

MEMORANDUM

To: CLPHA
From: Reno & Cavanaugh, PLLC
Date: September 11, 2020
Re: CDC Agency Order Issuing Eviction Moratorium

On September 4, 2020, the U.S. Department of Health and Human Services (“HHS”) Centers for Disease Control and Prevention (“CDC”) published an agency order titled “Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19” (the “Agency Order”). As explained in further detail below, the Agency Order restricts landlords, including public housing authorities (“PHAs”), from taking any eviction action related to any failure to pay rent between September 4, 2020, and December 31, 2020, against any individual who submits a required declaration.

Intent of Agency Order

The Agency Order’s stated objectives are to mitigate the spread of COVID-19 and to support Federal, State, local, territorial, and tribal response efforts. In issuing the Agency Order, the CDC recognizes that “evictions threaten to increase the spread of COVID-19 as they force people to move, often into close quarters in new shared housing settings.” According to the CDC, the eviction moratorium under the Agency Order “can be an effective public health measure utilized to prevent the spread of communicable disease” as it will help to facilitate quarantine, isolation, and social distancing efforts.

Landlords and “Covered Persons” under the Agency Order

Under the Agency Order, “a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action” (collectively, “Landlord”) is restricted from instituting any action “to remove or cause the removal of a covered person from the residential property.” Given the broad definition of Landlord under the Agency Order, the Agency Order seems to apply to PHAs.

To qualify as a “covered person” under the Agency Order, the tenant, lessee, or resident of a residential property (collectively, “Resident”) must provide their Landlord with a declaration signed under penalty of perjury that substantively provides that:

- 1) *The individual has used best efforts to obtain all available government assistance for rent or housing;*

- 2) *The individual either (i) expects to earn no more than \$99,000 in annual income for Calendar Year 2020 (or no more than \$198,000 if filing a joint tax return), (ii) was not required to report any income in 2019 to the U.S. Internal*

- Revenue Service, or (iii) received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the CARES Act;*
- 3) *The individual is unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses;*
 - 4) *The individual is using best efforts to make timely partial payments that are as close to the full payment as the individual's circumstances may permit, taking into account other nondiscretionary expenses; and*
 - 5) *Eviction would likely render the individual homeless—or force the individual to move into and live in close quarters in a new congregate or shared living setting—because the individual has no other available housing options.*

A Form Declaration Under Penalty of Perjury for the Centers for Disease Control and Prevention's Temporary Halt in Evictions to Prevent Further Spread of COVID-19 (the "CDC Form Declaration") can be accessed at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/declaration-form.pdf>. See Attachment A. Each adult member of the Resident's household must provide a similar declaration signed under penalty of perjury to trigger the eviction moratorium under the Agency Order.

Interestingly, in addition to the 5 elements above, the CDC Form Declaration includes the following additional language:

- *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.*
- *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.*
- *I understand that any false or misleading statements or omissions may result in criminal and civil actions for fines, penalties, damages, or imprisonment.*

The Agency Order Only Restricts Evictions for Failure to Pay Rent

The Agency Order specifically restricts eviction actions for failure to make timely housing-related payments, including rent, late fees or penalties, and interest and imposes the following fines:

- For a violation of the Agency Order that does not result in a death, a fine of up to \$100,000 or one year in jail or both;
- For a violation of the Agency Order that does result in a death, a fine of up to \$250,000, or one year in jail, or both.
- For a violation of the Agency Order by an organization, a fine of up to \$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.

PHAs found to have violated the Agency Order would therefore be subject to a fine of up to \$200,000 per violation if the eviction action does not result in a death or \$500,000 per violation if the eviction action does result in a death.

The Agency Order “does not relieve any individual of any obligation to pay rent, make a housing payment, or comply with any other obligation that the individual may have under a tenancy, lease, or similar contract.” PHAs may continue to charge or collect late fees, penalties, or interest for failure to make timely housing payments consistent with the applicable terms of their tenancy, lease, or housing contract. Further, the Agency Order does not preclude evictions based on a Resident:

- (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) violation 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).*

Lastly, the Agency Order does not apply to “any State, local, territorial, or tribal area with a moratorium on residential evictions that provides the same or greater level of public-health protection.”

Issues Raised by the Agency Order

Can a PHA Resident qualify as a “covered person” under the Agency Order?

