



Regarding the Extended CDC Eviction Moratorium

On December 27, 2020, the new Covid-19 stimulus package (Consolidated Appropriations Act, 2021) was signed into law. Section 502 of the stimulus package extends the residential eviction halt order, initially imposed by the Centers for Disease Control and Prevention on Sept. 1, 2020,¹ by one month (from its original planned expiration date of December 31, 2020). The complete text of the provision is as follows:

SEC. 502. EXTENSION OF EVICTION MORATORIUM.

The order issued by the Centers for Disease Control and Prevention under section 361 of the Public Health Service Act (42 U.S.C. 264), entitled “Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID–19” (85 Fed. Reg. 55292 (September 4, 2020)) is extended through January 31, 2021, notwithstanding the effective dates specified in such Order.

Following the passage of the stimulus bill, the CDC issued a new form declaration to replace the one that originally accompanied the halt order; the new form is now available on the CDC’s website at: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/declaration-form.pdf>

The CDC also updated its FAQ document regarding the eviction halt order, available at: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/eviction-moratoria-order-faqs.pdf>

A number of questions have already arisen around the extended eviction halt order. Here are some answers to these initial questions and some additional thoughts from reviewing the new materials.

Although any tenant signing a CDC form declaration for the first time should presumably use the updated form, there does not appear to be any need or requirement for a tenant who already signed and provided a copy of the original CDC form declaration to sign and provide a copy of the new form. While the updated FAQ document does not specifically address this, the FAQ does reiterate that a “covered person” is someone who makes, under penalty of perjury, the five key statements related to (i) having used best efforts to obtain governmental rental assistance, (ii) meeting the income limit for the CDC halt order, (iii) being unable to pay full rent due to substantial household income loss or extraordinary medical expenses, (iv) making partial payments of as much as they can afford, and (v) likely becoming homeless or forced to live in close quarters if evicted. See Updated FAQ at p. 2. The declaration must also “include a statement that the covered person understands that they could be liable for perjury for any false or misleading statements or omissions in the declaration.” Updated FAQ at p. 3.

¹ See 85 Fed.Reg. 55292 (Sept. 4, 2020).

Notably, the Updated FAQ omits certain additional statements required both by the form declarations (original and updated) as well as by the original halt order itself, pertaining to the tenant's obligation to comply with lease terms, the temporary nature of the halt order, and its expiration date.² Presumably, some version of the additional material may need to have been included in whatever declaration the tenant has signed, but the Updated FAQ strongly implies that a tenant would not lose covered person status simply because the additional contents still reflect the December 31, 2020, expiration date.

The CDC has provided an updated form declaration in Spanish at:

<https://www.cdc.gov/coronavirus/2019-ncov/downloads/declaration-form-es.pdf>

It is unknown whether CDC intends to provide the updated form in any other languages or, if so, when those additional forms might be available. Note the Spanish-language form is entirely in Spanish, not a dual-language form as is generally preferable.

There are no apparent differences in the substantive protections afforded under the extended eviction halt order—meaning, of course, that the same loopholes and shortcomings are also present. Among the largest remaining questions under the original halt order was whether the protection did indeed prevent evictions based on mere lease expiration or “no cause” notices, or were limited to the enumerated lease violations in the halt order.³ The Updated FAQ does not further clarify this issue, implying in one provision that the permissible grounds for eviction are limited to the grounds enumerated in the original order (all of which being lease violations other than nonpayment of rent or charges),⁴ yet continuing to

² See, e.g., 85 Fed.Reg. at 55297 (also requiring a declarant to state: “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[,]” that “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[,]” and that “I understand that any false or misleading statements or omissions may result in criminal and civil actions for fines, penalties, damages, or imprisonment.”).

³ See 85 Fed. Reg. at 55294 (“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; [10] (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).”).

