



Federal Law Prohibits Evictions and Late Fees for “Covered Properties”

MORATORIUM.

On March 27, 2020, the Coronavirus Aid, Relief and Economic Security Act (“CARES Act”) was signed into law. The CARES Act includes important, immediate protections for tenants living in certain types of housing. The law is in effect for a 120-day period from that date of enactment (unless otherwise extended).

The eviction moratorium restricts Landlords of *covered properties* (as defined below) from evicting or *filing* for eviction for the non-payment of rent, and also prohibits “charg[ing] fees, penalties, or other charges to the tenant related to such nonpayment of rent.” The federal moratorium also provides that a Landlord (of a covered property) may not evict a tenant without first providing the tenant at least a 30-day notice AND may not issue such a notice to vacate based on the nonpayment of rent until *after* the expiration of the moratorium.

The federal eviction moratorium does not affect cases:

- 1) that were filed before the moratorium took effect or that are filed after it sunsets;
- 2) that involve non-covered tenancies (see below); or
- 3) where the eviction is based on another reason besides nonpayment of rent or nonpayment of other fees or charges.

PROPERTIES COVERED.

The Act defines a “covered property” as a property that: (1) participates in a “covered housing program” as defined by the Violence Against Women Act (VAWA); (2) participates in the “rural housing voucher program under section 542 of the Housing Act of 1949”; (3) has a federally-backed mortgage loan (on residential property designed for occupancy by 1-4 families); or (4) has a federally-backed multifamily mortgage loan (on residential property designed for occupancy by 5 or more families).

Federally backed mortgage loans are defined to include loans secured by any lien on residential properties that are “made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by [HUD] or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.”

SIMILARITIES AND DIFFERENCES BETWEEN STATE AND FEDERAL LAW.

First, it is important to note, that neither the Federal, nor the State law serves as a waiver of tenants’ obligation to pay rent, to the extent that they are able to do so.

As discussed in a previous article, the New Mexico Supreme Court has issued a stay of the issuance of all writs of restitution issued pursuant to the New Mexico Owner-Resident Relations Act based on a tenant's inability to pay rent ("Stay"). Because the Stay references the Owner-Resident Relations Act ("Act"), it is specific to residential tenancies, not commercial. In this respect the State and Federal law are similar. Also, neither the State, nor Federal law explicitly states whether a landlord may evict based on a tenant's failure to vacate when served with a "no-cause" lease termination notice. For example, whether a Landlord could give a 30-day Notice to Terminate to a month-to-month tenant who has not paid rent or could give a Notice to Vacate to a non-paying tenant whose term tenancy has naturally come to the end. However, allowing landlords to avoid the stay and moratorium by using "no cause" evictions for delinquent rent may [arguably] frustrate the purpose of the statute.

However, the two laws differ in two important respects: 1) the Stay does not address the rights of a landlord to charge late fees for the non-payment of rent, so they still may be charged, whereas the CARES Act prohibits such charges; and 2) the Stay does NOT prohibit a landlord from serving the tenant with notice to terminate based on the tenant's failure to pay rent or from filing a petition for a writ of restitution if the tenant does not vacate the property, whereas the CARES Act prohibits the landlord from even filing a petition for the non-payment of rent.

GUIDANCE FOR PROPERTY MANAGERS

Tenant's Failure to Pay Rent.

It is important to first determine if the property is a "covered property." You should know or have access to the information necessary to determine whether properties you are managing have federally backed mortgage loans. Owners should be directed to review their note or mortgage instruments, other closing documents, servicing notices, account statements, or other correspondence to locate this information. Further, both the Fannie Mae and Freddie Mac websites provide a loan "look-up" function to determine if the entity owns the loan.

If it is a "covered property" under the CARES Act, then the rationale for the non-payment of rent is irrelevant, no action may be taken to terminate or evict the tenant and no late fees may be charged.

If it is NOT a "covered property" under the CARES Act, then you may ask the tenant for proof that he/she has an inability to pay rent, such as evidence that the tenant has been furloughed or laid-off and the status of unemployment benefits. If the tenant produces what you deem to be sufficient evidence of an inability to pay rent, no action to evict the tenant should be pursued, but late fees may be charged. If you determine that the evidence presented by the tenant is insufficient to demonstrate an inability to pay rent, you may serve the tenant with a termination of the rental agreement. **However, if the tenant refuses to vacate, you will have to petition the court for a writ of restitution; you may not otherwise take action to evict.** Upon filing of a petition, the court will order a hearing, determine the sufficiency of the tenant's evidence of an inability to pay rent and decide based thereon whether to issue the writ.

Note that neither State, nor Federal law prohibits a landlord from pursuing a writ of restitution for violations of the Act or lease agreement other than non-payment of rent. With that said, as discussed you should be aware of potential challenges if terminating for no-cause when a tenant

fails to pay rent. Also, see below for termination and eviction based on a tenant's unwillingness to allow entry.

Finally, it is important to note that the Mayor of the City of Santa Fe has issued a Proclamation prohibiting all residential and commercial evictions. The Proclamation does not serve as a waiver of tenants' obligation to pay rent and does not address late fees.

Property Manager's Right to Entry.

Under the Act, tenants are required to allow entry into the property "in order to inspect the premises, make necessary or agreed repairs, decorations, alterations or improvements, supply necessary or agreed services or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, prospective tenants, workmen or contractors", provided that you have given the tenant 24 hours written notification of your intent to enter, the purpose for entry and the date and reasonable estimate of the time frame of the entry. If the tenant gives reasonable prior notice and alternate times or dates for entry and it is practicable or will not result in economic detriment, then you must attempt to reasonably accommodate the alternate time of entry.

This notice requirement does not apply if you are entering to perform repairs or services within seven (7) days of a request by the tenant, when you are accompanied by a public official conducting an inspection or a cable television, electric, gas or telephone company representative or if you are entering because of an emergency. You may not abuse the right of access.

If the tenant refuses to allow lawful access, you may obtain injunctive relief to compel access or terminate the rental agreement. In either case, you may recover damages. If you make an unlawful entry, or a lawful entry in an unreasonable manner, or make repeated demands for entry that are otherwise lawful but that have the effect of unreasonably interfering with the tenant's quiet enjoyment of the dwelling unit, the tenant may obtain injunctive relief to prevent the recurrence of the conduct or terminate the rental agreement. In either case, the tenant may recover damages.

Currently, tenants are concerned about the Health Emergency and may be less cooperative in allowing entry into the properties for the purposes enumerated above. If a tenant is refusing entry, you should discuss the options with the owner of the property before taking (or not taking) any action. Be aware that if you, in consultation with the owner, decide to move forward with termination of the lease or request injunctive relief from the court because the tenant will not allow access, a court could exercise its equitable powers to prevent the termination/eviction or entry into the property.

Lastly, a reminder that you and the owner have no other right of access unless the tenant has abandoned or surrendered the premises. 'Abandonment' means absence of the tenant from the dwelling, without notice to the owner, in excess of seven (7) continuous days; providing such absence occurs only after rent for the dwelling unit is delinquent. If the tenant abandons the property, you or the owner may take immediate possession. In such event, you will be responsible for the removing and storing of the tenant's personal property for such periods as are provided by law.