



COVID-19 FAQs FOR HOUSING PROVIDERS

September 2, 2020

1. NEW FEDERAL EVICTION MORATORIUM

a. What:

The Centers for Disease Control and Prevention (CDC) announced the issuance of an Order under Section 361 of the Public Health Service Act to temporarily halt residential evictions to prevent the further spread of COVID-19.

b. When:

September 4, 2020 through December 31, 2020.

c. Who is covered?

All properties, except vacant and abandoned. Any resident who certifies they meet the below criteria may not be evicted for failure to pay. The CDC's order requires residents to declare (under penalty of perjury) that they:

- Have used best efforts to obtain all available government assistance for rent or housing;
- Expect to earn no more than \$99k (individual) or \$198k (joint) in 2020; OR was not required to report income in 2019; OR received an Economic Impact Payment from the CARES Act;
- Are unable to pay the full rent or housing payment due to substantial loss of household income, loss of hours, lay-off, or extraordinary medical expenses;
- Are using best efforts to make timely partial payments;
- Eviction would likely render them homeless or force to move into close quarters in congregate or shared living settings due to no other housing options.

d. What eviction is allowed?

Landlords may still evict tenants due to criminal activity, threatening health/safety, damaging property, violating codes/ordinances, or other contractual obligations.

e. Is the rent still due?

Yes, rental payments are still due. This order does not relieve anyone of the obligation to pay rent or make a housing payment and follow other terms of the lease. In addition, landlords may charge late fees, penalties and interest for any missed payments. However, they cannot evict any tenants until after the expiration of the notice (December 31, 2020).

f. How is this enforced?

- This is to be enforced jointly by Federal authorities and cooperating State and local authorities.
- The order is enforceable through substantial fines to individuals (tenants) of up to \$100,000 - \$500,000 per event and one year in jail.
- Organizations (housing providers) are subject to a fine of no more than \$200,000 per event if the violation does not result in a death or \$500,000 per event if the violation results in a death or as otherwise provided by law.

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g. What else?

Allows more restrictive state and local protections, but overrides anything less restrictive.

2. 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.

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.

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d. Can a landlord require masks in all common areas?

Just as a restaurant can adopt a “no shoes, no shirts, no service” rule, landlords generally can adopt rules restricting the use of their public and common use areas, including requiring tenants and visitors to wear masks. Owners’ decision to require masks in public places will be strengthened to the extent that state or local governments have adopted rules requiring masks in public places.

The rules may be slightly different for federally assisted properties including Section 8, Section 202 and Section 811 properties. According to recent HUD guidance, owners of these properties can update their house rules to require face coverings, but must give existing renters at least 30-days’ notice of any such change (persons within the initial lease term must be given notice 60 days prior to the end of their lease terms). The changes must be approved by HUD and “must be within the bounds of common sense [and] not excessive or extreme.” The FAQs state that rules concerning face coverings “must be consistent with state and local law and directives from public health officials,” suggesting that approval is less likely in places that have not adopted requirements to wear masks in public.

e. Can a landlord prohibit outside guests from a property?

Common law allows landlords to prohibit trespassers on their properties, but also gives tenants the right to invite guests. If a property owner wants to limit non-resident access to the property, there are several steps they can take. Landlords can require that all persons on the property (including contractors hired by tenants) must confirm they have no current COVID-19 symptoms and have not traveled to any place where the virus is prevalent. If possible, there should be some sort of check-in procedure. Posted signs should also say that visitors are subject to getting their temperature taken before being admitted. Landlords may also require that all deliveries be made to a central location (rather than throughout the property). Posting signs like that will discourage a lot of unwanted people from coming in. Staff should be familiar with the requirement and, to avoid subsequent claims of discrimination or other types of liability, should apply it uniformly.

With respect to housing for older persons, the CDC has said for months that at “retirement communities” and “independent living facilities,” non-essential visitors should be limited (one visitor per day) and should be restricted to persons “who are essential to preserving health, including mental health, well-being and safety of residents.”

With respect to federally-assisted housing, including Section 8, Section 202 and Section 811 housing, to the extent that HUD’s new FAQs require changes in house rules to implement a mask requirement on tenants, that guidance also suggests that owners should consider changing house rules if they want to restrict visitors. The same requirements for 30 or 60 day notice, referenced above, and HUD approval apply.

f. Could a landlord require temperature be taken for any outside guests?

Again, owners have latitude with respect to admitting outside persons onto their properties, which would include taking the temperature of visitors. Signs notifying visitors that they may be required to have their temperature taken should be posted at entrances to the property, and, as with other precautions, staff should be familiar with the requirement and apply it uniformly.

However, as with other requirements for wearing masks and restricting visitors, HUD’s recent FAQs suggest that owners of Section 8, Section 202 and Section 811 housing wishing to require visitors to submit to temperature testing should adopt applicable house rules, subject to the same 30- or 60-day notice and HUD approval requirements.

3. TENANT ISSUES

a. Must a landlord consider unemployment assistance as a form of income?

- In most cases, no. Owners are under no federal requirements when it comes to counting unemployment assistance as income in connection with lease applications. In addition, the one-time \$1200 check received by many taxpayers was a tax rebate or credit and should not be included in calculating a tenant’s income. If you are in a state or locality that has “source of income” provision in its discrimination laws, owners should check with legal counsel to determine how to treat unemployment compensation to avoid discrimination claims.
- If you participate in HUD-assisted housing, the amount of assistance a family receives may be affected by the amount of income they receive and so it is important to know how to

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count unemployment assistance. Recent HUD guidance says that different types of unemployment assistance is treated differently in calculating a family's "annual income":

- **Regular payments of unemployment insurance** are treated as annual income
- **Pandemic Unemployment Assistance ("PUA", CARES Act §2102):** this is unemployment assistance for individuals who are self-employed, seeking part time employment or who otherwise would not qualify for regular unemployment assistance. HUD says PUA payments are included in annual income
- **Federal Pandemic Unemployment Compensation ("FPUC," CARES Act §2104):** This is the payment of \$600 that supplemented regular unemployment compensation and that ended at the end of July 2020. HUD has determined FPUC payments are "temporary income" that is not included in annual income.
- **Pandemic Emergency Unemployment Compensation ("PEUC", CARES Act §2017):** This program provides up to a 13-week extension of unemployment compensation (from 26 weeks to a total of 39 weeks). HUD has determined that PEUC payments are included in annual income.

b. 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). 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.

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

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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.

c. 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 Fair Housing Act 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.

d. 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.

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.

e. 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.

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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 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.

4. 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 broadens 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 5010, 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 \$11 billion 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.

HUD BROCHURE FOR MULTIFAMILY PROPERTY OWNERS AND MANAGEMENT AGENTS

https://www.hud.gov/sites/dfiles/Housing/documents/Tenant_Brochure_Final.pdf