

**COVID 19 RENT COLLECTION ISSUES
UPDATE – 3/30/2020
(This Memorandum updates the previous guidance issued on 3/26/2020)**

As we continue to be confronted by the health and economic impact of the current COVID-19 pandemic, many owners have raised questions regarding the continued enforceability of residential leases, including the obligation to pay rent. Likewise, many owners have begun to consider rent deferment policies in an attempt to balance the economic hardship some residents may face as a result of this crisis with the duty to maintain sufficient funding to operate and maintain their properties. The federal government has also now enacted the Coronavirus Aid, Relief, and Economic Security Act (“CARES”) and specific mortgage forbearance options which may both enable residents to pay rent while also placing limitations on legal actions for certain housing providers. This update is intended to provide guidance for property owners and managers related to rent collections, as well as the opportunities and restrictions imposed by CARES.

As a general rule, neither a tenant’s loss of income nor a declared state of emergency releases a residential tenant from their obligations provided in the lease. The lease remains a binding contract and the tenant remains responsible for continuing to pay rent as same becomes due. This is generally true regardless of whether the lease term has actually commenced. While such a provision would be rare, owners should review their lease to confirm it does not excuse performance based on such an event. In addition, the federal government, various states and municipalities have passed, or are considering, various forms of mandated rent deferrals, which could alter the foregoing proposition. However, barring such a lease provision or law/order, tenants are required to pay the rent and otherwise comply with their lease obligations during the COVID-19 health crisis.

1. CARES:

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (“CARES”) was signed into law. Pursuant to CARES, certain “Covered Properties” are prohibited from serving a notice to quit or commencing new eviction cases through July 25, 2020. This law ONLY applies to Covered Properties, which include the following:

- Section 202 Supportive housing for the elderly (12 U.S.C. § 1701q)
- Section 811 Housing for People with disabilities (42 U.S.C. § 8013)
- Housing opportunities for Persons with AIDS (HOPWA) (42 U.S.C. § 12901)

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ATTORNEYS ADMITTED IN MASSACHUSETTS, NEW HAMPSHIRE AND RHODE ISLAND

- McKinney-Vento Act Homelessness programs - 42 U.S.C. § 11360)
- HOME - National Affordable Housing (42 U.S.C. § 12741)
- Multi-family Mortgage Credit Programs
- Public Housing (42 U.S.C. § 1437d)
- Section 236 Multifamily rental housing (12 U.S.C. § 1715z-1)
- Section 8 Low-income housing assistance voucher program (42 U.S.C. § 1437f)
- Rural housing assistance under Section 542 of the Housing Act of 1949;
- Low income housing tax credit program (LIHTC) (26 U.S.C. § 42)
- Section 221(d)(3) Below Market Interest Rate (BMIR) housing (42 U.S.C. § 1715I(d))

For these Covered Properties, the landlord may NOT:

- Initiate a new non-payment of rent case
- Serve any notice to quit

A landlord MAY:

- Proceed with any pending action
- Proceed with actions for cause or no-fault evictions
- Work with tenants to resolve matters.

CARES also contains specific funding for benefits to residential (and commercial) tenants. Specifically, most residential tenants should receive a one-time direct deposit of up to \$1,200 for an individual and \$2,400 for married couples, plus an additional \$500 per child. The payments will be available for persons with incomes up to \$75,000 for individuals and \$150,000 for married couples. In addition, tenants who become unemployed will be eligible for the expedited and expanded unemployment payments under state law and an additional \$600 per week for four months from the federal government. Finally, as noted, many employers who do not terminate employees will be entitled to low-interest loans and repayment waivers for such loans which program is intended to incentivize employers to retain workers. As such, the CARES act provides several benefits which are intended to ensure that tenants remain able to pay rent and do not suffer any actual loss of income.

