



COVID-19 FAQs FOR HOUSING PROVIDERS

1. PROPERTY MANAGEMENT ISSUES (NAR also recommends REALTORS® visit the Institute of Real Estate Management website at <https://www.irem.org/learning/coronavirus> for more information.)

a. The economy is reopening. How should housing providers respond?

Maybe the economy is reopening, but housing never closed. Indeed, the basic strategy from government authorities for the last six weeks has been to “shelter at home.” In other words, staying home has been our national response to COVID-19. In the absence of a vaccine, reliable medical treatment, or adequate testing/contact tracing/isolation, it is likely that, at least to some extent, the virus will spread more quickly as the economy reopens than it has in recent weeks. That means that it is more – not less – likely that the virus will circulate at rental properties. If so, housing providers need to maintain and, if necessary, increase the steps they have already taken to minimize the spread of the COVID-19 virus at their properties, even as the rest of the economy begins to reopen.

b. The governor wants to “liberate” the state. Do I have to “liberate” my property too?

Over the last six weeks, many government authorities adopted rules to strictly enforce social distancing, including closing businesses. Those policies gave owners and managers implied authority to adopt similar restrictions at their properties. As governments begin to lift those restrictions, some residents will press to lift restrictions imposed by housing providers. There are good reasons to keep restrictions in place, however. First, as noted above, if residents return to work and become exposed to the virus, there is more reason than ever to take steps to prevent them from exposing the virus to other residents. Also, the housing belongs to its owner, not the residents, and in most jurisdictions, owners retain broad control over the use and operation of their properties. Finally, in most jurisdictions, civil authorities themselves are lifting restrictions in phases, hoping to prevent new disease flare-ups, and housing providers are justified in using similar caution in removing their own precautions. Just because civil authorities lift restrictions doesn’t mean housing providers are required to do likewise.

c. Social distancing

i. What are the best practices for encouraging social distancing?

Social distancing remains the best method to slow the spread of the COVID-19 virus. Managing social distancing will vary from property to property. The solutions will be different for a high-rise, elevator-serviced apartment in an urban setting from a garden-style property in a suburban location. But some common themes apply to everyone:

1. To the maximum extent possible, housing providers should continue to restrict access to common and public areas. The virus spreads through social contact, and common and public areas are the most likely place in your property for those contacts to take place. Until effective prevention or treatment is available, housing providers should continue to restrict access to common and public areas. Encourage your residents to use common and public areas like lobbies as briefly as possible and to treat them as places for transit only and not as places for socializing. Some owners have removed furniture from lobbies to discourage residents from lingering there. Social spaces, such as community rooms and game rooms, should stay closed. Continue to restrict deliveries and, where possible, visits from non-residents.

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That's easier said than done. In response to resident requests and improving weather conditions, some owners are experimenting with methods to relieve restrictions on common and public area. This could include limiting the number of persons who can occupy a space, or assigning appointment times for use of picnic, playground and similar areas. The problem is "social creep" – once areas are opened, residents will want to use them, and it will be very difficult to enforce any remaining restrictions. If it is okay to have six people in a grill area, why not 8 or 10? In a lot of respects, a flat prohibition on use is a much easier policy to enforce than relaxed restrictions that rely on residents policing themselves.

2. Should all public and common areas be treated alike? Yes: In particular, housing providers need to be aware that facilities that are used frequently by children – for example, recreational areas, playgrounds, and tennis and basketball courts – must be treated like any other common/public areas. Otherwise, imposing additional restrictions on facilities predominantly used by children (compared to those areas used by adult residents) may lead to charges of violations of the prohibitions of the Fair Housing Act ("FHAct") against discrimination based on familial status.

d. Communications with residents

i. What is the best policy for communications with residents?

