starting to

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Sales Tax Review *Continued*

pay taxes does NOT make you any more vulnerable to an audit. In fact, companies without sales tax permits may be more likely to be audited.

✦"Give-aways"

What if you occasionally give away a disk lock, boxes, or other taxable item as part of a promotion? Sales tax is due. You must pay sales tax at one "end" of the transaction, regardless of whether you give the items away. In this instance you would pay sales tax on the items given away based on their purchase price from the wholesaler. The "give away" items should be categorized as a "taxable purchase" on your sales tax return, reportable on line three.

This is a very broad overview of a facility owner's sales tax responsibilities. This article alone should not be relied upon to determine if or when sales tax is owed. For further information you may also refer to TSSA legal counsel's article beginning behind the "Business, Property, and Tax Laws" tab in the most recent TSSA *Goldbook*©.

Quick Reference Tax Charts

Sales Tax

Rental of Vehicles/Trailer Parking
Items Sold at Foreclosure
Sale of Ancillaries

Services Rendered to a Facility
Real Property Services

No Sales Tax

Rental of Regular Storage Units
Rental Space for Trailer with Boat
Other Charges*

Services Rendered to a Facility
Maintenance Services
Management Company Services
Vehicle Towing

* Returned checks; late payment charges; overlock charges; lock-cutting charges; certified mail fees; foreclosure charges.

TSSA Forms of the Month

MISC-4 (48 Hour Advance Notice to Commercial Tenant Regarding Intent to Exercise Statutory Lockout Rights) & MISC-5 (Notice to Commercial Tenant Regarding Lockout for Non-payment of Rent) pursuant to statutory authority

When to use:

These two forms should normally be used only in a situation where a facility has leased property for a combined office/warehouse (office or self-storage) use. These forms are not appropriate for a "standard" self-storage facility unit. When you have a use that is not "pure" self storage, but involves office use, retail use, or other commercial tenancy other than self storage, these forms can be used to exercise a commercial landlord's right under state statute to lock a tenant out who is delinquent in rent.

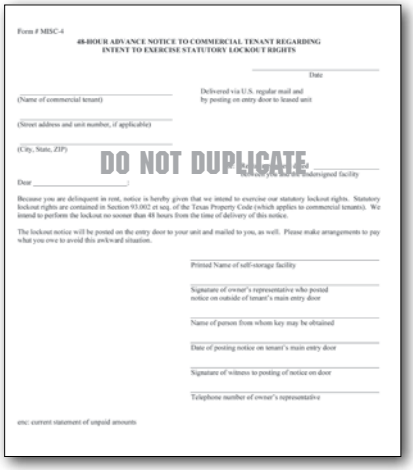
How to use:

If, for example, you lease office/warehouse space and your office tenant has not paid rent, per Section 93.002 of the Texas Property Code a landlord may change the door lock of a tenant who is delinquent in paying rent as long as the landlord places a written notice on the tenant's front door stating the name and address or telephone number of the individual or company from which a new key may be obtained. This "notice of lockout" may be given to the tenant by using form MISC-5, the Notice to Commercial Tenant Regarding Lockout for Non-payment of Rent.

Form MISC-4, the 48-hour advance notice of lockout, is not required by law. It is simply a policy decision whether to use it. Some people like using it because it gives tenants a heads up that you are serious about collecting the rent and they will be locked out of their office in 48 hours if they don't pay. Other landlords don't like to use this because they don't want to give the tenant the opportunity to remove all of the tenant's files, furnishings, computers, etc., in anticipation of being locked out.

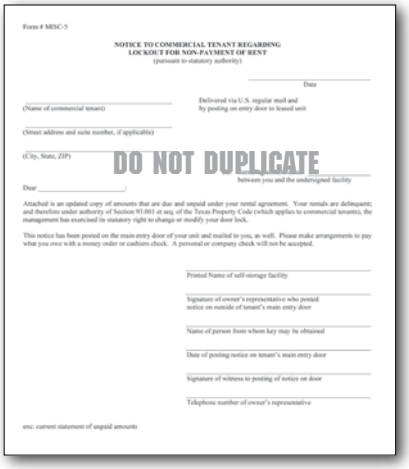
Tips for use:

Use this form only when you have a commercial tenancy involving something other than solely a self-service storage unit. Determine whether you want to give 48 hours notice, and regardless, at the time the lockout is performed, use Form MISC-5, completely filled out, to place on the front door of the space that the tenant is being locked out of. Per state law, you have no obligation to let the tenant back in the space until rent is paid in full.