2. COVID-19 multi-family relief plan:

In response to the ongoing COVID-19 health crisis, the Federal Housing Finance Agency has directed Fannie Mae and Freddie Mac to create plans to address the economic impact of the pandemic on the housing industry. In response, Fannie Mae and Freddie Mac have announced a Nationwide COVID-19 multi-family relief plan which is estimated to impact approximately 27,000 properties and 4.2 million tenants. In order to qualify, an owner of multi-family housing must: (1) maintain a fully performing multi-family loan with either Freddie Mac or Fannie Mae; (2) demonstrate financial hardship due to COVID-19; and (3) obtain lender approval. If approved, owners would be eligible for a deferral of three-monthly mortgage payments beginning from the first missed payment, so long as such payment did not occur prior to April 1, 2020. The request for forbearance must also be made prior to August 31, 2020. All deferred payments must be paid in full within twelve (12) months following the end of the forbearance

period or upon receipt of business income insurance proceeds (or other assistance or relief program proceeds).

In exchange, owners must suspend non-payment evictions during the forbearance period. While specific details have yet to be provided, a proposed forbearance agreement prepared by Fannie Mae suggests that owners are required to allow “affected tenants to repay any missed rent payments in up to 12 equal monthly installments beginning on a mutually agreed date together with the monthly rent”. Additionally, this suspension of eviction action must remain in effect for ninety-days OR until owner has tendered all deferred payments and is current with all loan obligations, whichever is later. Such forbearance agreements will likely also require that the owner waive and release any claims against Fannie Mae and/or Freddie Mac related to this restriction on eviction action. Essentially, owners would not later be able to claim a loss against these entities relating to their inability to proceed with evictions if they elect this forbearance relief.

Fannie Mae is also offering assistance directly to residents of these multi-family housing properties through its Disaster Response Network. Residents may speak to HUD approved housing advisors to discuss a variety of available resources.

3. Rent Collection Policies:

As an initial matter, owners should recognize that the economic stimulus funds afforded by CARES, as well as incentives offered to employers who do not terminate or suspend employees, should significantly reduce the economic effects on many residents. The stated purpose of CARES is to ensure tenants are able to pay rent, utilities and other necessities. As such, the importance of confirming an actual decrease in income prior to affording a rent deferral or waiver is significant both to ensure continued building operations and to ensure that CARES funds in fact provide economic stimulus. In addition, it is important when considering any potential rent deferral program to also understand any resulting federal, state or local restriction on the collection of rents.

In the event that individual owners desire to offer rent deferrals for residents experiencing an economic impact from the current pandemic, we would strongly advise clients to create a written rent deferral policy to ensure that any such agreements comply with any local, state and/or federal restrictions on rent collection and evictions, as well as ensuring such deferrals are offered uniformly in order to avoid potential fair housing claims. Rather than leave such decisions to the discretion of individual staff members, a written policy will ensure that agreements are consistent, meet respective owner requirements, and limit potential exposure to fair housing claims.

When adopting such policies, we would recommend that owners consider the following factors in order to balance the financial challenges of tenants with the duty to ensure the financial integrity of the property:

A. Subsidized v. Market Properties:

Initially, owners must determine whether they are a Covered Housing Provider, as provided above. However, even if a property is a Covered Housing Provider, we would recommend that the owner consider a policy as provided below, with the exception being that no notice to quit or legal action may be commenced if the parties are not able to come to a payment arrangement. As the vast majority of tenants in Covered Housing may not suffer more than a temporary, if any, economic impact due to either their receipt of CARES funds, rent recalculation to lower their rent, or receipt of RAFT or other funding, these residents will likely be able to enter into repayment agreements to ensure that their housing is maintained.

In addition, owners should determine whether they are eligible for, and desire to elect, a mortgage forbearance agreement from Fannie Mae and Freddie Mac. Owners electing to participate in such forbearance programs are required to offer repayment agreements to impacted residents and, as such, the below policy with the exception of proceeding with notices to quit and legal action, may be offered. Please contact our office to discuss any applicable forbearance program and to ensure that all agreements comport with the requirements of such program.

