

TAKE – 1

Early Lease Termination for Servicemembers and Dependents

1. Q. I am an active duty SM and I have signed a lease for quarters in North Carolina for a twelve month period. There are six months left on the lease. Are there any laws that allow me to terminate the lease early and avoid paying rent for the rest of the lease term?

Whether you can get out of the lease early depends on the reason for termination. The Servicemembers Civil Relief Act (SCRA), a federal law, allows for early termination in three instances:

- The servicemember (SM) entered the lease before active duty military service;
- The SM entered the lease while on active duty and then received permanent change of station orders; or
- The SM entered the lease while on active duty and then received orders to deploy in support of a military operation in excess of 90 days.

2. Q. Are there any other laws that protect SM-tenants and allow early lease termination?

Yes. In 2005, North Carolina passed an amendment to North Carolina General Statute 42-45. This statute allows for early lease termination in the following cases:

- The SM-tenant receives permanent change of station orders to depart 50 miles or more from the location of his current dwelling;
- The SM is “prematurely or involuntarily released or discharged from active duty with the United States Armed forces;” or
- The SM-tenant is deployed for 90 days or more.

3. Q. These laws sound pretty similar. Which one should I use to terminate my lease?

In some cases only one of the laws will apply. For example, only the North Carolina law will apply when the SM is “prematurely or involuntarily discharged.” On the other hand, only the SCRA will apply to leases entered into prior to military service. However, in many cases, such as when the SM receives PCS or deployment orders, both laws will apply. In such cases, use whichever law is most favorable to you under the facts of your case. You are entitled to the protection of both.

Yes, the SCRA and North Carolina law have a great deal of similarity, but there are subtle differences that can significantly affect how much rent you have to pay before you terminate your lease. Generally, if you have been in your lease for less than nine months, the SCRA will be more favorable. How much you have to pay depends on the effective date of lease termination and liquidated damages.

4. Q. When is the effective date of lease termination under the SCRA?

Under the SCRA, lease termination is effective 30 days after the next rental payment is due after the landlord receives proper notice of intent to terminate. For example, let’s say that your

monthly rent is due on the fifth day of the month and that you deliver proper notice of termination to your landlord on April 28th. Your lease terminates, and your obligation to pay rent terminates, 30 days after May 5th.

5. Q. When is the effective date of lease termination under the North Carolina law?

Under NC Gen Stat 42-45, as amended, your lease terminates 30 days after the next rental payment is due after the landlord receives proper notice of intent to terminate, OR 45 days after receipt of notice, whichever is shorter. For example, let's say that the rent is due on the fifth of the month. You provide proper notice to terminate on April 6th. Your lease terminates 30 days after May 5th or 45 days after April 6th whichever comes first. In this case, 45 days after the April 6 notice is shorter and that is the effective date of lease termination. However, if you terminate under North Carolina law and you have been in your lease under nine months, you may also be required to pay liquidated damages.

6. Q. What are "liquidated damages"?

"Liquidated damages" means a set dollar amount which is ordinarily an estimate of the dollar value of the harm that will be caused if a party to a contract breaches (that is, fails to comply with the promises made in the contract). The parties agree that if such a breach occurs, the breaching party must pay the agreed-on liquidated damages amount. Usually, the terms of the liquidated damages clause are set out in the contract. However, in the case of North Carolina residential leases, the requirement to pay liquidated damages, as well as the amount, is set by statute rather than by agreement of the parties. Thus, if you terminate your lease under North Carolina law, you may be required to pay rent through the effective date of lease termination and you may also be required to pay the applicable liquidated damages amount.

7. Q. When would I have to pay liquidated damages?

The answer depends on which statute you use to terminate your lease and how long you have been in your lease prior to termination. If you terminate your lease under the SCRA, you cannot be required to pay any liquidated damages. You must pay rent through the effective date of lease termination but there are no further charges resulting from early termination.

If you terminate your lease under North Carolina law, you will be required to pay rent through the effective date of termination of the lease. In addition, you may be required to pay liquidated damages if you have completed less than nine months of your lease term. If you have completed less than six months of the tenancy, the maximum liquidated damage amount is one month's rent. If you have completed at least six months of your tenancy but less than nine months, the maximum is one-half of a month's rent.

8. Q. It sounds like I always have to pay more under the North Carolina law. Is there any situation in which both laws apply and I would want to use North Carolina law rather than the SCRA to terminate the lease?

Yes. The North Carolina law will result in less expensive termination when you have been in your lease for nine months or more and you deliver notice to terminate more than fifteen days before the next monthly rental payment is due.

For example, let's say that you have been in your lease over nine months and the next rental payment is due April 5. It is March 6 when you decide to deliver notice of intent to terminate. Under the SCRA, the effective date of termination is 30 days after April 5th. You will wind up paying two months rent. Under the North Carolina law, the termination date is 45 days after delivery of the notice. (Remember, under NC law, termination date is 30 days after the next rental payment is due or 45 days after delivery of notice, whichever comes first.). Since you have been

in the lease for at least nine months, there are no liquidated damages. Thus, in this scenario, you wind up paying 45 days' rent under the North Carolina law and two months' rent under the SCRA.