On September 9, 2020, Assistant Secretary Hunter Kurtz issued a letter addressed to PHA Executive Directors stating that the Agency Order “applies to all tenants in the country (including assisted renters) who are subject to eviction for nonpayment of rent and who submit [the required] Declaration.” Given the specific elements that must be included in the required declaration and that, by definition, a public housing resident already receives rental assistance, it is unclear whether a PHA Resident could in fact certify to the requirements of the declaration.

The first element requires “best efforts” in obtaining “all available government assistance for rent or housing.” “Available government assistance” as defined under the Agency Order includes “any

governmental rental or housing payment benefits available to the individual or any household member.” A PHA Resident is already receiving government assistance, so it is unclear whether that satisfies the requirements of the declaration or whether the PHA Resident must take any other actions to obtain additional assistance, if eligible.

The third element of the required declaration relates to substantial changes in income. Besides “extraordinary out-of-pocket medical expenses,” each of the circumstances described in the third element of the required declaration would be grounds for an interim recertification for the assisted household and therefore a corresponding decrease in rent responsibility. As this interim recertification is based on the household’s current income, taking into account any “substantial loss of household income, loss of compensable hours of work or wages, a lay-off,” the assisted household should have the ability to make the newly calculated rental payment. Notably, if the assisted household has no income, their corresponding rent responsibility would be zero.

To demonstrate that a PHA Resident actually meets the required elements, it may be helpful for PHAs to have the ability to request support for the declaration in the form of a narrative description or other documentation. The Agency Order does not specifically address what, if any, information a Landlord may request of a Resident in addition to the declaration. Hopefully HUD will address this in its forthcoming guidance regarding the Agency Order.

What about evictions between August 24, 2020, and September 3, 2020?

The eviction moratorium under the CARES Act expired on July 24, 2020. It is unclear whether the Agency Order applies to eviction proceedings instituted between August 24, 2020, (allowing for the 30-day notice period required under the CARES Act) and September 3, 2020. It may be that proceeding on September 4, 2020, with an eviction action that commenced on September 3, 2020, is “an action by a landlord ... to remove ... a covered person from a residential property” in violation of the Agency Order which would subject a PHA to a fine of up to \$500,000. How broadly “an action by a landlord” is interpreted may depend on the jurisdiction.

Does the CDC have the authority to restrict a Landlord’s eviction rights?

The CDC states that it has authority to issue the Agency Order under Section 361 of the Public Health Service Act, 42 U.S.C. § 264, and 42 C.F.R. § 70.2. Under 42 C.F.R. § 70.2, the Director of the CDC “may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection,” provided he/she “determines that the measures taken by health authorities ... are insufficient to prevent the spread” of such infection.

In exercising this authority, the Director of the CDC provides the following in the Agency Order:

I have determined the temporary halt in evictions ... constitutes a reasonably necessary measure under 42 CFR 70.2 to prevent the further spread of COVID-19

throughout the United States. I have further determined that measures by states, localities, or U.S. territories that do not meet or exceed these minimum protections are insufficient to prevent the interstate spread of COVID-19.

There is little to no precedent for the use of the authority under 42 C.F.R. § 70.2 to restrict the lawful eviction of a resident for failure to meet rent payment obligations under a valid lease, rental agreement, or contract. There is also little to no modern precedent for dealing with the present COVID-19 pandemic. However, the continued rise in COVID-19 infections across the country and the observed spikes of infections due to social gatherings and close contact likely corroborate the CDC's findings that evictions would contribute to the spread of COVID-19 and current containment measures have been "insufficient to prevent the interstate spread of COVID-19." Therefore, it is likely that the CDC has the authority to issue the Agency Order.

There is also the question of whether the process by which the CDC exercised its authority in issuing the Agency Order complies with the Administrative Procedure Act ("APA"). According to the CDC, the Agency Order is not a rule within the meaning of the APA and therefore does not require notice-and-comment rulemaking. Even if the APA does apply, the CDC states that the COVID-19 emergency is sufficient "good cause" to dispense with notice-and-comment rulemaking as the delay in implementation of the eviction moratorium under the Agency Order would be "impracticable and contrary to the public health."

The APA requires notice-and-comment rulemaking unless "the agency for good cause (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." See 5 U.S. C. § 553(b). Again, there is little to no modern precedent for dealing with COVID-19; however, the current pandemic situation and "the convergence of COVID-19, seasonable influenza, and the increased risk of individuals sheltering in close quarters" due to evictions is likely sufficient to support a finding that notice-and-comment rulemaking would be impracticable and contrary to the public interest. Therefore, it is likely that the CDC was within its authority to forego notice-and-comment rulemaking to issue the Agency Order.

Attachment A