If they have not done so already, housing providers should communicate frequently with residents, providing them with regular updates about the steps they are taking to maintain a healthy environment. Signs and posters should be placed around the property to encourage personal hygiene (wash your hands!) and other steps individual tenants can take to make themselves and the property safer. Examples are available on the CDC website ([cdc.gov](https://www.cdc.gov)). If they have not done so already, housing providers should explain to residents that the COVID-19 virus is still spreading rapidly through the population and that they should assume that other people – including other residents at the property – may be carrying the virus and take appropriate precautions. Residents should be reminded that if everyone takes precautions to protect themselves from the virus, it will improve the health prospect of all residents.

ii. What should I do if I learn that a resident or staff person has tested positive for the COVID-19 virus?

First, do not respond to rumor or gossip. A verbal report from one tenant that another tenant is sick or has suspicious symptoms is not sufficiently reliable to take action.

The situation is different if a housing provider receives a reliable statement from a tenant that he/she has tested positive, or a similar report from a public health official. Although the law varies greatly from place to place, as a general matter, a landlord has a duty to warn tenants of known hazards at their property. While there is no case law specifically with respect to COVID-19, reliable information that someone at the property has tested positive for the virus could be deemed to constitute knowledge of a hazard that should be shared with other tenants. At a minimum, disclosing that information will encourage other tenants to redouble their efforts to avoid the virus, which will make the housing provider's job easier. But, as discussed below, you should not disclose specific resident or employee names or information. Better to communicate the issue generally and steps taken to protect residents and staff so they are not exposed. Both HUD and the CDC have advised that housing providers can inform residents that a staff member or another resident has tested positive for the virus.

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Be aware, however, that some local public health agencies have urged housing providers not to disclose this information, largely to protect the privacy interests of persons who test positive. Before notifying other residents, even generally, that someone at the property has tested positive, you should try to determine if your local public health agency has published guidance.

iii. If I decide to disclose that someone at the property has tested positive, can I disclose who that person is?

No: Medical information is subject to a variety of state and federal privacy protections, and providing personally identifying information about someone who has tested positive would likely violate these principles. And employees may also be protected under privacy and labor laws. Given the widespread presence of the virus and the many asymptomatic people who may be spreading the virus, information that a particular person has the virus may not provide really useful information. As a practical matter, it also may create issues for that resident or employee that will only complicate dealing with other residents: disclosing this information would make it much less likely that another person who tests positive would disclose that information to you. Housing providers should politely discourage any request to share personally identifying information about a person who tests positive, explaining that they treat all residents' privacy seriously and reminding residents that if they tested positive, they would want the housing provider to treat their personal health information similarly.

e. A resident has tested positive for the COVID-19 virus. Can I ask them to vacate their unit or evict them?

Except in extraordinary cases, no: HUD guidance is that in most cases, persons who have tested positive can successfully isolate themselves in their unit until they recover. If a person who has tested positive for COVID-19 refuses to self-isolate, however, housing provider should consider taking additional action. Housing providers should check with their legal counsel to determine whether their lease form and applicable landlord/tenant law allows additional action against non-compliant tenants. While it does not expressly discuss grounds for eviction, the FHAct does not protect persons from discrimination claims who present a "direct threat" to the health or safety of others. Conceivably, someone who fails to comply with direction to self-isolate may present such a direct threat. But courts advise that each "direct threat" claims must be based on an "individualized assessment" of the specific facts of each case, including whether some action less than eviction may persuade the person who has tested positive to follow self-isolation guidance. In serious cases, it may be appropriate to seek advice from local public health or law enforcement officials.

f. Cleaning

i. What additional cleaning procedures should housing providers adopt?

Since the beginning of the pandemic, the CDC has urged constant cleaning and disinfecting of public spaces. In a multifamily housing property, this will include disinfecting door handles, counter surfaces, elevator buttons, handrails, light switches, and laundry rooms, including controls for washers and dryers. Making extra efforts to clean and disinfect the property is probably the most visible way to demonstrate your concern for keeping your property virus-free and to encourage residents to make their own anti-virus efforts. Cleaning and disinfecting operations should happen multiple times each day - of course, whenever a surface is touched, it may become contaminated, but multiple cleaning will eliminate at least some possible exposure. Where possible, hand sanitizing stations and disinfecting wipes should be made available near doors, elevators and other "touch points" for residents' use. Even during this re-opening phase it is best to continue this cleaning process vigilantly until it is clear there are no or minimal reported cases in your state or region.