Form # MISC-4

48-HOUR ADVANCE NOTICE TO COMMERCIAL TENANT REGARDING INTENT TO EXERCISE STATUTORY LOCKOUT RIGHTS

DO NOT DUPLICATE


Form # MISC-5

NOTICE TO COMMERCIAL TENANT REGARDING LOCKOUT FOR NON-PAYMENT OF RENT
(pursuant to statutory authority)

DO NOT DUPLICATE

Federal Legislation

New Federal Legislation Regarding Methamphetamine Lab Cleanup

Legislation that was passed by Congress and ultimately signed by President Bush in December 2007 addresses cleanup of methamphetamine (meth) laboratories. Self-service storage facilities can be a target of "meth" labs, as the production of meth produces large amounts of by-product that are often stored along with the drug itself.

The new law directs the U.S. Environmental Protection Agency to work with the National Institute of Standards and Technology to create voluntary guidelines to remediate former meth labs. These voluntary guidelines should be promulgated by the end of 2008.

The guidelines will include preliminary site assessment recommendations and remediation of residual contaminants. Across the country there have been vastly different protocols adopted from state to state for decontamination of meth labs. As with voluntary mold guidelines that were promulgated years ago, it is hoped that the methamphetamine cleanup guidelines will provide consistency for this issue.

These voluntary guidelines are intended to be used to assist state and local governments in the development and implementation of legislation and other policies to apply state of the art knowledge to the remediation of former labs. These guidelines, again, will be model guidelines, voluntary, and will provide health-based cleanup guidelines for use by states and localities with the goal of making sure that the sites of former meth labs are safe to the public.

A federal website has also been created to provide the public with comprehensive information regarding methamphetamine abuse. For more information, go to www.methresources.gov for, among other things, information about legislation that may affect business owners.

Employment Legal Updates

Age Discrimination in Employment: It Can Affect You

The Federal Age Discrimination in Employment Act (ADEA) protects people age 40 and over from employment discrimination based on age. The law says that an employer may not fire, refuse to hire, or treat an employee differently than other employees because of an employee's age. The law covers workers and job applicants age 40 and over, and applies to employers with 20 or more employees (those with 19 or fewer employees are exempt). It does not apply to independent contractors.

Examples of ADEA provisions include requirements that:

- Job ads or recruitment materials cannot mention age or say that a certain age is preferred.
- Programs cannot set age limits for their trainees.
- Age cannot be a factor in making decisions about workers, including decisions about hiring, pay, promotions, or layoffs.
- Employers cannot take action against workers who file a charge of age discrimination or who participate in any ADEA process.
- With a few exceptions, employers cannot force employees to retire at a certain age.

Remarks by company management, however intended, can be very detrimental in an age discrimination case. For example, in one recent age discrimination case,, a court held that remarks by the company's president that he wanted "racehorses," not "plowhorses," that a plaintiff was "old school" and that there was a significant "graying of the sales force" were all evidence of age discrimination. Texas law differs slightly from federal law. Under Texas law, it is illegal to discriminate against anyone 40 years of age or older on the basis of age, and this law applies to employers with 15 or more employees. Under Texas law, an employer with15 employees or more commits an unlawful employment practice if—because of race, color, disability, religion, sex, national origin, or age of the applicant—the employer declines to hire an individual, fires an individual, or discriminates in any manner against the individual in connection with pay, benefits, or other conditions of employment, or segregates or classifies an employee in a manner that would deprive or tend to deprive the employee of an employment opportunity.

Prohibitions against any remarks that may be interpreted to discriminate against someone's age should be made clear in employer policies. Furthermore, employers should ensure that all management personnel in the workplace are made aware that neither age-based nor other protected category-based comments will be tolerated.

All articles in the TSSA *Legal Update* are authored by Connie Heyer. Heyer is a partner in the law firm of Niemann & Niemann, LLP in Austin and serves as legal counsel for the Texas Self Storage Association. She is co-author of the TSSA *Goldbook*©, a comprehensive guide to laws and regulations affecting self-storage professionals in Texas. Niemann & Niemann, LLP is also the author of the current TSSA Rental Agreement and official forms.

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