

CDC Eviction Moratorium - Initial Analysis (September 4, 2020)

Overview

On Sept. 1, 2020, the Centers for Disease Control and Prevention issued an order entitled “Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19.” *See* 85 Fed.Reg. 55292 (Sept. 4, 2020). The order, which took effect upon publication in the Federal Register on Sept. 4, declares a national moratorium on certain residential evictions for nonpayment (of rent, as well as other fees or charges) under the authority of 42 C.F.R. § 70.2 (authorizing the CDC Director, upon a finding that state health authorities have not taken sufficient measures to prevent the spread of a communicable disease, to “take such measures to prevent such spread of the diseases as he/she deems reasonably necessary”). *See* 85 Fed.Reg. at 55293; *see also* 42 U.S.C. § 264.

The moratorium lasts through December 31, 2020. *See* 85 Fed.Reg. at 55296. It applies only when tenants present their landlords with a signed declaration, the required text of which appears as an attachment to the order. *See* 85 Fed.Reg. at 55293. To sign the declaration, a tenant must be able to meet five essential criteria:

- Expect to have income less than \$99,000 in 2020, or have received a stimulus check, or not have been required to report income to the IRS in 2019;
- be unable to pay full rent due to an income loss or “extraordinary” medical bills
- have used best efforts to obtain governmental rent assistance,
- be likely to become homeless or forced to “live in close quarters” in another residence if evicted, and
- promise to “make timely partial payments that are as close to the full payment as the individual’s circumstances may permit.”

See 85 Fed.Reg. at 55293.

Closer Look

Where does the order apply?

The CC order applies in every U.S. state and territory with reported cases of Covid-19, except for states, local territorial, or tribal areas that already have “a moratorium on residential evictions that provides the same or greater level of public health protection than the requirements listed in this Order.” 85 Fed.Reg. at 55294.

Thus American Samoa, having no reported cases of Covid-19, is clearly not covered “until such time as cases are reported.” 85 Fed.Reg. at 55294. Other U.S. jurisdictions having no eviction moratoria of their own are clearly covered.

For jurisdictions that do have their own eviction moratoria, it is unclear how CDC applicability would be determined. One possible interpretation is that some person or entity (perhaps the CDC, a court, or other official) would make a threshold determination of whether the local moratorium provides equal or better public health protection—in which case the local moratorium would apply and the CDC order would not. This interpretation is difficult to reconcile with the order’s statement that local protections in excess of the CDC order can coexist (“this Order does not preclude local authorities from imposing additional requirements that provide greater public-health protection and are more restrictive than the requirements in this Order”). 85 Fed.Reg. at 55294. In addition, this interpretation would presumably require the entity responsible for making these assessments to study each local moratorium (which are constantly expiring, being renewed, and being modified), compare the public health effects of each one to the CDC order, and issue an appropriate determination. Considering the need for prompt and immediate action as emphasized in the order, the CDC likely did not intend such a cumbersome and time-consuming process. See 85 Fed.Reg. at 55296 (“Considering the public-health emergency caused by COVID-19, it would be impracticable and contrary to the public health, and by extension the public interest, to delay the issuance and effective date of this Order.”).

Therefore, CDC order will likely be interpreted as establishing a “floor,” with local eviction moratoria able to afford equal or greater protection against eviction but irrelevant if they afford less protection.¹ This means the CDC order would be compared to local moratoria on a case-by-case basis, with the more protective provision applying (and the local provision taking precedence over the CDC order where the protections are equivalent).

What housing is covered?

The CDC order prohibits any “a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action” from evicting a covered person from “from any residential property” in a jurisdiction where the order applies. See 85 Fed.Reg. at 55296. The terms “landlord” and “owner” are not further defined. “Residential property” is defined to include “any property leased for residential purposes,” and goes on to specify the term includes “any house, building, mobile home or land in a mobile home park, or similar dwelling leased for residential purposes.” See 85 Fed.Reg. at 55293. However, the definition does “not include any hotel, motel, or other guest house rented to a temporary guest or seasonal tenant” as defined under state law. See 85 Fed.Reg. at 55293.