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- ii. Disinfecting contaminated apartments. Professional cleaning companies are gearing up to provide this service. The apartment should be treated as if it has exposed to a type of toxic substance. Cleaning protocols should be consistent with CDC guidance. For example, if an apartment is vacated by a sick resident, CDC recommends that the windows should be opened for at least 24 hours to allow ventilation that may help remove the virus. It also would be reasonable to leave the unit vacant for two weeks (considered generally to be the maximum incubation period reported for people with the virus). Cleaning personnel should still wear gloves, goggles and masks as appropriate and should scrupulously follow all warning labels on products they use.

g. Tenant services/staffing/marketing

i. How should I manage on-site property management staff?

The management of a multifamily housing property is a business like any other. In addition to worrying about the health and safety of their residents, housing providers need to worry about the welfare of their staff also. At least in those jurisdictions that remain subject to stay-at-home orders, the first question an owner needs to confirm is whether on-site property managers are deemed to be “essential workers”. But even where on-site staff is deemed essential, most housing providers have adopted systems to minimize the number of persons required to be on-site, such as using more electronic and remote services for tenant transactions and restricting maintenance to only emergency repairs, as discussed below. In situations where property staff must remain on site, housing providers are looking at staggered shifts, scheduling appointments with residents, and other options to keep at least some on-site visibility while minimizing contacts that may be dangerous to both staff and residents. These options are far from ideal, and housing providers need to remain nimble and adaptable to respond to changing government policies, economic conditions, management issues, and local health directives.

ii. How should I handle maintenance requests?

Maintenance requests are a good example of the practical problems posed by the virus. Since the virus began to spread, many housing providers have announced that they would only undertake “emergency” maintenance and repairs. Maintenance staff and, grudgingly, most residents accepted this solution to avoid contacts that could spread the virus. But exactly what constitutes an “emergency” varies widely, and some residents report that repairs to important fixtures – refrigerators, water heaters, ovens – have not been treated as “emergency” matters. As the weather warms, air conditioning needs also will become urgent. And housing providers do not want their residents to undertake DIY fixes that may present fire, flood, and electrical hazards. Over time, wider availability of personal protective equipment (“PPE”) for both repair crews and residents may make people more comfortable about permitting in-unit repairs to take place. If units are occupied, repair crews should plan to wear their own PPE – at a minimum, masks and gloves – and bring similar PPE for any occupants in the unit while the repairs are performed.

iii. To protect my staff and tenants, can I use remote or electronic services to deal with tenant transactions?

Yes: many owners have discovered that modern technology allows many transactions that were formerly performed in person to be moved online, including making rent payments and submitting maintenance requests. Because of efficiency gains, some housing providers may decide to retain these electronic systems after the crisis passes. The availability of remote/electronic services, however, is not universal – not all tenants have access to computers or tablets, and even when they do, their operating systems may not mesh with the housing

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provider's systems. Back-up systems, such as lockboxes to collect rent payments, may still be needed. Also, to the extent that housing providers move services online, they need to make sure that those services are equally available to persons with visual and hearing impairments. Websites that are not accessible to persons with disabilities may result in claims of discrimination under the Americans with Disabilities Act, the FHAct, and other federal and state antidiscrimination laws.

iv. What should I do about apartment tours?

Here again, many housing providers are turning to remote and electronic alternatives to provide pre-rental apartment tours. Video sessions on FaceTime and other apps serve most of the needs for prospective renters to see a unit and assess its condition. While not the ideal solution for anyone, most prospective renters and housing providers are aware of the health dangers posed by physical meetings and look at video tours as an acceptable alternative under the circumstances. Here too, however, housing providers need to be aware that to the extent that they rely on electronic means to provide apartment tours, those media must be accessible to persons with visual and hearing impairments also.

2. EVICTION MORATORIUM

a. What properties are covered by the eviction moratorium?

