

## Landlord and Tenant Issues for Child Care, Volume One: A Resource for Landlords



CHILD CARE

An Overview for Landlords of Child Care Providers

Launched in 1982, The Enterprise Foundation is dedicated to rebuilding distressed neighborhoods and helping people with low and very low incomes move into the mainstream of American life. Working with partners, Enterprise provides struggling families and individuals opportunities for a decent home, steady employment, quality child care and safe streets.

Through our Child Care program, we work with local child care and community development partnerships to increase the supply and improve the quality and affordability of child care in low-income communities. We link child care providers to housing opportunities, provide leadership in child care financing and assist community-based organizations with grants, loans and expertise.

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This book is part of the Enterprise Child Care Library and is packaged here as a series within the Community Development Library. The Community Development Library is an invaluable resource collection for non-profit organizations dedicated to revitalizing and reconnecting neighborhoods to mainstream America. The Child Care Library is a reference collection for those dedicated to increasing the supply and improving the quality and affordability of child care in low-income neighborhoods. The manuals in these libraries offer simple, easy-to-read assistance to help your organization succeed. The Enterprise Foundation provides nonprofit organizations with expertise and training as well as an extensive collection of print and online resources. For more information, visit our website at [www.enterprisefoundation.org](http://www.enterprisefoundation.org).

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# About this Manual

## What does a landlord need to know about child care?

*A tenant's gainful employment is usually good news for a landlord, suggesting a future of stable income and residency. When a tenant is employed doing home child care, however, this good news can seem more mixed. As a landlord, you may have concerns about how the child care business might affect the property, the other tenants and your own obligations.*

*Landlord and Tenant Issues for Child Care, Volume One: A Resource for Landlords*, will help you understand:

- The landlord's roles and responsibilities
- The tenant's rights and responsibilities
- If child care on your property is something you can support

This manual is designed to help you work with your tenant to address these and other concerns, so that your tenant's employment, child care or otherwise, can continue to be a source of good news. Please note that many additional references are listed in the Resources section to help you learn more.

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*Cover photograph by Nathan Mandell*

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## Introduction

*You are showing one of your empty duplex units to a prospective tenant when you notice your current tenant, Ms. Frank, out in the backyard with a group of children. The children are playing loudly, and Ms. Frank is attending to two toddlers while several older children are throwing a ball against the side of the house. You recall that when they signed their lease last month, the Franks said they had no children. The prospective tenant looks concerned. While he is looking over the unit, you go out to talk to Ms. Frank. "It's my business," she says, "I take care of children during the day." You tell her your concerns about the children's noise and rough play and your potential liability. "But this is my living," says Ms. Frank, "and there's really no need for concern." You tell her you'll call later, and you turn back to the prospective tenant, whom you hope is still interested.*

What do you do? This manual will help you figure it out.

### WHAT IS FAMILY CHILD CARE?

All states allow child care to be provided in neighborhoods, whether in single- or multiple-family units. "Family child care" or "family day care" refers to homes where the renter or homeowner (referred to here as the provider) offers child care to families for pay, under the supervision of a state regulatory agency. Though state regulations vary widely, a small family child care home is usually limited to six to eight children while a "group" family child care home can commonly care for 12 to 14 children if the provider is assisted by another adult.

States are generally responsible for monitoring health and safety requirements, including whether the provider has adequate space, has taken appropriate measures to protect children from injury and has a background free of criminal activity or child maltreatment. With the vast majority of parents in the United States working and needing child care today, family child care has become common in all kinds of neighborhoods, urban, rural and suburban.

An additional category of care, informal or "kith and kin" care, is defined as license-exempt care provided by friends, family or neighbors who only take care of a few children. The number of children who can be cared for by a kith and kin care provider varies by state as does state oversight of this kind of care and subsidy usage. In this document, we will be addressing issues through a focus on family child care businesses, but many, if not most, of the same questions and answers apply to informal care as well.

# Business Concerns

## CHILD CARE BUSINESS VS. RESIDENTIAL USE

Family child care is both a business and a residential use of property. The provider provides a service for a fee and pays taxes like a small business owner. On the other hand, caring for children in a small family child care home is virtually the same as caring for children in any large family. With millions of entrepreneurs today operating home-based businesses, child care is just one of the many lawful, productive activities tenants engage in at home.

