

LEASES IN THE TIME OF COVID

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WAS THE CDC MORATORIUM EVEN LEGAL?

- Public Health Service Act of 1944 does not give express authority to CDC to stop evictions
- CDC has relied on catch-all phrase of being allowed to provide “. . . other measures as in its judgment may be necessary.”

- Courts have not upheld it:
 - *Sky Works Ltd. v. Centers for Disease Control*, No. 20-2407 U.S.D.C. Ohio, Eastern Division of Northeast District
 - Order exceeds CDC's statutory authority
 - Addressed concern that order did not accomplish goal of preventing spread of COVID
 - *Tiger Lily Inc. et al. v. HUD*, No. 20-02692 U.S.D.C. Western District of Tennessee, Western Division
 - Statutory authority exceeded

- Alabama Association of Realtors v. EDHHS, No. 20- 3377 U.S.D.C. District of Columbia

- Catch-all phrase far too broadly interpreted
- CDC does not have authority to impose nationwide eviction moratorium

- *Terkel v. Centers for Disease Control*, U.S.D.C. Eastern District of Texas
 - Moratorium unconstitutional
 - Order exceeded Article 1 powers under commerce clause and the necessary and proper clause
 - Justice Department: the decision relates only to the particular plaintiffs

- Other district courts have held that the CDC does have statutory authority to suspend residential evictions:

- *Chambless Enterprises, LLC v. Redfield*, No. 20-01455 W.D.La (Monroe Division)

- Courts cannot second-guess Congress in considering public interest
 - No constitutional violation

- *Brown v. DHHDS*, No. 20-3702 U.S.D.C. N.D. Ga. (Atlanta Division)
 - Undoing orders deemed necessary by public health officials and experts to contain a contagious and fast spreading disease would cause more severe injury to the community than damage to public interest

CURRENT STATUS OF MORATORIUM

- Expired September 30, 2021
- With progress in fighting COVID, will it be renewed?
- 11 million Americans behind on rent (15% of adult renters)

- \$45 billion in rental assistance available
- Low income households and older Americans specifically at risk
- Rental arrears could be as high as \$70 billion.

- Location is a factor:
 - 1 in 4 renters behind in Florida and South Carolina
 - 6% in Maine and Kentucky
 - Based on state's economy and affordable housing market

- Income is a factor:
 - The lower the family income, the higher the risk of being behind on rent
 - Under \$35,000.00, about 18% behind on rent
 - Over \$75,000.00 about 6% behind on rent

- Age is a factor:
 - Expectations of older citizens (55-64 and over 64) are of possible evictions

LOUISIANA STATUS

- Like most states, no eviction hold or utility payment hold
- Has Emergency Rental Assistance Program
- LouisianaLawHelp.org

EVICTIIONS IN THE TIME OF COVID

Determine the basis for seeking possession:

- Monetary default
- Non-monetary default
- Lease expiration

MONETARY DEFAULTS

CDC Declaration must be used.

- Best to give form to tenant
- Not an absolute bar to eviction



OMB Control No. 1920-1303
Form Expiration: 09/30/2021

Eviction Protection Declaration

The Centers for Disease Control and Prevention (CDC) has issued an order that may protect you from being evicted or removed from where you are living. **This means that you may be able to stay at the place where you live through JUNE 30, 2021, if you qualify.**

How to use this form

1. See if you qualify for eviction protection under the CDC order. If you'd like help from an expert, contact (800) 569-4287 or go to <https://www.hudexchange.info/programs/housing-counseling/rental-eviction/> to get contact information for a local HUD-approved housing counselor.
 2. Sign the declaration that you qualify, on the next page.
 3. Give the signed declaration page to the individual or company you rent from (for example, building management, landlord, etc.). Keep a picture or copy for your records and call your expert back if there's a problem.
-

1. Do I qualify?

If you can check at least one box in each column, you qualify.

Column A

- I received a stimulus check (Economic Impact Payment) in 2020 or 2021
- I was not required to report any income to the IRS in 2020
- In 2020 or 2021, I earned (or expect to earn) **less than** \$99,000 as an individual or **less than** \$198,000 as a joint filer

You are likely to have earned under **this amount if you receive any** of the following benefits:

- Supplemental Nutrition Assistance Program (SNAP)
- Temporary Assistance for Needy Families (TANF)
- Supplemental Security Income (SSI)
- Social Security Disability Insurance (SSDI)

None of the above — You do not qualify.

AND

Column B

I cannot pay my full rent or make a full housing payment because:

- My household income has gone down substantially
- I have been laid off from work
- My work hours or wages have been cut
- I have extraordinary out-of-pocket medical expenses¹

None of the above — You do not qualify.

You checked at least one item in each column? Your income level qualifies.

[Check the first box on the next page]

¹Defined as 7.5% or more of my adjusted gross income for the year

2. My Declaration that I qualify

By checking the boxes below, I declare that each statement is true.

- My income level qualifies for the reasons explained above
- I have done my best to make timely partial payments that are as close as possible to the full payment and to get government assistance in making my rent or housing payments. ²
- If I were evicted, I have no other available housing options, so I would:
 - Probably become homeless, **or**
 - Have to move to a homeless shelter, **or**
 - Have to move in with others who live in close quarters.
- I understand that after I sign:
 - Unless I come to an agreement with my landlord, I am still responsible for rent, back rent, and any fees, penalties or interest under my lease.
 - I must still follow the conditions of my lease.
 - Unless I come to an agreement with my landlord, if I fail to make my required payments, I could be evicted when this temporary halt of evictions ends.
 - I can still be evicted for reasons other than not paying rent or not making a housing payment.

I sign this declaration³ under penalty of perjury. That means I promise that the statements above are the truth and that I understand that I can be criminally punished for lying.