9. Q. What if the landlord quickly re-rents my residence to another tenant? What is the effect on liquidated damages?

The landlord is not entitled to liquidated damages under the SCRA. Even under North Carolina law, the landlord is not entitled to liquidated damages unless there are actual damages; that is, despite reasonable efforts, the landlord is unable to re-rent the premises. Thus, for example, if the landlord rents the residence two days after you terminate your lease, the liquidated damages may be not greater than two days' rent.

10. Q. What kind of notice must I provide to the landlord?

The notice requirements under both statutes are the same. You must provide written notice and a copy of your military orders to the landlord. Or, instead of military orders, you can provide a letter from your Commanding Officer verifying the reason that you are terminating the lease (e.g., that you received PCS orders, that you have been involuntarily or prematurely discharged or released from active duty, or that you have been ordered to deploy in excess of 90 days).

11. Q. What about civilian spouses who sign the lease? Are their lease obligations terminated as well?

The North Carolina statute was passed to assist SMs whose military duties cause them to leave the area. Logically therefore, termination by the SM terminates the spouse's obligation as well. However, the text of the North Carolina statute does not address that issue.

The latest version of the SCRA, on the other hand, makes it very clear that termination by the SM-tenant terminates the obligations of a spouse and any other military dependent that may have signed the lease as well.

12. Q. What if my spouse signed the lease but I did not? Can my spouse use the SCRA or North Carolina law to terminate the lease?

If the spouse signed the lease on behalf of the SM; such as by using a power of attorney, then the lease is covered to the same extent as if the SM signed the lease. However, if the civilian spouse signed a lease in her own capacity and the SM did not, there is no protection under either statute.

13. Q. My lease has a military clause that addresses early lease termination. What effect does that clause have on my ability to terminate early?

Leases may contain a so-called "military clause" which states the circumstances under which a SM can terminate a lease prior to the expiration of the lease term. Many of them attempt to explain the law, but get it wrong because they fail to take into consideration the SCRA and/or they fail to take into consideration the 2005 amendment to North Carolina law. In any event, under the law, the lease can give you more lease termination rights than you would otherwise have under the statutes but the lease cannot take any of these rights away. Any lease provision that affords you with less protection than you are given under the SCRA or the North Carolina statute is void.

14. Q. Is there any way that the landlord can make me waive, or give up, my right to early lease termination?

The North Carolina statute specifically says that its protections can not be waived or modified under any circumstances.

SCRA lease termination rights may be waived, but to be legally effective, such waiver must comply with certain requirements, including, but not necessarily limited to, the following:

- The waiver must be in writing;
- It must be on a document separate from the lease;
- The waiver must be signed by the SM;
- The waiver must specify the legal instrument; (e.g., the lease) to which it applies; and
- It must be in at least 12-point font.

If a landlord requires you to waive SCRA rights as a condition of renting premises, you should go elsewhere for rental quarters and then report the matter to the nearest legal assistance office and the base housing and housing referral office.

15. Q. What happens if neither the SCRA nor the North Carolina lease termination statutes apply to my case?

If neither of the lease termination statutes applies, you should review the lease to see if it gives you any special lease termination rights. Since leases are typically written entirely by landlords, chances are there won't be any special protection, but it's worth checking out. Assuming that neither statute applies and there are no special termination rights provided in the lease, then you are bound by the terms of the lease contract. If you leave the premises early in breach of the contract, the landlord is entitled to damages you caused as a result of the breach. These damages include the loss of rent due to any vacancy of the premises during the lease term. The landlord must take reasonable steps to mitigate the damages, that is, to re-rent the premises. The landlord may withhold the security deposit to satisfy these damages and may also sue you for any additional damages not covered by the security deposit.

16. Q. My landlord claims that I caused physical damage to the residence and is therefore withholding my security deposit and threatening to sue me for the cost of fixing the damage in excess of the security deposit. Is that legal?

A. This article addresses only a certain kind of damage, loss of rent due to the early termination of a lease. A landlord is also entitled to compensation for the tenant's destruction or physical damage to the premises beyond ordinary wear and tear. The rules concerning such physical damage are beyond the scope of this article.

17. Q. Can I terminate the lease early if the premises are seriously damaged by flood or hurricane or some other event that I did not cause?

North Carolina General Statute 42-12 provides that if the rental residence is damaged so badly that it can not be made reasonably fit, except at a cost in excess of one year's rent, the tenant may terminate the lease without penalty. However, the tenant must pay rent up to the time of the damage and must notify the landlord of intent to terminate *in writing and within ten days* of the damage. Read the lease carefully. This provision of the law only applies if the lease does not contain some other arrangement concerning destruction of the premises. Many of them do.

18. Q. What if I have other questions about lease termination or other rights as a tenant?

Contact a private attorney or your legal assistance office. In either case, when you meet with a lawyer, make sure to bring a copy of your lease, any correspondence between you and your landlord, any eviction notice, and any other pertinent documents, photos, or records. These records can help your attorney to properly advise you.

(rev. 11-30-07; written by Major Michael Archer, USMC – Ret.)

The TAKE-1 series of client handouts is a project of the North Carolina State Bar's Standing Committee on Legal Assistance for Military Personnel. For comments or corrections, contact Committee member Mark E. Sullivan at: Mark.Sullivan@ncfamilylaw.com, or at 2626 Glenwood Ave. #195, Raleigh, NC 27608 [919-832-8507].