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EVICITION FREEZE

Details Matter in Mass. Eviction Moratorium Law

Post-Moratorium Wave of Evictions Likely

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Gov. Charlie Baker signed into law two acts intended to address economic disruptions caused by the coronavirus pandemic and the commonwealth's state of emergency response. An Act Providing for a Moratorium on Evictions and Foreclosures During the COVID-19 Emergency, does what its title states: bans evictions and foreclosures until Aug. 18 or 45 days after the end of the declared state of emergency, if earlier. The second, An Act Providing for Virtual Notarization to Address Challenges Related to COVID-19, is more limited and intended to promote, rather than restrict, legal action.

The first law protects residential and certain small business tenants from broadly defined "non-essential evictions." This includes evictions for non-payment of rent and/or for any cause not involving allegations of criminal activity or lease violations affecting the health or safety of others lawfully on the property, health care workers, emergency personnel or the general public.

The law prohibits filing eviction cases and any notice terminating a tenancy, including notices to quit and notices to vacate a premises, for the purpose of initiating a non-essential eviction. Landlords are also prohibited from imposing late fees or reporting to credit agencies when residential or small business tenants miss a rent payment "due to

a financial impact from COVID-19."

The ban requires no income or asset testing and protects all tenants, even those without documented COVID-19 impacts.

Are Late Fees Allowed?

Many landlords, especially small property owners who count on rent payments to fund maintenance and their own mortgage payments, are concerned it is overbroad and protects even those who can afford to pay. They also fear that rent unpaid during the moratorium will prove uncollectible, notwithstanding that the law does not relieve the duty to pay. This concern is exacerbated by the fear that the moratorium and most residential leases may expire around the same time, forcing landlords to chase former tenants to recover unpaid rent. Undoubtedly, there is likely to be a post-moratorium wave of evictions and collection cases.

As opposed to the eviction ban, protection from late fees and negative credit reporting applies only to those documenting "a financial impact from COVID-19." The Executive Office of Housing and Economic Development (EOHED) has authored forms to use for notice and documentation. Tenants have 30 days from a missed payment to provide the required documentation; although they can submit no documentation and still be protected by the eviction ban. Separate forms exist for residential tenants and small business tenants. The six-page residential Certification of Financial Hardship requires a detailed accounting of income from every adult in the household. The certification form for small businesses requires an EOHED-designed profit and loss spreadsheet.

It is unclear whether a landlord may impose late fees if the information on the EOHED form is deemed inadequate. That action would be risky, particularly because the law does not require some information requested by the EOHED form. For

example, the residential form requires tenants to certify that, "[t]otal household income, for the month before the rent due date ... was less than three (3) times [the] monthly rent." This is not an eligibility requirement imposed by the law and may prove unenforceable.

Foreclosures Frozen

During the moratorium, residential property owners cannot be foreclosed on, and mortgage holders must grant a forbearance on mortgage payments for up to 180 days. During that period, no fees or penalties may be imposed – but interest at the contract rate continues to accrue – if the borrower submits a request to the loan servicer "affirming" he or she has "experienced a financial impact from COVID-19."

There is no guidance as to what information such an affirmation must contain, and the law charges no agency with developing guidance. Payments subject to forbearance will be added to the end of the loan term. Mortgage holders are prohibited from furnishing negative information to consumer credit reporting agencies for payments subject to a forbearance. Although mortgage holders are better capitalized than small landlords to bear the burden, the longer-term effect on mortgage lending is unclear.

To facilitate social distancing measures, the commonwealth has also authorized attorney and paralegal notaries to remotely take acknowledgments and notarize deeds, wills and other documents during the state of emergency. This act adopts a two-stage process, in which the notary must create two videos: one of the document's signing and the signer's acknowledgment it was his or her free act and deed; and a second, after the document has been delivered to the notary, in which the signer confirms this. The notary is then required to complete an affidavit attesting to this and keep the affidavit and videos for ten years.

Predictably, many practitioners are rejecting the process as onerous and too cumbersome. Sadly, the eviction/foreclosure moratorium may outlive the use of this new practice. ◀

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