

IT'S THE LAW:

Energy Performance Certificates

Is it MEES your looking for?

Energy Performance Certificates (EPCs for short) have been with us since 2007 – so you might think you know all you need to know about them. But, in reality, the law has been evolving over the last decade and it's sometimes difficult to keep up. The most recent stage in that evolution came on 1 April 2018 with the coming into force of the Minimum Energy Efficiency Standard (MEES) Regulations. So if you are a Landlord, whether residential or commercial, and don't want to be left out in the cold, then read on...

What is an EPC?

Much like the multi coloured stickers you'll see on fridges in a John Lewis showroom, an EPC will tell you how energy efficient a building is by rating it on a scale from A-G (with an 'A' rating being most efficient). That rating will help people gauge how costly the building is going to be to heat, cool and light. It also gives a clue as to whether the building's annual carbon footprint will be that of a petite ballerina or closer to the size 12s of Officer Dibble. An EPC can only be produced by an accredited energy assessor. The assessor will also produce a recommendation report which lists possible measures to improve the building's energy efficiency.

When is a building not a building?

One slightly confusing thing about the EPC regulations, which we'll get out of the way straightaway, is that when they use the word building they mean something else. In EPC world, a building means a roofed construction having walls for which energy is used to condition the indoor climate. So far, so good. But the word building (in EPC world) also means a section, floor or apartment designed or altered to be used separately. So in a block of flats, the flats themselves are referred to as buildings as well as the block as a whole.

When is an EPC required?

The general rule (we'll get to the exceptions later) is that a building will need an EPC when it is first built and then a valid EPC when it is subsequently sold or rented. This applies whether it is residential

or commercial. If the property is part of a larger building (say a shop in a shopping centre or a flat in a block of flats) you may also need an EPC for the communal areas of the building.

Long life

Once an EPC has been obtained it will remain 'valid' for 10 years unless during that time works are carried out which both (i) change the number of parts designed or altered for separate use (e.g. dividing a single house into two flats) and (ii) include works to any fixed heating, hot water, air-conditioning or mechanical ventilation serving the property. If works of that description are carried out then the person carrying out the works will need to obtain a new EPC and provide a copy, not only to the owner of the building, but also to the local Building Control department. That new EPC will then have a 10 year life of its own. And can be used again and again as the building changes hands over the next decade.

The exemptions to the rule

So, generally, an EPC (no older than 10 years old) will need to be produced each time a building (as defined) is sold or let. There are, however, a whole host of exemptions to this requirement. They include:

- Temporary buildings (less than 2 years anticipated use)
- Residential buildings where the intended use will be for less than 4 months per year
- Detached buildings with less than 50m² floor area
- Places of worship
- Certain listed buildings

A building may also be exempt from the requirement to provide an EPC where it is going to be demolished following the sale. There is some complexity around the hurdles that need to be left before this exemption applies (such as the need for all necessary consents for the demolition to be in place) and those rules apply slightly differently depending on whether the building in question is residential or commercial.



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Penalty shot (or own goal)

If a Seller or Landlord does not provide an EPC when required they (and/or a person acting on their behalf (e.g. an estate agent)) may be liable to a civil penalty charge. These are enforceable by Trading Standards and the penalty is fixed. For residential buildings it's fixed at £200 per dwelling. For commercial buildings, in most cases, it will be fixed at 12.5% of the rateable value of the building (with a minimum penalty of £500 and a maximum of £5,000).

The evolution of teeth

Previously, EPCs were often viewed as little more than colourful pieces of paperwork with little practical purpose. They were a requirement, but if they showed poor energy efficiency there were no consequences (putting to one side climate change and the resulting risk of extinction).

But from 1 April 2018 EPCs have evolved teeth, with the coming into force of the Minimum Energy Efficiency Standard (MEES) Regulations. Those regulations prohibit a Landlord from granting a new tenancy of its building if the current EPC shows it has an energy performance rating which is worse than 'E'. And from 1st April 2023 the teeth get sharper. No Landlord will be able to continue to let a building (even to existing tenants on an existing lease) with an EPC rating which is worse than 'E'.

Once again, there are certain buildings where these prohibitions do not apply and these include buildings which are not required to have an EPC (as detailed above), where a lease is granted for a term of 99 years or more or 6 months or less (without a right to renew) and properties that have not yet needed an EPC because, for instance, it was let for a term of 25 years in January 2007 (before the requirements first came into force) and hasn't since then been the subject of a sale or new letting.

Where a building has an EPC rating below an 'E' (and if none of the exemptions referred to in the preceding paragraph apply) then the Landlord will need to undertake energy efficiency improvements to improve the rating to an E, or above, unless one or more of what are known as the minimum standard exemptions apply. These are:

The Green Deal's Golden Rule: where an independent assessor determines that the amount spent on energy efficiency improvements would not be recouped within 7 years.

Devaluation: if carried out, the works would reduce the value of the property by more than 5%.

Third Party Consent: consents are required from a third party (e.g. a tenant or local authority) to enable the works to be carried out and consent has been refused

Any such minimum standard exemptions must be registered on a central government register in accordance with MEES Regulation 36(2). Such registration would last for 5 years.

In the event that a Landlord does not comply with the MEES Regulations, they may be subject to civil penalties. The penalty payable will differ depending on how long the breach has lasted

and whether the building is residential or commercial. If the Landlord of a commercial building has been in breach for less than 3 months, the penalty will be 10% of the building's rateable value subject to a minimum of £5,000 and a maximum of £50,000. After three months the penalty rises to 20% with the minimum increasing to £10,000 and the maximum increasing to £150,000. For residential buildings the penalty will be a maximum of £2,000 for a breach of less than 3 months, rising to a maximum of £4,000 where a breach exceeds 3 months. An additional penalty of up to £1,000 may be imposed where a residential Landlord has provided false information and a further penalty of up to £2,000 may be charged where such Landlord has failed to comply with a compliance notice. Residential Landlords are protected by a total cap of £5,000 per building. Finally, residential landlords can be subject to a 'publication' penalty with details of the breach being placed on a publically accessible part of the Private Rented Sector Exemptions Register.

Registered Providers are special (we all know that)

The regulations surrounding EPCs provide special rules for RPs. Subject to some very detailed provisions; a Private Registered Provider does not need to comply with the MEES Regulations for their shared ownership or social/ affordable residential rented stock. They're still caught when it comes to any commercial stock or any properties they are letting on market rents. And the exemption doesn't apply to non PRPs even if they are a subsidiary of a PRP

Get it in writing

When granting tenancies or leases Landlord's should consider including the following clauses:-

- A prohibition on the tenant against obtaining an EPC without the Landlord's consent. This will prevent an EPC with an adverse rating being obtained which supersedes the Landlord's current EPC which, as mentioned above, would otherwise be valid for 10 years.
- A right of entry to allow improvement works to be carried out
- A restriction preventing the Tenant from carrying out works which would impair the EPC rating.
- Service charge provisions which, to the extent possible, enable the landlord to recover the cost of required improvements.

The tiny print

This is one of a series of leaflets published by Devonshires' Real Estate & Projects Department aimed at our property owning clients. No action should be taken on the matters covered by this leaflet without taking specific legal advice.

Find out more

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