The CARES Act imposed a moratorium on initiating eviction proceedings and charging fees for late payment or nonpayment of rent on a broad variety of multifamily housing. All properties that are covered by the Violence Against Women Act ("VAWA") - which includes all public housing, housing that receives Housing Choice Vouchers or Section 8 rental assistance and virtually all other housing assisted or supported by the U.S. Department of Housing and Urban Development ("HUD") or other federal agencies, including low income housing tax credit properties - are subject to the moratorium. In addition, all properties that have a "Federally backed" mortgage loan -- which includes a loan that is insured by HUD and loans that are held or securitized by Fannie Mae or Freddie Mac - are also subject to the eviction moratorium. Thus, the moratorium covers the vast majority of rental housing in the United States.

b. When does the eviction moratorium end?

The moratorium ends on July 25, 2020. At that point, a housing provider may initiate eviction proceedings. However, the CARES Act says that a housing provider cannot require a tenant to vacate a unit for 30 days after providing a notice to vacate a unit. So, if a housing provider gives a notice to vacate on July 25 (a Saturday), the earliest date a tenant can be evicted is Monday, August 24, 2020.

c. Is rent that accrues during the eviction moratorium forgiven?

No: The moratorium prohibits housing providers from initiating eviction proceedings or charging fees for late payment or nonpayment, but it does not forgive rent that is due during that period. Recently published HUD guidance confirms that tenant rents are still due during the eviction moratorium. That means that at least in theory, the full amount of accrued but unpaid rent is due at the end of the moratorium. If a tenant does not pay its full rent on time during the eviction moratorium, the tenant is in default of its lease obligations and the owner can start eviction proceedings when the moratorium is over. Of course, the owner needs to consider any state or local eviction moratoriums that may still be in place after July 24, 2020 (more on that below). The owner may also negotiate other repayment terms. Negotiated terms may be a path to a greater and less acrimonious recovery of missed rent payments.

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d. If a tenant doesn't pay the full rent on time, can I send a late payment notice to the tenant?

Yes, but with some caveats: the moratorium prohibits initiation of eviction proceedings but it does not prohibit an owner from sending the tenant a notice that the rental payment is late or incomplete. Among other things, if an owner wants to initiate collection or eviction proceedings after the moratorium ends, it is wise to have a copy of these notices on hand, making clear that the housing provider documented the nonpayment and provided information to the tenant. If you send such a notice, you should consult with your legal counsel about the wording. Among other things, the notice needs to indicate that it is not itself a notice of eviction and does not include charges or fees for late or nonpayment of rent, both of which are forbidden under the terms of the eviction moratorium.

e. What other steps should I take if a tenant doesn't pay the full rent on time?

In addition to providing a notice of nonpayment, many owners are asking tenants to execute a formal rent forbearance agreement. These documents constitute a contractual agreement between the housing provider and the tenant, identifying the amount of rent that is unpaid and providing terms for repayment in the future. If a tenant has a good rental history in the past, it may be desirable to work out terms for repayment after the moratorium, rather than go through the effort to evict a tenant now and try to re-rent the unit in a very uncertain market. From the tenant's point of view, many are eager to enter into a forbearance agreement that establishes a mechanism to pay accrued rents to avoid having to pay all accrued but unpaid rent in a lump sum at the end of the moratorium period. A forbearance agreement clarifies what the tenant owes and when it will be paid, and provides remedies that the housing provider can exercise if the repayment terms are not met. Again, housing providers need to consult with legal counsel to make sure that the forbearance agreement complies with state and local landlord/tenant laws in general.

f. Can tenants pay partial rent?

Some housing providers may want to enter into a rent discount agreement with tenants, under which the tenant agrees to pay a discounted amount of rent on the regular due date each month. Many tenants, even if they recently lost their job, will continue to receive some income from unemployment compensation and other sources and would be willing to pay some portion of their current rent to avoid facing a lump sum at the end of the moratorium period and possible eviction thereafter. Likewise, many housing providers would prefer to receive at least some portion of their rental income on a current basis, rather than no income at all and face the cost and uncertainty of eviction in the future. Again, any such discount agreement should be prepared by legal counsel familiar with state and local landlord/tenant law requirements.

g. If tenant does not pay rent during the eviction moratorium, when can I start to charge fees or penalties for nonpayment?

