

Minimum energy efficiency standards: a date for the diary



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- From 1 April 2016, residential tenants will be able to request landlord consent – which must not be unreasonably withheld – to prescribed energy efficiency improvements unless certain exemptions apply or the landlord proposes alternative energy efficient measures.
- From 1 April 2018 it will be unlawful to grant new leases of residential or commercial property with an EPC rating of less than "E".
- From 1 April 2020 this will apply to all residential leases (both new and existing) lettings.
- From 1 April 2023 this will be extended to include all existing commercial leases.

The Energy Efficiency (Private Rented Property)(England and Wales) Regulations 2015 (the Regulations) will bring into force minimum energy efficiency standards (MEES) in the residential and commercial private rented sector.

Landlords with properties with an EPC rating of less than "E" will need to carry out works to improve the energy performance of the building to a rating of "E" or above or face civil penalties. The Regulations will also make it unlawful for landlords of residential property to unreasonably refuse consent to a tenant's request to make prescribed energy efficiency improvements to properties.

When do the Regulations apply?

MEES apply to all properties required to have an energy performance certificate (EPC), and:

- for commercial property, will apply to all leases granted for more than six months (including any extensions) and less than 99 years; and
- for residential property, will apply to all tenancies let under assured tenancies, assured shorthold tenancies, Rent Act tenancies and any other tenancy specified by an order of the Secretary of State from time to time.

There are three exemptions, which will allow landlords to let or (later), continue to let, properties which do not meet the relevant EPC rating.

1. Cost effectiveness

A landlord is exempt if there is no Green Deal available for the improvements recommended by an independent installer of energy efficiency improvements and it has been assessed that the recommended improvements would not pay for themselves over seven years based on energy savings in the energy bill.

2. Third party consent

A landlord is unable to increase the energy performance rating of a property to not less than the minimum level because a third party who had the right to prevent works from being carried out without their consent, such as a lender, freeholder or sitting tenant refused to grant consent or would only grant consent subject to a condition that a landlord could not reasonably satisfy.

3. Devaluation

MEES will not apply where a report obtained from an independent surveyor states that the energy efficiency improvements will decrease the market value of the property (or the building of which it forms part) by more than five per cent.

An exemption will last for up to five years and will need to be pre-registered on a central register for a landlord to rely on it. At the end of the period, a landlord would need to carry out new reports and assessments or again seek third party consent (which is refused), for the exemptions to continue to apply and to update this on the register.

Failure to comply with the Regulations will result in landlords facing a financial penalty or a publication penalty, or both.

Where the breach is for less than three months, the fine will be:

- for commercial property – £5,000 or 10 per cent of the rateable value
- for residential property – £2,000

If the breach is for more than three months, the fines will be:

- for commercial property – £10,000 or 20 per cent of the rateable value (up to £150,000)
- for residential property – £4,000

Breaches can be published in the exemptions register for a minimum of 12 months.

Enforcement authorities can also serve a compliance notice to identify if there is a breach. Failure to comply with a compliance notice will result in a financial and/or publication penalty.

Unreasonably refusing consent

From 1 April 2016, landlords (and superior landlords) of residential property will be unable to unreasonably refuse consent to a tenant's request to make prescribed energy efficiency improvements.

The prescribed energy efficiency improvements are those listed in the Schedule of the Green Deal and those prescribed in these Regulations, and include items such as replacing central heating systems to make them more efficient or to change windows and improve insulation. The Green Deal is a government initiative to remove the upfront cost for property owners to improve the energy efficiency of their property. The cost of the works will be repayable direct to the energy supplier through the electricity bill. There are currently no Green Deal plans for commercial property.

A landlord will be reasonable in refusing its consent where:

- another tenant made a request within the preceding six months and the landlord complied with their request;
- a Green Deal provider advised that the requested improvements would have a negative impact on the fabric or structure of the building; or
- the improvement proposed is the same or substantially the same as that which the landlord proposed but which the tenant had refused or failed to respond to within the preceding six months.

Alternatively to granting consent, a landlord can make a counter-proposal putting forward its own improvement. The tenant's own request then ceases to have any effect, but the tenant must consent to those works before they can be carried out.

Landlords can benefit from the exemptions of third party consent and devaluation set out above for MEES. It is unlikely that cost effectiveness will apply as it will be the tenants putting forward the proposed works pursuant to a Green Deal plan or agreeing to fund the costs themselves.

The First Tier Tribunal (Property Chamber) will have the power to determine any dispute as to whether the landlord (or superior landlord) failed to comply with the Regulations. If the landlord/superior landlord is found to have unreasonably refused consent, the Tribunal can order that the energy efficiency improvement requested by the tenant is carried out.

Comment

Over time the minimum energy efficiency standard is likely to rise above the minimum EPC rating of "E". It is unclear as to how quickly this will be but the Secretary of State will review the position every five years. Although the Regulations do not come into force for a few more years, landlords should begin carrying out assessments of their properties to see which properties are likely to fall below the minimum rating and investigate what improvements are available to raise the energy efficiency of those buildings, or consider whether an exemption will apply. Landlords should also consider whether it is worth doing more than the bare minimum and implementing a programme of works to improve any

buildings that also fall within ratings C and D, given likely future intentions to raise standards.

If improvements works are required, landlords will need to consider whether the current lease terms allow for the landlord to enter the property and carry out the works during the term, or whether provision needs to be made for works to be done during any void periods. If there is likely to be substantial disruption, tenants may refuse to grant access and a third party consent exemption may need to be registered.

Drafting of certain lease clauses may also become a point of issue. For example, landlords may wish to expressly exclude a requirement for them to grant consent to alterations if the alterations would diminish the EPC rating for the property, whilst tenants may resist this. Also the tenant's repairing/reinstatement obligations at the end of the term need to be considered carefully as, if the clause is quite widely drafted, this could include obligations to repair/reinstate the property to the minimum EPC rating in force at the relevant time.

Landlords will also want to ensure all costs are passed on to tenants. Tenants, in turn, will want to be aware of any additional costs. Even if works are funded by a Green Deal, tenants may be repaying the capital cost of the works as part of their energy bills if they pay this to the energy supplier direct. Consideration also needs to be given to the service charge and whether tenants are required to pay for the costs of improvements. If so, landlords could carry out works at their own cost and seek to recoup this from tenants. If tenants wish to avoid any liability in this way, this should be expressly excluded in the service charge provisions.