

3094 RESIDENTIAL EVICTION: POSSESSION OF PREMISES¹

The plaintiff, who has also been referred to as landlord,² claims that the defendant was (his) (her) (its) tenant at a property located at (address) and that the defendant breached their lease agreement³ by [failing to pay rent] [committing waste] [breaching a condition of the lease by (insert reason)]. The plaintiff is asking that the defendant(s) be evicted and possession of (address) be returned to the plaintiff. The defendant(s) deny(ies) that (he) (she) (they) should be evicted and that [(he) (she) (they)] [(is) (are)] entitled to remain in possession of (address) as [(he) (she) (they) did timely pay the rent], [the alleged (breach) (waste) did not occur] [the (breach) (waste) was corrected within the time specified in the notice].⁴

In order for you to find in favor of the plaintiff/landlord, the plaintiff/landlord must prove by the greater weight of the credible evidence, to a reasonable certainty, all of the following;

1. that there was a valid lease with the defendant(s),
2. that the defendant(s) breached the lease by [failing to pay rent] [committing waste] [breaching a condition of the lease by (insert reason)], and
3. that the defendant(s) (was) (were) given the required written notice and did not comply with the notice.

Lease

The plaintiff must first prove by the greater weight of the credible evidence, to a reasonable certainty, that a lease existed. A lease is an agreement in which one party, the landlord, transfers the right to the possession of real property to another person for a definite period of time. [You will hear testimony from the parties regarding the issue of the lease for the property at (address)]. The plaintiff has the burden to prove to you by the greater weight of the credible evidence that the lease existed and that the defendant breached one or more conditions of the lease agreement by [not paying rent when due/committing waste/breach of condition of lease].

WRITTEN NOTICE

The plaintiff must also prove by the greater weight of the credible evidence, to a reasonable certainty, that proper notice was given to the defendant(s). Before a landlord can evict a tenant for a breach of a lease agreement a landlord is obligated by law to give their tenant written notice. The landlord must give notice by one of the following methods: [choose applicable provisions]

- a. By giving a copy of the notice personally to the tenant or by leaving a copy at the tenant's usual place of abode in the presence of some competent member of the tenant's family at least 14 years of age, who is informed of the contents of the notice.

- b. By leaving a copy with any competent person apparently in charge of the rented premises or occupying the premises or a part thereof, and by mailing a copy by regular or other mail to the tenant's last known address.
- c. If notice cannot be given by either (a) or (b) with reasonable diligence, by affixing a copy of the notice in a conspicuous place on the rented premises where it can be conveniently read and by mailing a copy by regular or other mail to the tenant's last known address.
- d. By mailing a copy of the notice by registered or certified mail to the tenant at the tenant's last-known address.
- e. By serving the tenant as prescribed in s. 801.11 for service of a summons.

Actual Notice Wis. Stat. 704.21(5) (if applicable)⁵

If notice is not properly given by one of the methods specified in this section, but is actually received by the other party, the notice is deemed to be properly given; but the burden is upon the party alleging actual receipt to prove the fact by clear and convincing evidence.

Type of Notice

In this case the landlord was required to provide the following notice;

[choose applicable provision]:

A. **Month-to-Month & Week-to-Week Tenancies**⁶:

1. **Failure to pay rent: 5-Day:** If (a month-to-month) (a week-to-week) tenant fails to pay rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and the tenant fails to pay.
2. **Failure to pay rent/Waste: 14-Day:** A month-to-month tenancy is terminated if the landlord, while the tenant is in default in payment of rent, commits waste, or breaches the lease other than for payment of rent, gives the tenant notice requiring the tenant to vacate on or before a date at least 14 days after the notice is given.⁷
3. **Waste: 5-Day:** If a month-to-month tenant commits waste or breaches the lease other than for payment of rent, the tenancy is terminated if the landlord gives the tenant a notice that requires the tenant to repair or fix the damage or vacate the premises no later than a date at least 5 days after the giving of the notice and the tenant fails to comply with the notice. A tenant complies with the notice if the tenant promptly takes reasonable steps to remedy the breach and proceeds with reasonable diligence, or makes a bona fide and reasonable offer to pay the landlord all damages for the breach.

