



Mark N. Tschetter
Victor L. Sulzer
Peter E. Muccio
Lindsay E. Jasper
Karen A. Harvey
Rachel L. Griffin
Kory J. Cook
Christopher R. Cunningham
Jonathon G. Carlson
June A. Torres

Denver
Tel 303.699.3484
Fax 720.449.0160

Colorado Springs
Tel 719.550.8004
Fax 719.227.1181

Grand Junction
Tel 970.822.7020

MEMO

To: Clients

From: Tschetter Sulzer

Re: Centers for Disease Control Order - Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19 - Published September 1, 2020.

OVERVIEW

On September 1, 2020, the Centers for Disease Control (“CDC”) published a draft Order entitled “Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19” (the “Order”). The Order temporarily halts residential evictions for non-payment of rent. The rationale for the Order is to combat the spread of COVID. The Order cites evidence that an eviction moratorium is effective in combating the spread of COVID.

EFFECTIVE DATES

Per the Order, the Order is anticipated to be effective from September 4, 2020 (the projected date the Order will be published in the Federal Register) through December 31, 2020, unless extended, modified, or rescinded.

SUMMARY OF THE ORDER

The Order prohibits landlords from evicting covered tenants for non-payment of rent from any residential property through December 31, 2020. Landlords can charge tenants late fees, penalties or interest for nonpayment of rent. Tenants are still obligated to pay rent and comply with their leases. As discussed further below, several key aspects of the Order are not clear including what constitutes an eviction. Because it is not clear what constitutes an eviction, what constitutes a violation of the Order is also not clear. These aspects of the Order will have to be clarified through the judicial process. The Order does not supersede state or local eviction moratoriums that are stricter than the Order.

KEY DEFINITIONS

Covered Person - any tenant, leasee, or resident of a residential property who provides to their landlord, the the owner of the residential property, or other person with a legal right to pursue eviction or a possessory action, a Declaration under penalty of perjury.

"Evict" and "Eviction" means any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a covered person from a residential property. This does not include foreclosure on a home mortgage.

Residential Property - any property leased for residential purposes, including any house, building, mobile home or land in a mobile home park, or similar dwelling leased for residential purposes, but shall not include any hotel, motel, or other guest house rented to a temporary guest or seasonal tenant as defined under the laws of the State, territorial, tribal, or local jurisdiction.

PROTECTED TENANTS

Only residential tenants that meet all of the Declaration criteria and have provided the Declaration to their landlord, are protected. The Order does not protect commercial tenants. The Declaration criteria focuses on income, loss of income, ability to pay the rent, efforts to pay the rent, and efforts to find rental assistance. Loss of income does not need to be directly COVID related.

THE PROCESS FOR TENANTS TO CLAIM PROTECTION

In order to be protected under the Order, all tenants occupying a rental unit must provide a written Declaration. The tenant must declare in writing **all** of the following:

- 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 non-discretionary 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.

This Declaration must be made under penalty of perjury signed by all adult leaseholders on the lease to the landlord to be protected. The obligation, burden, or responsibility to make and provide a landlord with the Declaration is on the tenant. While a landlord has no obligation to determine if a tenant is a covered person or seek a Declaration from a tenant, the issue almost certainly will come up one way or another as discussed below. Accordingly, landlords should consider resolving the issue up front to potentially save time and effort later.

LANDLORD'S ABILITY TO CHALLENGE TENANT'S DECLARATION

Unfortunately the Order does not make it clear whether the landlord has the ability to challenge the tenant's Declaration of covered person status. The Declaration is a sworn statement, and should be subject to review in a Court. Due process dictates that landlords should be given an opportunity to test the truth of the tenant's Declaration. However, there is no clear mechanism provided in the Order for testing or challenging the veracity of a tenant's Declaration. It will be incumbent on the Courts to review the legitimacy of a tenant's declaration and allow landlords the fundamental right to challenge any actual or perceived fraudulent Declarations.

VIOLATIONS OF THE ORDER

Landlords would violate the Order by taking any action contrary to the Order or the prohibitions set forth in the Order. The Order prohibits evictions of covered persons for non-payment of rent. The Order defines an eviction as "any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a covered person from a residential property." Thus, an eviction is "any action . . . to remove or cause the removal of any tenant".

