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HOUSING
COUNCIL

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CDC Temporary COVID-19 Residential Eviction Halt: Frequently Asked Questions

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About NMHC

Based in Washington, DC, the National Multifamily Housing Council (NMHC) is a national association representing the interests of the larger and most prominent apartment firms in the U.S. NMHC's members are the principal officers of firms engaged in all aspects of the apartment industry, including ownership, development, management and financing. NMHC advocates on behalf of rental housing, conducts apartment related research, encourages the exchange of strategic business information and promotes the desirability of apartment living. Nearly one-third of Americans rent their housing, and almost 15 percent live in an apartment (buildings with five or more units). For more information, contact NMHC at 202/974-2300, e-mail the Council at info@nmhc.org, or visit NMHC's Web site at www.nmhc.org.

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The information provided herein is general in nature and is not intended to be legal advice. It is designed to assist our members in understanding this issue area, but it is not intended to address specific circumstances or business situations. For specific legal advice, consult your attorney.

General Background

The Centers for Disease Control and Prevention (CDC) announced a [nationwide eviction moratorium](#) on Sept. 1, 2020, that will be in effect until Dec. 31, 2020.

Unlike the moratoriums under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), the order applies to all buildings, including single-family rentals — not just those that are federally related. The CDC characterizes this moratorium as a "temporary halt in residential evictions," which emphasizes that all eligible tenants who opt in to the protections must still pay rent in accordance with their lease, and may be subject to fees, penalties or interest for missing payments. (Eligibility and opt-in procedures will be detailed below.) The CDC order supersedes and preempts any moratorium on residential evictions that provides a lesser level of public-health protections (discussed more below).

Importantly, the moratorium is an "opt-in" for tenants who represent that they are eligible for the relief and complete and sign a [Declaration Form](#). Landlords must accept the form and may not pursue an eviction or possessory action and may not evict any person who completes the Declaration. The landlord is not required to and not expected to investigate the veracity of any of the claims made in the Declaration Form.

In general, this Declaration Form requires tenants to assert (under penalty of law for perjury) that they are incapable of paying their rent or are likely to become homeless if removed from the property, and they will pay as much rent as they can afford until Dec. 31, 2020, when the full balance of the arrearage may be due. Eligibility is income limited and requires the tenant to use "best efforts" to make timely, partial payments for duration of their need until Dec. 31.¹

The CDC has not released any additional guidance since Sept. 4, 2020. However, several states have or are working on implementation instructions. Michigan's state courts have already issued a [guidance on enforcement](#).

This document answers several key questions concerning the CDC order.

FOOTNOTES

¹ 85 Fed. Reg. 173, 55297.

Why Was the Order Enacted?

On Aug. 8, 2020, President Donald Trump issued an [Executive Order](#) that stated:

"The Secretary of Health and Human Services and the Director of CDC shall consider whether any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary to prevent the further spread of COVID-19 from one State or possession into any other State or possession."

The CDC's action on Sept. 1 is the implementation of this Executive Order.

Who Does the Order Impact?

- All landlords in multifamily properties and single-family rentals in jurisdictions where there is no lesser level of public health protections. This includes federally and non-federally related properties.

"Residential property" means any property leased for residential purposes, including any house, building, mobile home or land in a mobile home park, or similar dwelling leased for residential purposes, but shall not include any hotel, motel, or other guest house rented to a temporary guest or seasonal tenant as defined under the laws of the State, territorial, tribal, or local jurisdiction."²

- Eligible tenants who make the required assertions in the provided [Declaration Form](#). These declarations include:
 - The individual has used best efforts to obtain all available government assistance for rent or housing.
 - The individual either: (1) expects to earn no more than \$99,000 in annual income for Calendar Year 2020 (or no more than \$198,000 if filing a joint tax return); (2) was not required to report any income in 2019 to the U.S. Internal Revenue Service; or (3) received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the CARES Act.
 - The individual is unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a layoff or extraordinary out-of-pocket medical expenses.

FOOTNOTES

² 85 Fed Reg 173, 55293

- The individual is using best efforts to make timely partial payments that are as close to the full payment as the individual's circumstances may permit, taking into account other nondiscretionary expenses.
- Eviction would likely render the individual homeless — or force the individual to move into and live in close quarters in a new congregate or shared living setting — because the individual has no other available housing options.
- Applies to tenants who are already in arrears:
 - The representations in the tenant's [Declaration Form](#) states, "[I] further understand that at the end of this temporary halt on evictions ... my housing provider may require payment in full for all payments not made prior to and during the temporary halt."³

Are All Evictions Prohibited?