Therefore, the order clearly applies to all standard rental housing, whether publicly or privately operated. Persons leasing rooms in residential motels and other marginal housing situations may not be covered, however—though coverage of such properties will depend heavily on state law (particularly how a “temporary guest or seasonal tenant” might be distinguished from an ordinary tenant).

¹ Though the order uses the term “public-health protection,” this term appears synonymous with protection from eviction in this context because the threat to public health under discussion is the anticipated spread of Covid-19 that residential evictions would cause. See 85 Fed.Reg. at 55294.

What types of evictions are prohibited?

There are two key limitations on the types of evictions prevented by the order. First, the order prohibits only the eviction of “covered persons.” See 85 Fed.Reg. at 55296. To be a covered person, a tenant must sign a form declaration and provide a copy to the lessor, and only those meeting certain need-based criteria and agreeing to make partial payments and seek government rental assistance may properly sign the declaration (see below for more detail). See 85 Fed.Reg. at 55293.

Second, the order lists five categories of evictions that it does not preclude:

“Nothing in this Order precludes evictions based on a tenant, lessee, or resident: (1) engaging in criminal activity while on the premises; (2) threatening the health or safety of other residents; (3) damaging or posing an immediate and significant risk of damage to property; (4) violating any applicable building code, health ordinance, or similar regulation relating to health and safety; or (5) violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment (including non-payment or late payment of fees, penalties, or interest).”

See 85 Fed.Reg. at 55294.

Accordingly, advocates should argue that the order prohibits any eviction (of a covered person) not falling into the five exempted categories. This interpretation would at least block all evictions (of covered persons) for nonpayment of rent, lease expiration/no cause, and any other evictions unrelated to a tenant’s lease violation.

The text does not explicitly provide that the included list of permissible grounds for eviction is exclusive, however, and a landlord theoretically could seek to terminate a tenancy for a non-enumerated reason unrelated to nonpayment of rent. An example could be a landlord’s desire to renovate or change the use of the premises, or perhaps a personal grudge or personality conflict with the tenant. In such a case, it is noteworthy that each of the five enumerated exceptions requires some form of misconduct or lease infraction (other than non-payment of rent) by the tenant. See 85 Fed.Reg. at 55294. This suggests that, if allowed at all, any non-enumerated ground for eviction would similarly need to involve tenant misconduct or a lease violation (other than nonpayment of rent or charges). See *Beecham v. United States*, 511 U.S. 368, 371 (1994) (“That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.”); see also *U.S. v. Williams*, 553 U.S. 285, 294 (2008) (“common sense canon of *noscitur a sociis* ... counsels that a word is given more precise content by the neighboring words with which it is associated”).

Some leases expressly obligate a tenant to vacate upon expiration of the lease term. Such a provision could enable a housing providers to contend that a tenant’s failure to vacate upon lease expiration amounts to a lease violation authorizing eviction for violation of an “other contractual obligation.” See 85 Fed.Reg. at 55294. Yet requiring a tenant to vacate the premises in order to avoid eviction for having failed to vacate would be an absurd result, hence courts will likely reject that interpretation. See, e.g. *Haggard Co. v. Helvering*, 308 U.S. 389, 394 (1940) (“All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be

given a reasonable application consistent with their words and with the legislative purpose.”). Such a construction would also run contrary to the public health purpose of the order. See 85 Fed.Reg. at 55294 (“Evicted renters must move, which leads to multiple outcomes that increase the risk of COVID–19 spread.”). Instead, courts will likely read the provision authorizing eviction for violations of “other contractual obligations” to mean contractual obligations existing *during the term of the lease*—not vacating upon lease expiration. See 85 Fed.Reg. at 55294; see also *Haggar Co.* at 394.

Who is a “covered person?”

To be a “covered person” entitled to the protection of the order, one must be a “tenant, lessee, or resident of a residential property” and provide a required declaration, sworn under penalty of perjury, to the landlord. See 85 Fed.Reg. at 55293. The order includes, as an attachment, a form declaration for tenants to use—though the order also makes clear that tenants may use a different form so long as the required contents are present and the declaration is sworn under penalty of perjury. See 85 Fed.Reg. at 55292 (“To invoke the CDC’s order these persons must provide an executed copy of the Declaration form (or a similar declaration under penalty of perjury) to their landlord..”), 55297 (form declaration). Both the preamble to the form and the supplementary information accompanying the order state that “[e]ach adult listed on the lease, rental agreement, or housing contract should complete this declaration,” though again, it is unclear what the effect of having fewer than all listed adults sign the declaration would be. See 85 Fed.Reg. at 55292, 55297.