You sign here:

X

Date:

Troubleshooting tools for tenants

Find emergency rental financial assistance

Call (800) 569-4287 to find a listing for local HUD-approved housing counselors

Report problems with debt collection

Submit a complaint to CFPB cfpb.gov/complaint

Report discrimination

Submit a complaint.
Call HUD at (800) 669-9777

3. Give this signed page to the individual or company you rent from.

ATTN LANDLORDS: *Thank you for your compliance. If you violate the CDC's eviction Order, you and/or your business may be subject to criminal penalties, including fines and a term of imprisonment.*

²Calling a local expert is the best way to figure out all the help that is available to you. Find a listing for a local HUD-approved housing counselor by calling (800) 569-4287.

³If you have already signed an eviction moratorium declaration, you do not need to submit another one.

CDC DECLARATION

- To acknowledge:
 - Tenant has income limitations
 - Tenant would become homeless
 - Tenant has no funds to pay rent

If all satisfied, eviction on monetary default

CANNOT PROCEED

CDC DECLARATION APPLIED ONLY TO MONETARY DEFAULT

- Does not apply to lease violations (non-monetary defaults)
- Does not apply to lease expirations

PROCEEDING WITH THE BASICS

- Issue notice to vacate
- Notice may be waived in the lease
- If lease is silent, must be five days' notice
- No notice, no eviction

DEALING WITH THE CLERKS

- Use their forms if possible
- Coordinate hearings
- Highlight waivers
- Know local practices

JURISDICTION

- Monthly lease over \$3,000.00 cannot use City/Parish courts
- May use district court if rent sought
- City/Parish courts have expertise
- Know local practices

BASIC PROCEDURE

- Filed on a summary basis
- Filed by “lessor or owner or agent thereof” (CCP 4731)
- Attach exhibits

SERVICE

- Personal
- Domiciliary (but not on registered agent)
- Tacking
 - OK if premises abandoned, closed, or if “whereabouts” unknown
 - Use for five-day notice and hearing notice
- Whereabouts
 - No need for exhaustive search or multiple attempts
 - OK if tenant “refuses to make presence known”
- Tacking not valid to enforce other lease obligations (past-due rent)

HEARING

- Tenants often *pro se*
- Try to contact legal service corporations

JUDGMENTS

- Judgment of eviction/effect
- Lease termination
- Enforcement of property:
 - CCP 4733 allows “24 hours” to vacate
 - Generally from service of judgment
 - Despite mandatory requirements, judges will have flexibility

- Enforcement of the lease:
 - Verify proper service
 - Can combine actions but money claim is not a summary proceeding
 - possible exception
 - MUST “MITIGATE” LOSS
- Enforcement of non-compliance for possession:
 - Code allows Sheriff or Constable to “clear premises of any property”
 - They don’t
 - Will remove occupants

- Consent judgments:
 - Flexibility on resolution terms
 - Critical to tax credit, public housing and Section 8 tenants

- Defenses:
 - Bad service
 - Miscalculation of rent
- Answer under oath needed for suspensive appeal

- Reconventional demand can be used but won't stop eviction
- Injunction won't stop eviction

BANKRUPTCY

- Particularly after 2005 Bankruptcy Code amendments, bankruptcy more “lessor friendly”
- Key to determine status of lease when bankruptcy filed
 - Within term
 - Or terminated (occupancy based on reconduction)

- Automatic stay under 11 U.S.C. § 362 prevents lessor from obtaining “property of the estate”
 - Stay needs to be lifted
 - Bankruptcy court may be able to handle eviction
 - *In re: Dolese*, 28 B.R. 999 (E.D. La. 1982)
- If month-to-month, no stay lift needed for non-residential

- If month-to-month, no stay lift needed for non-residential real estate
 - Not property of the estate pursuant to 11 U.S.C. § 541(b)(2)
 - No automatic stay for non-residential real property pursuant to 11 U.S.C. § 362(b)(10)
 - Can use comfort order
- Must still lift stay for residential property

LESSEE'S RIGHTS

- Unexpired lease can be “assumed”
 - Must cure or give “reasonable expectation” of cure
 - Expired lease cannot be assumed

- Can assign
 - Must assume first
- Can reject
- Can do nothing
 - Residential lease deemed rejected in 60 days

- *Ipso facto* clauses invalid
 - Lease deemed in default due to bankruptcy filing of lessee's insolvency
- Lease anti-assignment clauses are invalid

CLAIMS

- Pre-petition
 - General unsecured
- Post-petition
 - If for the benefit of the estate, administrative post- petition expense
- Hearing required under 11 U.S.C. § 503(b)(7) and 507(a)(2)
- Filing proof of claim not enough

- Claim limitations
 - Greater of rent due for one year or 15% of remaining lease not to exceed 3 years
 - Plus actual unpaid past-due rent

COVID Bankruptcies

- Century 21
- Stein Mart
- Lucky Brand
- Lord & Taylor
- Ascena (Justice, Lane Bryant, DressBarn)
- The Paper Store
- RTW Retailwinds (New York & Company)
- Muji USA
- Bravo
- Sur La Table
- Brooks Brothers
- G-Star Raw
- GNC
- Tailored Brands (Jos. A. Bank, Men's Warehouse)
- Tuesday Morning
- Centric Brands (Hudson, Robert Graham)
- J.C. Penney

COVID Bankruptcies

- Stage Stores
- Aldo
- Neiman Marcus
- J. Crew
- Roots USA
- True Religion
- 24 Hour Fitness
- Modell's Sporting Goods
- Art Van Furniture
- Bluestem Brands
- Pier 1
- SFP Franchise Corp. (Papyrus, American Greetings)
- Chuck E. Cheese
- Hertz
- Ruby Tuesday
- Sizzler
- Gold's Gym