B. Communication:

Owners should decide the manner by which to communicate the option of a potential rent deferral. In most cases, and in order to avoid a significant increase in rental delinquencies, owners should consider sending a reminder letter to residents that do not pay their rent effective April, 2020, confirming that the rent is required to be paid and requesting that the tenant contact them to discuss if they are experiencing an economic hardship. We have prepared such a letter and would be pleased to provide you with same. This letter is intended to ensure that tenants who are able to pay rent do so, while allowing staff to identify and address those who actually are suffering from a financial hardship. As noted, CARES funding is specifically intended to ensure tenants are able to pay their rent. While owners may elect to notify all residents in advance of any rent deferral program, such a proactive announcement may increase the number of persons seeking such assistance.

C. Affordable Housing Residents:

If the tenant's rent is subsidized, either through project-based assistance, mobile voucher or another affordable program, the tenant's rent share should be recalculated if permitted by the program. As rents for such tenants are already adjusted based on changes to household income, rent deferral should not be required in these cases as the tenant's rental share will already be adjusted proportionally based on the household's reduced income (and may actually be zero if they have no income). HUD, as well as other state and local program administrators, have already provided for expedited rent recalculations, remote recertification appointments, and flexibility in required verification paperwork.

D. Market Residents:

Initially, we would suggest that rent deferral only be offered to those suffering an actual economic hardship which renders them unable to pay rent. The policy should define which events would trigger a “COVID-19 economic hardship”. While any objective means may be used to evaluate what constitutes a “COVID-19 economic hardship”, we would suggest that total household income and the rental amount at issue should be two threshold considerations in any evaluation procedure. The fact that someone’s income is reduced should not be determinative. Rather, the fact that the household income has been reduced to the point where rent cannot be paid should be the determinative factor. We would suggest that owners consider whether the rent is now more than 30% of the gross household income. This is the rent level set for most affordable housing programs and would therefore appear to be a reasonable standard. Thus, the resident would be required to demonstrate that the rent now exceeds 30% of the adjusted gross income of all household members in order to qualify for any deferral. The resident should also then be required to provide reasonable evidence of such income reduction, in the form of paystubs, letters from employers, or other verifiable documentation acceptable by management, and to confirm the reason, if any, that they did not qualify for unemployment benefits or other funding from CARES.

In the event a tenant qualifies for a rent deferral based on the aforementioned considerations, ownership should provide specific payment terms for both ongoing rent and the arrears. As for ongoing rent, we would suggest, in line with the above, that the rent be set at a specific percent of income for a set period. For example, the rent for April and May would be set at 30% of the gross household income. Effective at the end of this period, payment of the full monthly rent would be required in order to qualify for the rent deferral. Late fees should also be waived upon compliance. The policy should set specific payment terms by dividing the arrears into equal payments over a set time period. For example, the arrears may be paid in three (3) equal payments on the 20th day of each month effective June, 2020. Finally, owners may wish to consider a requirement that any resident eligible for a rent deferral seek third party financial assistance (i.e., RAFT) as a condition of such relief, which may obviate the need for such a deferral.

The terms of any such agreement should be reduced to writing and signed by all parties. The agreement should confirm all of the terms, as well as the right of the owner to proceed with formal legal proceedings in the event payments are not tendered as required.

While payment plans and rent deferrals may not be the desired outcome, proactively addressing arrearages based on need may be the best means by which to ensure ongoing income streams and to achieve the goal of maintaining tenancies. Likewise, establishing written payment policies will ensure that these agreements avoid potential claims from residents that do not qualify for such relief.

If you would like to discuss adopting such a policy, or if you have other COVID-19 related issues or general questions, please feel free to contact us. Our office remains open and available to meet any of your legal needs. This memorandum is intended for informational

purposes only and you should consult with legal counsel prior to establishing any policy or initiating any action.