⁴ See Updated FAQ at pp. 4-5 (“Can I still be evicted for reasons other than not paying full rent? Yes, you may still be evicted for reasons other than not paying full rent or making a full housing payment. The Order does not prevent you from being evicted for (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 of a tenant's lease, other than the timely payment of rent or similar housing-related payment (including nonpayment or late payment of any fees, penalties, or interest). Individuals who are confirmed to have, have been exposed to, or might have COVID-19 and take reasonable precautions to not spread the disease should not be evicted on the ground that they may pose a health or safety threat to other residents. Individuals who might have COVID-19 are advised to self-isolate except to get medical care. See What to Do If You Are Sick, available at <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html>. You may have additional protections against evictions under laws in your state.”).

state in multiple other provisions that the purpose and effect of the halt order is to prohibit “residential evictions of covered persons for nonpayment of rent.”⁵

One difference that does exist between the original declaration form and the new form pertains to the income limit, which was up to \$99,000 per person (\$198,000 or married persons filing a joint tax return) in calendar year 2020, now applies to “calendar year 2020-2021.” The meaning of this term is not further clarified, but suggests that a tenant who earned more than \$99,000 in 2020 could meet the income prong if that tenant does not expect to earn more than \$99,000 in 2021. This could prove a significant benefit to tenants who lost high-paying jobs or successful businesses during the pandemic and have not regained those income levels.

Another difference from the original declaration form to the updated version is a provision, oddly worded as a notice to the declarant yet appearing in the declaration form nonetheless, which states as follows:

Even if you have provided a declaration to your landlord, the Order does not prevent your landlord from seeking a hearing, if authorized by State or local law and in accordance with State or local court procedure, to challenge the truthfulness of your declaration.

This is, of course, consistent with the position CDC asserted in its original FAQ document, that a landlord could bring such a challenge if “the landlord does not believe the tenant actually qualifies” as a covered person. See Updated FAQ at p. 6. This language is also reconcilable with the text of the original halt order defining “eviction” as taking any action to remove a covered person,⁶ since any such challenge would necessarily be predicated on a contention that the tenant is not, in fact, a covered person. Courts should follow state law equivalents to Federal Rule of Civil Procedure 11 (as well as, for lawyers, state equivalents to ABA Model Rule of Professional Conduct 3.1) to ensure that no such challenges are brought without at least a good faith basis for disputing a tenant’s covered person status.

Unfortunately, the Updated FAQ continues to state that the halt order “is not intended to terminate or suspend the operations of any state or local court. Nor is it intended to prevent landlords from starting eviction proceedings, provided that the actual eviction of a covered person for non-payment of rent does NOT take place during the period of the Order.” Updated FAQ at 1.

The CDC reports that there are now reported Covid-19 cases in American Samoa, hence the order is applicable there as well. See Updated FAQ at p. 4.

Finally, and perhaps the most significantly, that Congress has itself extended the CDC eviction halt order should resolve any remaining question as to whether the CDC had the authority to halt evictions in the first place. Even if CDC did not originally possess that authority, Congress ratified the CDC order by explicitly recognizing and approving it. See, e.g., *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 149 (1937) (“We are of opinion that the act of 1936 and the Commission's order render moot the constitutional questions sought to be raised by the appellant even though we assume, without deciding,

⁵ See Updated FAQ at pp. 1, 4, 6-7.

⁶ See 95 Fed.Reg. at 55293 (““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.”).

that the Secretary of Commerce had no power to issue the order of November 18, 1935.”). This should dispose of the promising argument for the challengers in the various lawsuits challenging the CDC halt order, even if those suits remain pending due to various constitutional claims (such as interference with access to court or takings claims) that have been repeatedly rejected.⁷ This also means the Biden administration should have clearer authority to further extend the CDC order, if necessary.

⁷ See, e.g., *Brown v. Azar*, No. 1:20-CV-03702-JPB, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020); see also *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148 (S.D.N.Y. 2020); *Baptiste v. Kennealy*, No. 1:20-CV-11335-MLW, 2020 WL 5751572 (D. Mass. Sept. 25, 2020); *Auracle Homes, LLC v. Lamont*, No. 3:20-CV-00829 (VAB), 2020 WL 4558682 (D. Conn. Aug. 7, 2020); *HAPCO v. City of Philadelphia*, No. CV 20-3300, 2020 WL 5095496 (E.D. Pa. Aug. 28, 2020); *Apartment Ass'n of Los Angeles Cty., Inc. v. Los Angeles*, No. CV2005193DDPJEMX, 2020 WL 6700568 (C.D. Cal. Nov. 13, 2020).