In some states, laws that encourage child care in neighborhoods have been applied to prohibit private leases from excluding child care providers as tenants. Many states have passed laws that forbid local governments from zoning or otherwise banning child care in neighborhoods (for example, New York Social Services Law, s. 390(12)).

Courts have interpreted these laws as strong state policy providing that family child care is consistent with residential use, such that neither private nor public bodies can lawfully prohibit it. (See, for example, *Quinones v. Board of Managers of Regalwalk Condominium I*, 673 N.Y.S.2d 450, 242 A.D.2d 52 (1997), *Alexander v. Young*, New York Law Journal Volume 212, Number 47 (Second Department, Westchester County, City Court of New Rochelle) (1994), p. 27.)

If your state prohibits local governments from placing restrictions on family child care, state courts will not find it difficult to extend the same rules to cover private landlords.

## CHILD CARE ON YOUR PROPERTY

Rather than risking running afoul of the law or becoming entangled in court action, landlords rightly have turned their attention toward ways to address their concerns instead of trying to ban family child care altogether. Tenants and landlords both have important roles to play in making the rental arrangement work so that everyone – the landlord, the provider and the children – can have their needs reasonably met.

With family child care, a landlord is usually concerned about how the presence of a group of young children will affect the unit, the other tenants and potential liability. As a landlord, you should discuss these concerns and any others with the provider and expect that the provider will want to take reasonable steps to address them. A provider may be reluctant to bring up the fact that he or she provides family child care, anticipating a hostile response or a dispute that might disrupt the family's living situation. If the provider hasn't already taken the initiative, you should expect the provider to inform other tenants who might be affected, and to show openness in dealing with concerns they may have. Overall it works best to discuss concerns frankly but calmly as early in the rental relationship as possible and bring some ideas for possible solutions.

## DAMAGES TO THE RENTAL UNIT

Just as with any large family, more children can mean more wear on a home. Anticipating more wear, you can legitimately negotiate a higher damage deposit to protect your investment. Also, you might consider increasing coverage for property damage under your insurance policy that covers the property. The additional premium is not likely to be very expensive. You could, in lieu of a higher damage deposit, ask that the provider help cover the cost of the additional coverage. You could also reasonably ask the provider to make changes in the activities or space arrangements to reduce the potential for damage. For example, you might ask the provider to keep the children from playing ball on the side of the building. Finally, you and the provider could add periodic inspections of the unit for damage to the lease.

## ADDITIONAL NOISE

Larger numbers of children usually produce larger amounts of noise. Depending on the lease and state or local laws as to nuisances like excessive noise, it may or may not be the landlord's responsibility to police the amount of noise made by tenants engaged in family child care or any other activity. It usually works best if the

provider works out any concerns with each neighbor who expresses a concern, after hearing directly from the neighbors. Depending on the specific concern, a provider can take steps to hold down noise, including closing windows, taking children to a playground rather than having them play in the backyard, having certain “quiet play” hours and putting sound-muffling material such as carpeting or rugs down on floors.

#### **PICK-UP AND DROP-OFF PARKING**

It is important to identify the complaining tenant’s specific concerns. Is it the availability of parking space? Noise from revving engines or car horns? Concerns about possible injuries to children? Once the problem is clearly identified, parents who use the family child care home can also be brought in to help solve the problem. Possible solutions include: developing guidelines about where to park, reducing unnecessary noise and taking extra care to watch for children when cars are pulling in or out.

# Safety and Liability Concerns

## SAFETY FOR THE CHILDREN

Even if you don't fear being held liable, you may still be concerned that the physical space or supervision is not sufficient to maintain a safe setting for the children. It is essential to bring these concerns to the provider's attention as soon as possible. Because the provider knows the children and what they are capable of, it may be that she just needs to explain what safety measures are in place. If the concern is about adequate space, the provider might also put you in touch with the regulatory agency representative who can share a copy of the results from the provider's most recent inspection. A good provider will be open to working with specific concerns about safety, which may range from children playing too near to traffic in the front yard to using the backyard more often for outdoor play.

## PROVIDER LIABILITY

As a landlord, you may well have concerns about liability for injuries to the children in the family child care home. These concerns are valid and can be addressed if the provider has a reasonably good safety program for the child care children and liability insurance to cover the family child care home that includes you as an additional insured.

Child care providers have a legal duty to act with reasonable care toward the children in their care. This duty is imposed by state child care regulations, as well as by their status as a care giver for children. When a provider fails to use reasonable care and a child is injured, the provider is said to have "breached" her duty of care, or to have acted "negligently."