The definition is problematic because what constitutes removing or causing the removal of a tenant is arguable. Remove means to take (something) away or off from the position occupied. Physically removing a tenant from a property clearly meets the definition and would be a violation of the Order. This means a landlord may not execute a writ of restitution to remove a tenant. Given that physically removing a tenant from a leased unit would clearly constitute a violation of the Order, Courts in all likely event will not issue writs of restitution until the Order ends or is rescinded. In Colorado, no tenant can legally be removed (dispossessed)

from a leased property by a Sheriff without a writ of restitution (the Court Order that orders the Sheriff to remove the tenant and to restore the landlord to possession of the property).

What is not clear and will be subject to further clarification by the Courts is whether other actions in the eviction process constitute “any action to remove or cause the removal of any tenant”. Does serving a demand for rent or possession constitute an action to remove a tenant? Does filing an eviction with the Court? Because serving a notice or filing a court case does not result in the “removal” of the tenant, a strong argument can be made that such actions are not a violation of the Order. Obviously, tenant advocates are going to argue that serving a notice or filing a case is a violation of the Order.

Interpreting the Order as to allow both the service of notices and the filing of eviction cases is logical because it gives landlords a forum to challenge the truthfulness of the tenant’s Declaration. Again, the tenant’s Declaration is a sworn statement made under penalty of perjury. If the tenant made these statements under oath on the witness stand in Court, the landlord would have the absolute right to challenge the veracity of these statements through cross examination. This interpretation of the Order (notice and filings allowed) also makes sense because landlords clearly have the right to serve notices and file cases until the tenant provides the Declaration. If the Order prevented landlords from serving notices or filing cases in absence of a Declaration, the Declaration would be meaningless because all tenants would be protected without having to make the Declaration.

If the Order is interpreted as prohibiting the service of notices and filing of cases, tenants will be allowed to state anything without challenge. This means a tenant that has not lost their job could refuse to pay their rent, provide the Declaration that would not be subject to challenge, and be prevented from being evicted through the end of 2020. Interpreting the Order in this matter is nonsensical. An interpretation that allows the Court to determine if the tenant is a covered-person makes infinitely more sense.

Ultimately, the Courts will determine what actions will be allowed and therefore what constitutes an eviction, i.e. what is a violation of the Order. We are endeavoring to learn the Court’s position on what constitutes an eviction. We will provide that information and update this memo as soon as we ascertain the Courts’ position. Even if landlords are allowed to service notices and file, landlords should be aware that the five required points in the tenant Declaration are pretty low bar to clear. Further, pursuant to the Order, judges have broad discretion to interpret the Order. This means as a practical matter that even if a landlord can file an eviction, the Court will almost certainly stay the writ of restitution until after December 31, 2020. If your writ is stayed, the advantage of filing now is that you will be ready to move forward when the Order expires. The disadvantage is that until the issue is clarified, a landlord is subject to the criminal penalties discussed below. Given the significant nature of these criminal penalties, we recommend not serving or filing any eviction cases on any tenant for which you have received a Declaration until the issue of what constitutes an eviction is clarified.

CRIMINAL PENALTIES FOR VIOLATION OF THE ORDER

A person violating the Order may be subject to a fine of no more than \$100,000 if the violation does not result in a death or one year in jail, or both, or a fine of no more than \$250,000 if the violation results in a death or one year in jail, or both, or as otherwise provided by law.

An organization violating the Order may be 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.

The U.S. Department of Justice may initiate court proceedings as appropriate seeking imposition of these criminal penalties.

EXISTING CASES

This Order can impact existing eviction cases. Whether the case is filed awaiting a return date or if there is a judgment for possession. If a tenant provides a completed Declaration, a landlord will need to halt the eviction process and analyze the Declaration. For existing cases that have judgments for possession, we anticipate that the Court may require that the tenant be given an opportunity to provide a Declaration that they are a covered-person, and if the tenant does stay the writ of restitution until after December 31, 2020. We also expect the Court to inform all tenants of the protections available under this Order during the court process and prior to the entry of any judgment of possessions. Courts may also require landlords to affirmatively state whether they have received a Declaration from the tenant even in cases where the tenant fails to respond to the Court's request to clarify the issue.

NON-MONETARY VIOLATIONS

The Order is not a complete moratorium on evictions. Non-monetary lease violations are not protected under this order. Landlords may continue to serve demands for compliance, notices to quit for repeat violation, notices to quit for substantial violations, and notice of non-renewal.

