

COMMERCIAL REAL ESTATE INSIGHT & NEWS

The Bowditch & Dewey Real Estate Blog

Massachusetts Eviction and Foreclosure Moratorium Expires and is Replaced by a More Limited CDC Order

BY SAMANTHA P. MCDONALD • OCTOBER 20, 2020

On October 17, 2020, the Baker-Polito administration allowed the Massachusetts moratorium on residential foreclosures and residential and small business evictions to expire. Accordingly, commercial landlords may proceed with summary process actions against businesses formerly protected by the moratorium; residential landlords may now be able to move forward with *some* summary process actions against tenants who have not complied with lease obligations; and lenders may now pursue residential foreclosures.

The United States Centers for Disease Control and Prevention (CDC) enacted a federal eviction moratorium on September 4, 2020. Because COVID-19 is a communicable disease, the CDC asserted that evictions will cause people to relocate, congregate, or change living arrangements which may result in living in closer contact with others and may increase homelessness, which the CDC asserts will increase the likelihood of spreading COVID-19.

The CDC moratorium is similar to the former Massachusetts one but less comprehensive. It applies to any state that does not currently have a moratorium with terms at least as stringent as the CDC moratorium. As the Massachusetts moratorium just expired, Massachusetts residential landlords and tenants are now subject to the CDC moratorium only.

THE CDC MORATORIUM ONLY APPLIES TO *RESIDENTIAL* EVICTIONS

You can find our comprehensive description of the Massachusetts moratorium on evictions and foreclosures which is now expired.

The CDC moratorium differs in two significant ways from the former Massachusetts law: (1) the CDC order does not address mortgage foreclosures for borrowers impacted by COVID-19; and (2) it only applies to residential leases. It seems clear that as of October 17, 2020, small business tenants are no longer protected from eviction and residential property owners are no longer protected from foreclosure.

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The full text of the CDC's order is available on their website.

WHO IS PROTECTED?

The CDC moratorium applies only if a tenant is a "covered person," meeting certain criteria and documentation obligations. Specifically, "covered persons" are "any tenant, lessee, or resident of a residential property who provides their landlord . . . with a declaration under the penalty of perjury that . . . "

1. The occupant has used best efforts to obtain all available government assistance for rent or housing; *and*
2. The occupant: (i) is expected to earn no more than $99,000 in annual income for the 2020 calendar year (or no more than $198,000 if filing a joint tax return); (ii) was not required to report any income in 2019 to the IRS; *or* (iii) received an Economic Impact Payment (a/k/a stimulus check) pursuant to Section 2201 of the CARES Act; *and*
3. The occupant is unable to pay full rent or make housing payments due to a substantial loss of income, loss of compensable work hours or wages, a layoff or extraordinary out-of-pocket expenses; *and*
4. The occupant is using "best efforts" to make timely partial payments that are as close to the full rent payment as circumstances may permit, taking into account other non-discretionary expenses; *and*
5. An eviction would likely render the occupant homeless or force the occupant to move into and live in close quarters with others in a new shared living arrangement.

THE CDC MORATORIUM DOES NOT EXCUSE RENT PAYMENTS

The CDC moratorium ends on December 31, 2020 and any tenant seeking relief under the CDC's moratorium must accept and acknowledge full responsibility for paying all rent in arrears, and any and all fees or other charges. All such payments will be due upon the moratorium's expiration. So, like its Massachusetts predecessor, the CDC moratorium does not excuse tenants from paying rent. In fact, all tenants are expected to pay as much of their rent as they are able, and the order explicitly allows landlords to assess late fees, penalties or interest on any unpaid rent.

THE CDC MORATORIUM, LIKE THE MASSACHUSETTS VERSION, ALLOWS FOR SOME EVICTIONS IN CERTAIN URGENT CASES

Despite the CDC moratorium's general prohibition on evictions of "covered persons", the CDC will allow a landlord to evict a tenant if that tenant is:

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 nonpayment or late payment of fees, penalties, or interest).

CRIMINAL AND SUBSTANTIAL FINANCIAL PENALTIES FOR VIOLATIONS OF THE CDC MORATORIUM

A landlord who is a natural person found to have violated the CDC moratorium may be subject to: (1) a fine of no more than $100,000 or one year in jail or both (if the violation does not result in a death); or (2) a fine of no more than $250,000 or one year in jail, or both (if the violation results in a death). Organizations (i.e. business entities operating as

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landlords) are subject to double the fines.

THE CDC MORATORIUM IS SUBJECT TO JUDICIAL CHALLENGES

It's worth noting that the CDC's moratorium is subject to judicial challenges (*Brown v. Azar*, No. 1:20-cv-03702 (N.D.Ga.), *KBW Investment Properties LLC v. Azar*, No. 2:20-cv04852 (S.D.Ohio), and *Tiger Lilly LLC v. HUD*, No. 2:20-cv-02692 (W.D.Tenn.)). The plaintiffs in these cases are arguing that the CDC does not have the authority to stop landlords from proceeding with evictions. In each case, the plaintiffs have sought to prohibit the moratorium's enforcement pending trial.

In enacting the moratorium, the CDC cited the Public Health Law (42 U.S.C. § 264) as its authority for regulating housing and landlord/tenant relations. Section 361 of the Public Heath Law allows the CDC to enact regulations "necessary to prevent the introduction, transmission, or spread of communicable diseases . . . from one State or possession into any other State or possession." The CDC asserted that the moratorium will allow renters to remain in current homes thus mitigating the increase in housing density or homelessness and the resultant spread of COVID-19.

The plaintiffs in the various lawsuits have challenged the CDC's authority to regulate housing and evictions under the Public Heath Law. At this time, the CDC moratorium remains in place and no court has issued any injunction preventing the moratorium's enforcement.

NOW WHAT?

The CDC moratorium raises multiple questions and issues which are likely to be resolved through litigation, although perhaps not before the moratorium is lifted or the pandemic ends. The one clear point is that landlords of commercial properties may now institute proceedings for possession. Until procedural guidance is available or the moratorium ends, residential evictions should proceed with significant caution, if at all. We are monitoring developments and will report further on changes or developments on the state of evictions in Massachusetts.

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