From reading the news each day, it should be obvious that a lawsuit for injuries can be filed for almost any reason. Beyond having in place a good safety program and giving competent supervision, there is little more the provider can do to prevent someone from filing a lawsuit when a child is injured. What is important is whether the lawsuit is successful.

To guard against a successful lawsuit, the provider needs to have a good liability insurance policy with limits as high as she can afford. Then if an injury occurs and a lawsuit is filed, the provider's insurance company will hire an attorney to defend the provider. If the court determines that the provider was responsible for the injury because of negligence, the insurance company will cover the damage award up to the limits of the policy, minus any deductible amount that the policy requires the provider to pay.

If the provider adds you to the liability insurance policy as an "additional insured," you can get the same kind of protection for any added liability from the family child care home.

## LANDLORD LIABILITY

Landlords are reasonably concerned about their liability because of their duty to act reasonably toward the provider who is the tenant and the children who come onto the property. As part of this, you must warn the provider of any hidden dangers in your rental unit and in "common areas" under your control, such as an entryway or a backyard shared by several apartments. Landlords must make reasonable attempts to fix these dangers, even if they try to avoid responsibility by putting a contrary position in the lease.

If someone is injured in the family child care business and a lawsuit is filed, you may also be named in the suit. Even if the court later finds that you weren't at fault, you would still have to pay the cost of putting up a legal defense. If the court finds that you were at fault, you will have to pay monetary damages. If a provider puts you on the insurance policy as an additional insured, these costs would be paid by the provider's insurance company. Usually, naming an additional insured costs a minimal amount and may be something the provider is happy to do to keep the relationship with you a good one.

It should be noted that other forms of limiting landlord liability, such as having parents sign waivers of liability, have generally been less effective than arranging additional insurance

coverage. Courts tend to interpret such waivers very narrowly and will not enforce them when an injured party lacks any other way to get compensation for damages suffered.

## LEAD PAINT

In general, you have a continuing duty to take reasonable steps to protect the tenant and guests who may come onto the property, and, in particular, to remedy hidden dangers. Landlords in a number of states are required to take specific measures to protect children in their rental units from exposure to lead paint. Most homes and apartment units built prior to 1978 probably have some amount of lead paint in them, so the risk is widespread. The greatest risk is generally from peeling paint and paint dust on floors and surfaces where small fingers can come in contact with lead paint dust. On their shoes, children can also track in soil contaminated with lead dust. Young children who are still crawling and putting their fingers in their mouths are especially susceptible. Even fairly low levels of exposure can cause serious damage to children.

Federal law now requires landlords of most housing built before 1978 to tell tenants about any known lead paint hazards and give them the required U.S. Environmental Protection Agency (EPA) pamphlet about residential lead poisoning hazards. HUD's Office of Healthy Homes and Lead Hazard Control offers a table on its website that describes recent federal regulations that require owners of rental housing receiving certain kinds of federal financial assistance to take affirmative steps to abate or control lead paint exposure. (See Environmental Health Hazards in the Resources section for the website address.)

When courts have been asked to determine whether a landlord "should have known" about lead paint hazards, the results have been inconsistent. Sometimes "actual knowledge" is required, and sometimes the prevalence of lead in pre-1978 housing is deemed to be adequate notice that surfaces should be tested. Therefore, given the potential for serious injury to children and substantial monetary damages, the prudent approach is always to test for lead. This testing always should be done by trained professionals who meet the requirements of your state and locality.

If you discover the presence of peeling lead paint or lead paint dust, you need to take steps to diminish the risk. Because stripping and sanding away peeling paint can increase the amount of lead dust in the unit, many owners opt for either abatement or interim controls. To find definitions of abatement and interim controls, check the HUD's Office of Healthy Homes and Lead Hazard Control reference in Environmental Health Hazards in the Resources section. Both should be done by trained professionals. If you have questions about the best method to diminish the risk of lead paint exposure, contact your local health or housing department.

Other measures to protect against exposure can be implemented by the provider as part of a cleaning routine. The primary cleaning process is to first wet wipe the surface with a detergent solution and then rinse with clean water and wipe. Be careful not to contaminate the rinse water with lead dust. Because lead paint dust is a primary source of exposure, vacuuming often with a high quality vacuum, preferably one with a HEPA (high efficiency) filter, will help a great deal. For any child, keeping wipes handy and cleaning hands often (particularly before meals and after outdoor play) can make an important difference.