4. [Drug/Gang House notification by law enforcement: see §704.17(1p)(c)
– 5 day notice]

B. One Year Or Less & Year-To-Year Tenancies⁸:

1. **Failure to pay rent: 5-Day:** If (a one year or less) (a year-to-year) tenant fails to pay rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and the tenant fails to pay accordingly.
2. **Failure to pay rent: 14-Day:** If a tenant within the prior year has been given written notice of failure to pay rent and the tenant fails to pay a subsequent installment of rent on time the landlord may terminate the tenancy by giving the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.
3. **Waste: 5-Day:** If (a one year or less) (a year-to-year) tenant commits waste or breaches the lease other than for payment of rent, the tenancy is terminated if the landlord gives the tenant a notice that requires the tenant to repair or fix the damage or vacate the premises no later than a date at least 5 days after the giving of the notice and the tenant fails to comply with the notice. A tenant complies with the notice if the tenant promptly takes reasonable steps to remedy the breach and proceeds with reasonable

diligence, or makes a bona fide and reasonable offer to pay the landlord all damages for the breach.

4. **Waste: 14-Day:** If a tenant within the prior year has been given written notice of committing waste or a breach of the lease other than for payment of rent and the tenant again commits waste or breaches the same or any other condition of the lease other than for payment of rent, the landlord may terminate the tenancy by giving the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.
5. **[Drug/Gang House notification by law enforcement: see § 704.17(2)(c) – 5 day notice]**

C. Lease For More Than One Year⁹:

1. **Failure to pay rent, waste, or other breach: 30-Day:** If a tenant under a lease for more than one year fails to pay rent when due, or commits waste or breaches the lease, the tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent, repair the waste, or otherwise comply with the lease on or before a date at least 30 days after the giving of the notice and the tenant fails to comply with the notice. A tenant complies with the notice if the tenant promptly takes reasonable steps to remedy the breach and proceeds with reasonable diligence, or makes a bona fide and reasonable offer to pay the landlord all damages for the breach.

2. **[Drug/Gang House/Criminal activity notification by law enforcement:
see § 704.17(2)(c) & (3m) – 5-day notice]**

Failure to Comply With Notice

If you find that the plaintiff gave valid notice to the defendant(s), then the plaintiff must prove to you that the defendant(s) did not comply with the notice as: [give as appropriate from evidence received]

- A. Failure to pay rent:** Defendant(s) failed to pay the rent within 5 days after the 5-day notice was received,
- B. Waste or Breach:** Defendant(s) did not within 5 days after notice was received [promptly take reasonable steps to remedy the breach], [proceed with reasonable diligence to repair the damage or correct the breach], [make a bona fide and reasonable offer to pay the landlord all damages for the breach].

[NOTE: Valid 14-day notices have no remedy for defendant but may require an inquiry on the special verdict as to whether the tenant, within the prior year, had been given written notice of a prior breach]

SPECIAL VERDICT: Eviction: Possession of Premises

We, the jury find as follows:

[If the lease period is (week-to-week) (month-to-month), use the following special verdict when 5-day notice at issue]:

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

Answer: _____ Yes _____ No

Question 2: Did [the landlord] properly provide a valid 5-day notice requiring [the tenant(s)] to pay the past due rent or vacate the premises?

Answer: _____ Yes _____ No

Question 3: Did [the tenant(s)] pay the full amount of the past due rent within the 5-day notice period?

Answer: _____ Yes _____ No

[If the lease period is month-to-month, use the following special verdict when 5-day notice for waste or other breach at issue]:

Question 1: As of [date], had the [tenant(s)] committed waste or otherwise breached the lease?

Answer: _____ Yes _____ No

Question 2: Did [the landlord] properly provide a valid 5-day notice requiring [the tenant(s)] to repair or fix the damage or other breach or vacate the premises?