The contents of the declaration, which essentially function as eligibility criteria for the protection of the CDC order, are as follows (from the form declaration at 85 Fed.Reg. 55297):

- I have used best efforts to obtain all available government assistance for rent or housing

“Available governmental assistance” is a term of art in the order, which means “any governmental rental or housing payment benefits available to the individual or any household member.” See 85 Fed.Reg. at 55293. The wording of the form declaration is unfortunate here, being in the past tense—this suggests a tenant who may have failed to apply for rental assistance grants previously available might be reluctant to sign the affidavit. However, any tenant with any passable reason for not having applied (e.g., unaware of the funds, did not qualify, funds ran out before tenant could apply, tenant was not delinquent at the time the funds were available, etc.) should still be able to claim “best efforts.” Moreover, a tenant can scarcely be expected to have foreseen prior to the CDC order that a failure to apply for assistance funds would deny that tenant protection under a future CDC order. Therefore, even if the tenant may have failed to make best efforts to apply for assistance funds in the past, a tenant could still credibly make the declaration by undertaking in the present a best effort to investigate and apply for any funds presently available before signing. Note the definition only applies to governmental benefits so does not require the tenant to have investigated all private sources of assistance.

- I either expect 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), was not required to report any income in 2019 to the U.S. Internal Revenue Service, or received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the CARES Act.

The key here seems to be that these are three alternative ways of qualifying for protection. That is, a tenant may have income less than \$99,000 (or \$198,000 together with spouse if married and filing jointly) or have not been required to report income in 2019 or have received a stimulus check.

As has been well-reported in the media, many individuals eligible for stimulus checks did not receive them in a timely manner—and some have not received them at all.² Advocates should assert that a tenant qualifies for protection under the stimulus check prong if the tenant was eligible to receive a stimulus check, whether or not the funds were ever actually received.

- I am unable to pay my full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, lay-offs, or extraordinary out-of-pocket medical expenses.

Note that there is no requirement here of demonstrating a link between income loss and Covid-19. The order defines “extraordinary” medical expenses as “unreimbursed medical expense likely to exceed 7.5% of one’s adjusted gross income for the year.” 85 Fed.Reg. at 55297 (fn 38). The order imposes no obligation to supply documentation of any income loss or medical expenses.

- I am 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.

The hilarious ambiguity of this partial payment requirement is destined to become an engine of controversy in many situations. Presumably a tenant who calculates, in good faith, a reasonable partial payment she can afford and tenders those funds complies with the obligation—even if the landlord thinks the tenant could have afforded more. No provision in the order purports to allow a landlord to proceed with eviction of a tenant who fails to make partial payments—let alone partial payments the landlord considers insufficient. The order and form declaration both ensure tenants understand the “declaration is sworn testimony, meaning that [a tenant] can be prosecuted, go to jail, or pay a fine if [they] lie, mislead, or omit important information.” 85 Fed.Reg. at 55297. This suggests the intended consequence for a false declaration is prosecution for perjury—not eviction.

Nevertheless, landlords challenging the veracity of a tenant’s declaration may gain traction in eviction courts if able to present evidence that a declaration was made in bad faith or with fraudulent intent. Thus, tenants should avoid making unreasonably low partial payments (based on their ability to pay) and should use discretion in sharing information about their available resources with landlords or publicly that might be used to question the amount of their payments or the integrity of other declaration contents.

² See, e.g., Lorie Konish, “Still waiting on stimulus check money? IRS urges you to take action before these two deadlines,” CNBC (Aug. 17, 2020), on-line at: <https://www.cnbc.com/2020/08/17/missing-1200-stimulus-checks-irs-urges-action-before-these-deadlines.html>, last visited Sept. 4, 2020.

- If evicted I would likely become homeless, need to move into a homeless shelter, or need to move into a new residence shared by other people who live in close quarters because I have no other available housing options.

