

RD Issues a ‘HUD Light’ Version of Residents’ Post CARES Act Protections

Rural Development (RD) issued an email to its multi-family partners on July 20 informing them about three new or updated questions and answers on the impact of the CARES Act’s resident protections that expired on July 25. The release applies to all RD rental housing including the Section 515 and 538 rental programs, the Section 514 and 516 farmlabor programs, and the RD Voucher program. Unfortunately, as noted later, the protections extended to RD residents under this email are substantially weaker than the protections extended to residents of HUD multi-family housing.

Specifically, the RD questions and answers state that

- the moratoriums on late fees and evictions, which expired on July 25, 2020, prohibits owners from seeking to recoup late fees that could have accrued during the moratoriums and that such fees may only be assessed prospectively when August rent payments are not made on a timely basis;¹
- RD will continue to accept requests for 90-day mortgage payment moratoriums from owners that have previously not requested a moratorium as long as the National Emergency is in place or December 31, 2020.³
- the resident rent payment and eviction moratoriums remains in place for as long as an owner has a 90-day moratorium on mortgage payments from RD or a private, Section 538, lender. Thus, if an owner has a payment moratorium for June, July and August, no late payments may accrue or evictions commenced for nonpayment of rent until September 1;²
- state and local jurisdictions may have adopted their own moratoria on payments and evictions and that owners must follow those restrictions;
- owners should work with tenants and assist them in maintaining their housing by conducting interim recertifications⁴ even if a resident’s income has already been recertified before on an interim basis; further, it urges owners to be flexible in verifying income by accepting information by phone or email and to accommodate residents when income cannot be verified because businesses have closed;

¹ Under RD regulations late fees cannot be assessed until 10 days after the rent is due and the late fee may not exceed \$10 or 5% of the tenant’s rent contribution whichever is higher. 7 C.F.R. § 3560.209(b)(2).

² Note that the prohibition on late fees for nonpayment ends when the owner begins to make full mortgage payments and not when the owner has paid off the accrued mortgage payment arrearage. The notice is also not clear whether the 30-day notice to vacate in non-payment cases applies to mortgage payment moratoriums extended after the CARES Act moratorium period.

³ It is not clear from the RD communication whether the deadline applies to the earlier or later of the two dates, but it likely is intended to track the CARES Act timeline, which uses the earlier of the two dates. It states that RD has processed over 4,000 deferrals, which covers about 25% of all Section 515 and 514/516 developments.

⁴ RD regulations require owners to recertify residents’ incomes when a resident household has experienced a

- RD has suspended additional income and expense verifications requirements for residents that report zero income. *See*, Attachment 6-B to RD Handbook 2-3560;
- persons who have lost income due to COVID-19 need not have their interim income annualized because it is temporary; however, RD states that rent should be based on current income;
- owners should enter into payment plans with residents to deal with past due balances.

Unfortunately, the new notice does not protect RD residents to the same extent that HUD has protected residents living in HUD financed multi-family housing.⁵ Specifically,

- it makes no distinction between the rights of deeply subsidized residents living in Section 515 or 514/516 housing and those living in RD Section 538 unsubsidized housing.
 - HUD has stated that residents living in non-assisted developments cannot be charged late fees for as long as an owner who has secured forbearance on mortgage payments has not repaid all arrearages that accrued under the HUD payment moratorium. Moreover, it requires such owners to send tenants a 30-day notice to vacate if the tenant is being evicted for nonpayment of rent. RD does not extend the same rights to residents of Section 538 housing.⁶
- it also makes no distinctions between residents in Section 515 and 514/516 housing who receive Rental Assistance and those that do not.
 - HUD has exempted residents living in assisted developments (i.e. Section 202, Section 811, and developments with Project-Based Section 8 Assistance) from continuing to receive an eviction moratorium because all of these residents can have their incomes recertified and their rents adjusted so that they do not pay more than 30% of income for shelter. About 30 percent of residents living in Section 515 housing do not receive Rental Assistance and cannot have their rents adjusted if they go below the project's minimum rent. Thus, these residents are likely to experience rent overburden and face eviction even if the owner has an outstanding debt to RD as a result of the agency's mortgage payment moratorium.
- it does not require owners to post or distribute any information to residents about their post-CARES Act moratorium rights, making it practically impossible for them to exercise these rights or enforce owners' obligations.⁷ This is particularly egregious

⁵ On July 1, 2020, HUD published a detailed six page notice which sets out residents' rights and owners obligations after the expiration of the CARES Act payment and eviction moratoriums. HUD, Notice H 2020-07 (July 1, 2020) (available at <https://www.hud.gov/sites/dfiles/OCHCO/documents/20-07hsgn.pdf.pdf>).

⁶ RD has advised NHLP that it has not received any forbearance requests from Section 538 owners. It is not clear, however, that Section 538 lenders have any obligation to forward forbearance requests to RD when the property is not also secured with a Section 515 loan or when the request is for a 90-day forbearance period under the CARES Act. Moreover, RD has advised NHLP that mortgage payment arrearages are do not become due or payment until the end of the loan term. Unfortunately, it is not clear when RD has decided to treat arrearages in that way and it is not clear that it is consistent with RD regulations.

⁷ As of July 26, this information does not even appear on RD's COVID-19 website.

<https://www.rd.usda.gov/coronavirus>. RD has, however, advised NHLP that it will be posted within the next several days.

- because there is no way for residents to determine whether an owner has secured a moratorium on mortgage payments.
- HUD has required all owners who are under a forbearance agreement to notify residents that they are protected against evictions for non-payment during the forbearance period.⁸
 - it does not state how repayment plans should be structured or that they have to be reasonable.
 - HUD prohibits landlords from requiring residents to make lump sum payments of rent arrearages and urges that repayment plans be reasonable as determined by the owner. The RD email does neither.
 - it does not remind owners that the CARES Act requires that they issue a 30-day eviction notice before they can commence an eviction action for failure to pay rent arrearages that accrued during the payment moratorium.
 - HUD's notice advises owners of the 30-day eviction notice requirement in the CARES Act and extends its applicability to non-assisted owners who receive a mortgage payment moratorium until they have repaid all arrearages on their mortgage payments.

RD's email also does not state whether it has sent letters to inform RD Voucher holders, who no longer live in RD financed housing and whose subsidy cannot be adjusted for loss of income, of their post CARES Act moratorium rights. RD previously sent them a letter about the CARES Act payment and eviction moratoriums. It has not announced whether it did the same prior to their expiration.⁹

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⁸ RD has advised NHLP that it asked owners to post notices regarding tenants' rights during and after the CARES Act's late payment and eviction moratoriums. Asking owners to post materials is different from requiring owners to post the information.

⁹ Advocates should be aware that on July 25, RD has advised NHLP that it will not terminate RD voucher holders' vouchers upon eviction for nonpayment of rent. Instead, it will send voucher holders a notice advising them that they have a right to move to other housing with an RD voucher.