# Mobile Home Parks and Child Care

Usually state laws that apply to landlords will also apply to owners of mobile home parks who rent to tenants. Laws prohibiting discrimination in leasing, guaranteeing tenants a judicial hearing prior to eviction and other rules will generally apply in the same way for all landlords and tenants. In the case of a mobile home tenant, however, the landlord may own only the utility hook-up lines and/or the space upon which the tenant places his or her own mobile home.

A number of states have provided better protections for tenants in mobile home parks than in other residential units. For example, in New York State (see New York State Real Property Law section 233), a mobile home park owner must offer a tenant a written lease every year, and if the owner fails to do so, it is likely that the tenant will be able to remain for at least one year. Similarly, given the unique characteristics of a mobile home residence, other states have enacted laws allowing tenants more time and opportunity to defend against a landlord's eviction action.

Often, a mobile home park owner will establish an additional set of rules that must be followed by all tenants. By law in a number of other states, all mobile home park rules and regulations must be given to tenants at the beginning of the rental; such rules must also be posted in a conspicuous place on the park grounds. Where laws like this exist, a park owner cannot enforce any rules that are not posted or given to tenants when they move in. In any event, mobile home park rules cannot be unreasonable or arbitrary, and they must be applied in the same way to all park residents.

## Getting Help

Sometimes communication breaks down enough that additional outside assistance is needed. In this situation, landlords have often turned to attorneys, to mediation and to the courts to help resolve problems that cannot be ignored.

### ATTORNEYS

If you need an attorney, generally you will want one who is experienced in handling landlord and tenant cases, and someone who will listen well and maintain good communication with you. Most attorneys provide the opportunity to have an initial consultation that lasts an hour or

*An attorney can review a lease for you before you distribute it to your tenants to sign, spotting potential problems and illegal provisions.*

so for an hourly fee. Your local bar association sometimes has referral arrangements with attorneys to charge prospective clients a relatively low rate for an initial consultation.

If you need help with a specific case, the attorney will need a lot of information. You will probably be asked to tell your story more than once, and you will be asked for all notes, receipts and any other documentation you may have. Keep in mind that these requests for information are not because your attorney has doubts about your story. Instead, the attorney wants to be certain that she or he has all of the facts correct and in the right order, so that the strongest possible arguments in your favor can be created. Your attorney should keep you updated on progress with your case, as she or he conducts legal research and contacts witnesses and other people who may be helpful. You should always be able to get from your attorney copies of any documents collected or created on your behalf, including memoranda, letters and other materials.

After researching your case thoroughly, your attorney should also counsel you, instead of just telling you what to do without your input. The attorney should present you with several possible courses of action from which you can choose the one that you think best suits your needs. There are usually many means to an end, and a good attorney will try to offer you a number of different options. One approach would be to have your attorney write a letter on your behalf to the tenant, or to the tenant's attorney, explaining your concerns and requesting corrective action. The attorney can also seek to negotiate a solution. In negotiating a settlement, your attorney has a duty to keep you informed during the process and to obtain your final approval of any terms. Even if the negotiation process later breaks down and you have to go to court, the judge will want to see that the parties (or at least you) tried to work out a resolution beforehand.

Attorneys also can help you with a range of legal matters regarding your tenants. An attorney can review a lease for you before you distribute it to your tenants to sign, spotting potential problems and illegal provisions. An attorney could also help you in negotiating adequate protections for you in the lease and in later negotiating with a tenant should problems arise.

### MEDIATION

Another option is mediation. Many communities have some form of mediation services available, although there might be some fees to use them. You should keep in mind that mediators usually are not trained in the law. They are lay people who do not make the decision for the parties, but who try to facilitate discussions between them in an effort to get them to come to an agreement. One advantage to mediation is that it does not foreclose other options. If mediation breaks down, or produces an unacceptable result, you can always choose to go to court. However, this could also work to your disadvantage, even if an agreement is reached, because unless the agreement is written down and signed like a contract or included in a court order, the tenant could later decide not to comply.