- No. The CDC order only applies to evictions of adult residents who have completed and returned [Declaration Form](#) to the landlord, owner or other person who has a right to have them evicted. Embedded within that document are assertions that the tenant is eligible for the relief, which generally are tied to income and hardship.
- Evictions unrelated to the non-payment of rent are still permitted without regard to the tenant's completion of the Declaration Form. For example, violating the terms of the lease and breaking the building rules.
- Note that the CDC order only applies in jurisdictions where it offers a greater level of public health protection than local rules.

How Do Tenants Avail Themselves of This Protection?

- Tenants need to provide the completed and executed [Declaration Form](#) to the landlord, owner or other person who has a right to have them evicted.
 - It is a best practice for the landlord to acknowledge receipt of the completed document upon receipt. Tenants are advised to seek written confirmation of receipt through certified mail or other means.⁴
 - It is a best practice for landlords to identify the proper person or office to whom the Declaration Form should be submitted.

FOOTNOTES

³ *Id.*, 55297

⁴ Elements of this FAQ that state "best practices" are not part of the official guidance provided by the CDC. They do not constitute legal advice or imply representation by Holland & Knight. They are solely practical tips for members of the public to consider in their own judgement.

- Each adult listed on the lease "should" complete a declaration.
 - The ability to avail oneself of the temporary halt to eviction is based on an individual's own declaration. It does not apply to all persons living in a particular unit who are listed on the lease.
 - The CDC order is unclear on the practicality of partial evictions from a residence. Instead, it put forth rather vague language that states that each adult listed on the lease, rental agreement or housing contract should complete the declaration.⁵
- Complicated lease arrangements and sublets are not discussed in the CDC order. However, the order makes clear that it applies to any "resident," which conceivably includes adults who do not appear on the lease or fit the legal description of tenant or lessee.
 - " 'Covered person' means any tenant, lessee, or resident of a residential property who provides to their landlord ..." ⁶

What Are the Landlord's Duties?

- Landlords may not evict (or cause the eviction of) a tenant who completes and submits an executed Declaration Form to them.
 - The actual definitional text states that the landlord may not remove or cause the removal of a tenant who completes the Declaration Form through Dec. 31, 2020.
 - "Under this Order, a landlord, owner of a residential property, or other person [3] with a legal right to pursue eviction or possessory action, shall not evict any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of the Order."⁷ " 'Evict' and 'Eviction' means any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a covered person from a residential property. This does not include foreclosure on a home mortgage."⁸
 - "Cause the removal of" is likely a litigable concept, considering that most evictions are not conducted by the landlord. Rather, they are executed by law enforcement.
 - A best practice and practical reading of the text suggests that a landlord should permit tenants to remain in the property if the tenants complete a Declaration Form.

FOOTNOTES

⁵ 85 Fed Reg 173, 55292.

⁶ *Id.* at 55293.

⁷ 85 Fed Reg 173, 55292

⁸ *Id.* at 55293

- There is no affirmative duty for the landlord to send the form to delinquent tenants.
 - It is a best practice for landlord to provide the attestation form to tenants who request it. This may also create opportunity for the landlord and tenant to come to agreement on partial payment in order to satisfy the "best effort" requirements of the Declaration Form to make "as close to the full payment as the individual's circumstances may permit."
- The CDC order implies that a landlord should accept partial payment if a tenant offers it. While the order does not require a landlord to accept partial payment, it may be a best practice to set up a system to do so in jurisdictions where the CDC order is in effect.
- It is very likely that pending cases must temporarily halt (until after Dec. 31) if the tenant submits the [Declaration Form](#) at any point during the proceedings. Because the standard of "evict" in the order includes "or cause the removal of a covered person," the landlord may still be liable for penalties if a court executes on an eviction action.

What Is the Impact of the Order on Existing Leases?

- The CDC order creates a deferral of eviction. It is not a rent forgiveness tool. All contractual terms relating to payment being due and associated late fees apply.
 - The order states that the landlord may require payment of any arrearage in full at the end of the order's effective date of Dec. 31, 2020.
- The order applies only to evictions related to non-payment of rent. All other justifications for eviction in the contract are permitted.
- Landlords may not evict (or cause the eviction of) a tenant who completes and submits an executed Declaration Form to them.

How Do I Know if This Order Applies to Me? How Do I Know if My Locality Is Exempt?