Nothing in this order precludes evictions based on a tenant, lessee, or 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) violating 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).

RECOMMENDATIONS

Provide a copy of the Declaration to all residents and make sure that you keep a record that a copy of the Declaration was sent to all residents. A Declaration Form to be used by tenants is available on our website at: tinyurl.com/TS-CDCTD. At the time of this drafting, there is no requirement for Landlords to do this. However, given previous Executive Orders from the Governor (he made landlords inform tenants of their CARES's rights in writing), the Governor is very likely to make this a requirement through a future Executive Order. Because there is no prohibition on non-monetary violations, landlords may move forward with those cases. Landlords may also serve Rent Demands and file cases if the tenant has not provided a Declaration pursuant to the Order. Again, the Order does not prohibit you from assessing late fees. Until the issue of what constitutes an eviction is clarified, we strongly recommend not serving notices or filing cases if your tenant has provided you with a Declaration that they are a covered person under the Order.

CHANGE IN COURT REQUIREMENTS

We are also expecting to see requirements from Courts regarding landlords making statements about whether or not the landlord has received a Declaration from a tenant. Nothing in this Order prevents the landlords from dialoguing with their tenants about what their intentions are with regard to paying rent. In fact, the Order clearly states that tenants are still obligated to pay rent. Payment plans are certainly an option to continue to keep on the table for resolving outstanding balances. There are multiple programs available at the State level to provide additional financial support to landlords and tenants.

ANTICIPATED FREQUENTLY ASKED QUESTIONS REGARDING ORDER

Effective Dates

1. When does this order go into effect? The Order is anticipated to be effective from September 4, 2020 (the projected date the Order will be published in the Federal Register).
2. When does this Order expire? December 31, 2020 unless extended, modified, or rescinded.

Eviction Process

3. Can I serve a Demand for Rent? Yes, if the tenant has not provided a Declaration. Please note, under Governor Polis' Order, you must serve a 30-day Demand for Rent (set to expire or modified September 9, 2020). We strongly recommend not serving Rent Demands if your tenant has provided a Declaration until the issue of what constitutes an eviction is clarified by the Courts.
4. Who is required to provide a Declaration? All tenants. However, because you can't evict any tenant that submitted the form, the practical result is you won't be able to evict other tenants in the same unit even if they didn't submit a Declaration Form.
5. Does this change the eviction process? Landlords may be required to provide an affidavit stating that they have not received a Declaration from the tenant. As with other COVID related issues standards and processes rapidly change. We will continue to keep our clients informed of any changes.
6. Can the tenant and the landlord enter into a payment agreement? Yes.
7. Are tenants obligated to pay rent? Yes.
8. Can I charge late fees? Yes.
9. Does this apply to commercial properties? No.
10. Does this apply to current cases? Yes. The case can move forward until such time that the tenant provides a Declaration. If the tenant does provide a Declaration during an existing case, even in a case where the Court has already entered a judgment for possession, the writ of restitution will be stayed until January 1, 2021. Even if the writ was not stayed, it would be a violation of the Order to execute it.
11. Can we serve a notice of non-renewal? Yes.
12. Can I serve a Demand for Compliance, Notice to Quit Repeat Violation, or Notice to Quit Substantial Violation? Yes.

13. Does this apply to covered and non-covered properties under the CARES Act? Yes, the Order applies to all rentals. Alternatively, is this limited to covered-properties under the CARES Act? No, the Order applies to all residential rental properties.

14. Does the tenant need to have COVID-19? No. The tenant only needs to be impacted by COVID-19 and fit the requirements of a covered person, and provide the Declaration.

Challenging the Order

15. Can I challenge a tenant's Declaration? Maybe. A lot will depend on how the courts interpret the Order.

16. Is this legally enforceable? For now, yes, until successfully challenged in a court, rescinded, or until it expires.

17. Can we challenge the CDC Order in court? Yes. However, litigation against it is impractical for a variety of reasons. First, any litigation will take time. The wheels of justice grind slowly. The Order is essentially another 120 day eviction moratorium. By the time anyone could get into court and have a court rule on the challenge, 75 days could have easily passed. Even if it was quicker, there would be appeals. Bottom line, is that no effective court order striking the Order down is likely to be obtained before the 120 days runs out on December 31, 2020. While it is possible that it could be extended, we don't believe that is likely at this time.