The language of the CARES Act says that a housing provider may not, during the period of the eviction moratorium, "charge fees, penalties, or other charges to the tenant related to such nonpayment of rent." So, during the eviction moratorium, housing providers cannot charge fees or penalties for nonpayment. Although not expressly forbidden by the CARES Act, it seems inconsistent with the operation of the statute for owners to charge fees retroactively at the end of the moratorium period that they were forbidden to charge during the moratorium itself. However, to the extent that the tenant owes accrued but unpaid rent at the end of the moratorium period,

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the CARES Act does not prohibit an owner from charging fees and penalties that accrue after the expiration of the moratorium period. Please remember there are two eviction moratoriums—a 120 day period starting March 27th (ending July 25th, plus at least another 30 day notice period) and up to a 90 day period (plus at least 30 day notice period) that tracks any mortgage forbearance pursuant to the CARES Act. These periods likely, if not entirely, may overlap.

As a practical matter, courts are themselves reopening and will be swamped with caseload. If a housing provider intends to initiate foreclosures at the end of the moratorium, it may be desirable to keep its evictions as simple as possible, to avoid legal complications such as attempting to collect fees that accrued during the moratorium period. Anything that requires judicial consideration could delay an otherwise straight-forward eviction proceeding. The more complicated the eviction claim, the more likely that claim will be delayed.

h. Am I allowed to initiate eviction for cause (criminal activity, etc.) during the eviction moratorium?

Yes: the moratorium only applies to actions “for nonpayment of rent or other fees or charges.” A housing provider can initiate a “for cause” eviction if a tenant has breached some other lease provision – such as committing a crime or assault on another tenant – that does not involve nonpayment of rent or other charges or fees.

i. Some of my units receive Housing Choice Vouchers. Are all my units subject to the moratorium?

The moratorium applies to “covered dwellings,” which are leased dwellings located in a “covered property,” which, as noted above, are properties covered by VAWA or are subject to a “Federally-backed” mortgage loan. So if a specific unit receives a tenant-based voucher but other units at the property do not – and if the property is not itself subject to a “Federally-backed” mortgage loan, low income housing credit, or project-based grant or other subsidy agreement – the other units at the property are not subject to the eviction moratorium in the CARES Act.

j. What other limits on evictions are in place? In addition to the eviction moratorium in the CARES Act, many other state and local governments have adopted various types of eviction moratoriums or other measures to slow or prevent tenant evictions. Housing providers need to be familiar with any such state or local anti-eviction provisions to avoid violating the law and complicating evictions later. Also, in addition to eviction moratoriums adopted by federal, state, and local governments, many state courts have adopted restrictions on judicial proceedings, including eviction actions. That means that even when eviction moratoriums have ended, it may be very difficult to initiate eviction filings and schedule court proceedings to complete the eviction process.

3. CARES ACT STIMULUS PROVISIONS

a. How can housing providers take advantage of the Paycheck Protection Program (“PPP”) and other stimulus provisions of the CARES Act? Federal agencies are continuing to develop rules to govern the PPP, Economic Injury Disaster Loans, and the Federal Reserve’s Main Street Lending program and many questions remain to be determined. In the meanwhile, real estate professionals who receive passive income should understand there is risk around basic eligibility questions. While the CARES Act itself broaden eligibility, and some administrative guidance supports this, SBA and Treasury have adopted or referred back to pre-existing guidance, such as 13 CFR 120.110 and SBA Standard Operation Procedure 50 10, which provides contradictory guidance. In sum, this has made unclear eligibility for passive real estate entities, apartment buildings, and others. Nevertheless, Treasury reports that nearly 80,000 loans of about \$11billion have been provided to real estate and equipment rental companies. Housing providers may want to consider the Employee Retention Credit (“ERC”) as an alternative, because at least so far, it appears to be a less complicated alternative, does not require an application to a lender or federal agency, and does not involve competition for a limited supply of federal funds.