The order defines “[a]vailable housing” as essentially meaning decent and affordable housing that is presently available to the tenant. See 85 Fed.Reg. at 55293 (“any available, unoccupied residential property, or other space for occupancy in any seasonal or temporary housing, that would not violate Federal, State, or local occupancy standards and that would not result in an overall increase of housing cost to you.”). Hence, a tenant need not be willing to accept any housing irrespective of price or condition as an alternative to becoming homeless.

- I understand that I must still pay rent or make a housing payment, and comply with other obligations that I may have under my tenancy, lease agreement, or similar contract. I further understand that fees, penalties, or interest for not paying rent or making a housing payment on time as required by my tenancy, lease agreement, or similar contract may still be charged or collected.

Unlike the CARES Act moratorium did,³ the CDC order provides no relief from late fees and related charges—except that the tenant may not be evicted for nonpayment of those amounts. See 85 Fed.Reg. at 55294. This could be one area where state and local protections commonly exceed the CDC minimum.⁴

- I further understand that at the end of this temporary halt on evictions on December 31, 2020, my housing provider may require payment in full for all payments not made prior to and during the temporary halt and failure to pay may make me subject to eviction pursuant to State and local laws.

Advocates may wish to evaluate how this statement interacts with any rights or protections under state and local laws—particularly provisions of state landlord-tenant acts that may provide non-waivable rights likely unaffected by the CDC order.

- I understand that any false or misleading statements or omissions may result in criminal and civil actions for fines, penalties, damages, or imprisonment;

The form affidavit is big on intimidating language.

- Declarant must certify the truth and correctness of the contents “under penalty of perjury, pursuant to 28 U.S.C. 1746.”

The form affidavit is big on intimidating language, as may have been previously mentioned.

³ See 15 U.S.C. § 9058(b)(2).

⁴ Note that preserving the landlord’s right to collect late fees and other charges authorized by the lease may help the order avoid a takings challenge.

Which stages of the eviction process does the order block?

The order prohibits a landlord from “evict[ing]” a covered person from residential rental property. See 85 Fed.Reg. at 55296. “‘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.” 85 Fed.Reg. at 55293. Hence the CDC order appears to reach all phases of the eviction process (issuance of notices to vacate, filing unlawful detainer actions, holding hearings, entering judgments for possession and writs of restitution, physical execution of writ). CDC officials appeared to confirm this to *New York Times* columnist Rob Lieberman shortly after the order was released.⁵

Consistent with this interpretation, under the order a covered person likely cannot be holding over on premises until after Dec. 31, 2020. Therefore, any non-exempt eviction case filed or pending before Jan. 1, 2021, would presumably (depending on state law) be premature and subject to dismissal, and any eviction notice directing the tenant to vacate sooner than Dec. 31, 2020, would be ineffective.

Since the prohibition applies to landlords and not to government officials, the CDC order might not stop a physical eviction from being carried out where the writ has already been issued to the sheriff in a jurisdiction where no further action is required by the landlord to facilitate execution. Arguably, an “actions” such as providing keys or contracting with laborers might violate the order—though whether such a violation would establish grounds for stopping the eviction (and through what procedural vehicle) is difficult to assess. Reportedly, at least some courts have reportedly already signaled an intention to construe the CDC order as stopping the execution of eviction writs.

The order’s definition of “eviction” likely also reaches at least some, if not all, conduct such as threats, intimidation, misinformation, or self-help measures taken to remove a tenant. While state landlord-tenant laws generally already provide superior civil remedies for lockouts and other extrajudicial eviction practices, the significant criminal penalties available under the CDC order may pose a more powerful deterrent against such practices—or enable a truly far-reaching remedy for egregious violators. Note that the order may be enforced by certain state and local authorities as well as federal. See 85 Fed.Reg. at 55296 (“This Order shall be enforced by Federal authorities and cooperating State and local authorities through the provisions of 18 U.S.C. 3559, 3571; 42 U.S.C. 243, 268, 271; and 42 CFR 70.18.”).

⁵ See Ron Lieberman, “*The New Eviction Moratorium: What You Need to Know*,” *NY Times* (Sept. 2, 2020) (“Does the order halt evictions that are already in process? Yes, according to administration officials.”), on-line at: <https://www.nytimes.com/2020/09/02/your-money/eviction-moratorium-covid.html?referringSource=articleShare>, last visited Sept. 4, 2020