Answer: _____ Yes _____ No

Question 3: Did [the tenant(s)] comply with the notice by [promptly taking reasonable steps to remedy the breach and proceeding with reasonable diligence] [making a bona fide and reasonable offer to pay the landlord all damages for the breach within the 5-day notice period]?

Answer: _____ Yes _____ No

[If the lease period is month-to-month, use the following special verdict when 14-day notice is alleged]:

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

[Alternate Question 1]: As of [date of waste or other breach], did [the tenant(s)] (commit waste) (breach the lease)?

Answer: _____ Yes _____ No

Question 2: Did [the landlord] properly provide a 14-day notice requiring [the tenant(s)] to vacate the premises?

Answer: _____ Yes _____ No

[If the lease period is year-to-year or one year or less use the following special verdict]:

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

Answer: _____ Yes _____ No

Question 2: Did [the landlord] properly provide a 5-day notice requiring [the tenant(s)] to pay the past due rent or vacate the premises?

Answer: _____ Yes _____ No

Question 3: Did [the tenant(s)] fail to pay the full amount of the unpaid rent within the 5-day notice period?

Answer: _____ Yes _____ No

[use if a 14-day notice has been given alleging a prior notice within a year]:

Question 1: Within the prior year had [the tenant(s)] failed to pay rent when due and been given prior written notice to pay rent or vacate the premises?

Answer: _____ Yes _____ No

Question 2: Did [the landlord] properly provide a 14-day notice requiring [the tenant(s)] to vacate?

Answer: _____ Yes _____ No

[If the lease period is for more than one year use the following special verdict]:

Question 1: As of [date rent was due], did [the tenant(s)] owe past due rent to [the landlord]?

Answer: _____ Yes _____ No

Question 2: Did [the landlord] properly provide a 30-day notice requiring [the tenant(s)] to pay the past due rent or vacate the premises?

Answer: _____ Yes _____ No

Question 3: Did [the tenant(s)] fail to pay the full amount of the unpaid rent within the 30-day notice period?

Answer: _____ Yes _____ No

Dated _____

Presiding Juror:

Dissenting Juror:

Identify each answer that you do not agree with and sign your name.

_____ : as to question(s) # _____

Alternate Special Verdict

Special Verdict Question No. 1:

Who Is Entitled To Possession of (address): (circle party entitled to possession of the premises):

Plaintiff/Landlord or Defendant/Tenant

Dated this ___ day of _____, 20____.

Foreperson

Dissenting Juror:

Identify each answer that you do not agree with and sign your name.

_____ : as to question(s) # _____

COMMENT

The instruction and comment were approved by the Committee in 2019. An editorial correction was made to the comment in 2020.

This instruction is created as a result of § 799.20(4) which requires that in a “residential eviction action” a jury or court trial on the issue of “possession of the premises” must be held within 30 days of the return date if the defendant “claims a defense to the action.” This instruction addresses the instructions and special verdict required for deciding the eviction; i.e. who is entitled to the possession of the premises.

The reader should be aware that there is a discrepancy in the statutes; as noted § 799.20(4) requires a trial if a defendant “claims a defense” to the eviction action at the return date, whereas § 799.206(3) states that in an eviction action if a party at the return date “raises valid legal grounds for a contest,” then the matter is to be scheduled for a “hearing” before a judge (not a court commissioner) within 30 days of the return date. We leave to you the significance, if any, regarding the competing language in the above statutes.

Residential Rental Practices are regulated in Wisconsin in Chapter 134 ATCP, Wis. Admin. Code and the reader should modify any instructions per the code provisions. Substantive statutes regarding

Landlord and Tenant are found in Chap. 704 Wis. Stats., and procedural rules regarding eviction actions are found in Chap. 799 Wis. Stats., (Small Claims).

1. § 799.20(4).
2. ATCP 134.02(5)
3. ATCP 134.02(6) (10) & §704.01(1)
4. ATCP 134.02(9)
5. § 704.21(5)
6. § 704.17(1p)
7. § 704.17(1p)(a) & §704.17(b)(2)
8. § 704.17(2)
9. § 704.17(3)