## COURT

Finally, your case could go to court. If you decide that is the route you wish to take, you may have a choice about which court to address, as there may be more than one court that has the authority to hear your case. Depending upon which court you choose, the proceedings may be more or less formal, and the cost of bringing a case more or less expensive. In any of the courts, you will have to give sworn testimony, and your tenant, or your tenant's attorney, will probably cross-examine you. Cross-examination can be a very difficult and nerve-wracking experience because the tenant, or the tenant's attorney, will try to make you sound as though you are lying or unsure of the facts.

## References

*Ithaca Renter's Bible*, Cornell Public Interest Research Group, Ithaca, NY.

*Family Day Care Zoning Advocacy Guide*, Child Care Law Center, San Francisco, CA.

*Deed Restrictions as Impediments to Family Day Care: Fighting Back*, Child Care Law Center, San Francisco, CA.

*Liability Insurance: Insuring Your Program*, Child Care Law Center, San Francisco, CA.

*Look Out for Lead: A Guide for Tenants with Preschool-Age Children*, Office of the New York State Attorney General, revised July 1999. ([www.oag.state.ny.us/environment/lead96.html](http://www.oag.state.ny.us/environment/lead96.html))

"Look Who's Working at Home," *Nation's Business*, October 1989.

# Resources

Most of these resources are easily available online by typing in the web addresses, or URLs, offered below. However, as you are aware, URLs can change pretty quickly, and some of these may be out of date by the time you read this. So wherever possible, we've listed both the organization's main URL or homepage address (in parenthesis following the organization's name), and the URL that takes you directly to the resource we think would be helpful. If the direct URL doesn't work, go to the organization's main URL, and search for the resource from there.

## ENVIRONMENTAL HEALTH HAZARDS

**The Environmental Protection Agency (EPA)** ([www.epa.gov](http://www.epa.gov)) offers a pamphlet, *Protect Your Family from Lead in Your Home* at <http://www.epa.gov/opptintr/lead/leadpdf.pdf>.

**The Department of Housing and Urban Development's (HUD) Office of Healthy Homes and Lead Hazard Control** ([www.hud.gov/offices/lead](http://www.hud.gov/offices/lead)) offers publications that deal with lead-based paint for both residents and landlords.

- *Lead Paint Safety: A Field Guide for Painting, Home Maintenance, and Renovation Work* and *Help Yourself to a Healthy Home: Protect Your Children's Health* (topics covered include indoor air quality, asthma and allergies, mold and moisture, carbon monoxide, lead, drinking water, hazardous household products, pesticides and home safety) <http://www.hud.gov/offices/lead/outreach/communityoutreach.cfm>
- The Lead-Based Paint Poisoning Prevention Act sets forth new rules to require lead paint abatement in most properties that receive some kind of federal assistance.
- A table summarizing lead-safe housing rule requirements at <http://www.hud.gov/offices/lead/leadsaferule/summary.cfm>

**The National Center for Healthy Housing** ([www.centerforhealthyhousing.org](http://www.centerforhealthyhousing.org)) provides information on protecting children from environmental health hazards, including lead.

**The Office of the New York State Attorney General** ([www.oag.state.ny.us](http://www.oag.state.ny.us)) offers *Look Out for Lead: A Guide for Tenants with Preschool-Age Children* (revised July 1999) on its website at [www.oag.state.ny.us/environment/lead96.html](http://www.oag.state.ny.us/environment/lead96.html).

## LEGAL INFORMATION

**The Child Care Law Center** ([www.childcarelaw.org](http://www.childcarelaw.org)) is devoted exclusively to the complex legal issues that affect child care, including public benefits, civil rights, housing, economic development, family violence, regulation and licensing and land use. The center offers publications about landlord and tenant issues, including zoning and deed restrictions.

**The Enterprise Foundation's** ([www.enterprisefoundation.org](http://www.enterprisefoundation.org)) Child Care Library manual *Landlord and Tenant Issues for Family Child Care, Volume 2, A Resource for Providers* also discusses lease issues.

## OTHER INFORMATION

**The National Association for Child Care Resource and Referral Agencies** ([www.naccrra.net](http://www.naccrra.net) or call 1.800.424.2246) provides listings of local child care resource and referral (CCR&R) agencies as well as other resources.

## Notes

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## **THE ENTERPRISE FOUNDATION**

The Foundation's mission is to see that all low-income people in the United States have access to fit and affordable housing and an opportunity to move out of poverty and into the mainstream of American life.

As the nation's leader in community development, Enterprise cultivates, collects and disseminates expertise and resources to help communities across America successfully improve the quality of life for low-income people.

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