- The order provides no guidance with respect to the applicability. It says only that the order is not applicable in jurisdictions with a moratorium on residential evictions that provides the same or greater level of public-health protection.
- "The same or greater level of public-health protection," has few precedents for comparison based on the anomalous authorities used to create the order. "Public-health protection" is undefined.

How Does This Apply to Pending Eviction Actions? May Landlords Still File Orders?

- This Order likely applies to pending evictions if the conditions are met:
 - If the local jurisdiction does not offer "the same or greater level of public-health protection" and the tenant is eligible for the protection, and actually completes the Declaration Form.
- A tenant may complete and submit a Declaration Form at any time after Sept. 4, 2020, and that is likely enough to halt the execution of an eviction order and prevent the landlord from effectuating any issued eviction order.
 - The [FAQ from Michigan's state courts](#) punted on the exact question by saying that it will be up to a court to interpret "to remove or cause the removal of":
- "Q5: Can the court accept filings or can the landlord obtain a judgment to be executed when the moratorium lifts? A5: The order defines 'evict' and 'eviction' as 'any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a covered person from a residential property.' The language in the order — 'any action ... to remove or cause the removal of' — is a matter of judicial interpretation."

Who Enforces the Order?

- The U.S. Department of Justice (DOJ) will prosecute landlords who breach the order, in areas where the order is applicable (see discussion of preemption for more) with fines of up to \$500,000 and one year in prison.
- The order relief on the locality to "police" and coordinate (refer) cases to the DOJ of possible breaches.
- It is expected that a number of local courts in major metropolitan areas and states without moratoriums in effect will be issuing guidance in the coming weeks on how they will conduct court-ordered eviction proceedings and instructions on how they will "cooperate" with the DOJ.

Can the CDC Do This?

- Maybe. A challenge is very likely to surface in the coming months. Courts have traditionally not favored overreach of federal executive branch authority. However, landlords have an equally long and unpromising track record in challenging government rules that are expensive or uneconomical, such as rent control laws.
- Section 361 of the Public Health Service Act, 42 U.S. Code § 264 has been cited as justification for this activity. This is a completely novel use of authority that was originally used only to justify certain kinds of customs actions.

- "Regulations to control communicable diseases." "[The Surgeon General is authorized] to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary."

What Is the Interplay with Other Federal Moratoriums?

- The CARES Act eviction moratoria expired on July 25, 2020.
- Fannie Mae and Freddie Mac, the government-sponsored enterprises (GSEs), likely offer "greater protections" than the CDC order's scheme. Because the GSE moratoria are not conditioned upon a Declaration Form or its related attestations, it is likely to preempt the CDC order.
 - With the expiration of the CARES Act-related moratoria, the GSEs' current moratoria apply only to the multifamily buildings they have financed whose owners have availed themselves of a forbearance and only for such period of the forbearance, which can be up to 12 months. Importantly, the Fannie Mae and Freddie Mac guidelines prevent the collection of late fees for the duration of forbearance and eviction moratorium.
 - Other conditions of the GSEs' moratoria on multifamily housing include: flexibility to repay back rent over time and not in a lump sum; no late fees or penalties for non-payment of rent; and a minimum 30-day notice to vacate before recovering possession of the unit from the tenant.
 - [More details](#) are available on the Fannie Mae website.
 - In the single-family rental space, special rules may apply for Fannie Mae- and Freddie Mac-owned loans and real estate as well as Federal Housing Administration (FHA)-insured mortgages.
- There is no U.S. Department of Housing and Urban Development (HUD) policy that governs all of its related housing programs with respect to applicable eviction moratoria.
 - For federally subsidized housing, tenants who have income changes may be able to qualify for a reduced rent. If the tenants also meet the eligibility requirements for the CDC order and complete the Declaration Form, they are likely also able to be subject to the temporary eviction halt.

- For multifamily property owners with HUD financing (FHA or other) who have taken a forbearance on their obligations, tenants are protected for the period of the forbearance from eviction for non-payment of rent. Because the HUD protection is not conditioned upon a Declaration Form or its related attestations, it is likely to preempt the CDC order. Other conditions of HUD's moratoria on multifamily housing with forbearance plans in place for the borrower include: no late fees or penalties for non-payment of rent, as well as a minimum 30-day notice to vacate before recovering possession of the unit from the tenant. [More details on protection for renters](#) are available on the Consumer Financial Protection Bureau (CFPB) website.

Is There Federal Support for Expenses Related to the CDC Order?

- The CDC is not making any funds available for landlords. There is no current plan for a short-term lending facility for landlords related to the order.