March 31, 2020

RESPONSE TO FEDERAL CARES ACT AND GOVERNOR DUCEY’S EXECUTIVE ORDER AFFECTING EVICTION ACTIONS

As many of you know, there have been significant changes to federal and state law which greatly affect the landlord’s ability to proceed with eviction actions. On March 27, 2020 President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”). Additionally, on March 24, 2020 Arizona Governor Doug Ducey issued an executory order (2020-14) (“Governor’s Order”) that provides for a delay in the execution of a writ of restitution under certain circumstances. The combination of the CARES Act and the Governor’s Order could effectively prevent landlords from enforcing the terms of the rental agreements or pursuing eviction actions as a result of nonpayment of rent or other contractual terms.

During this unprecedented global event it is clear that steps to prevent the spread of COVID-19 must be taken by everyone. Unfortunately, through these legislative actions, landlords are being deprived of a lot of their contractual rights. The CARES Act creates an eviction moratorium for tenants living in certain types of housing, for non-payment of rent and non-renewal issues. The Governor’s Order does not actually prevent eviction actions instead it delays a landlord’s ability to retake possession of the property after a judgment has been entered in a non-payment of rent or non-renewal case.

To understand the interplay between the CARES Act and Governor Ducey’s Executive Order and your rights as a landlord, please see our flowchart regarding landlord’s rights to evict residents.

This letter will discuss both the CARES Act and the Governor’s Order in an effort to provide guidance for proceeding with an eviction action if appropriate. First, we will discuss the CARES Act and what properties are affected by this Act.

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I. What properties are covered by the CARES Act federal eviction moratorium?

The CARES 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) (as amended through the 2013 reauthorization); (2) participates in the “rural housing voucher program under section 542 of the Housing Act of 1949”; (3) has a federally backed mortgage loan; or (4) has a federally backed multifamily mortgage loan. See Sec. 4024(a)(2).

Each landlord will need to determine if their properties are covered under one of these four (4) designations.

A. VAWA covered housing programs include the following

**Department of Housing and Urban Development (HUD)**

- Public housing (42 U.S.C. § 1437d)
- Section 8 Housing Choice Voucher program (42 U.S.C. § 1437f)
- Section 8 project-based housing (42 U.S.C. § 1437f)
- Section 202 housing for the elderly (12 U.S.C. § 1701q)
- Section 811 housing for people with disabilities (42 U.S.C. § 8013)
- Section 236 multifamily rental housing (12 U.S.C. § 1715z–1)
- Section 221(d)(3) Below Market Interest Rate (BMIR) housing (12 U.S.C. § 17151(d))
- HOME (42 U.S.C. § 12741 et seq.)
- Housing Opportunities for Persons with AIDS (HOPWA) (42 U.S.C. § 12901, et seq.)
- McKinney-Vento Act homelessness programs (42 U.S.C. § 11360, et seq.)

**Department of Agriculture**

- Section 515 Rural Rental Housing (42 U.S.C. § 1485)
- Sections 514 and 516 Farm Labor Housing (42 U.S.C. §§ 1484, 1486)
- Section 533 Housing Preservation Grants (42 U.S.C. § 1490m)
- Section 538 multifamily rental housing (42 U.S.C. § 1490p-2)

**Department of Treasury**

- Low-Income Housing Tax Credit (LIHTC) (26 U.S.C. § 42)
B. Rural Housing Voucher Program (42 U.S.C. 1490r).

C. Properties with federally backed mortgage loans

Federally backed mortgage loans are loans 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 it purchased or securitized by the Federal Home Loan Mortgage Corporation of the Federal National Mortgage Association.” Sec. 4024(a)(4). If a landlord is unsure whether their loan is federally-backed they should assume it to be so, until it can be verified, in order to reduce the risk of violating the moratorium.

D. Properties with federally backed multifamily mortgage loans

Multifamily mortgage loans are the same as “federally backed mortgage loans,” the mortgage is secured by a property with five or more dwelling units. See Sec. 4024(a)(5).

II. What does the federal eviction moratorium do?

The moratorium restricts landlords of covered properties from filing new eviction actions for non-payment of rent, it also prohibits “charg[ing] fees, penalties, or other charges to the tenant related to such nonpayment of rent.” Sec. 4024(b). The landlord (of a covered property) cannot evict a tenant, even after the moratorium expires, unless the landlord provides a 30 days’ notice, which can not be delivered until after the moratorium period has come to an end. See Sec. 4024 (c). It also appears that landlords are not supposed to serve non-payment of rent notices, but there is debate over that issue, given the vague language used in the federal law.

In other words, if your community has a federally-backed mortgage (like a Fannie Mae-backed multi-family loan, for example); or if your community participates in any Housing Assistance Program like Section 8, you are prohibited from evicting any tenant for non-payment of rent, utilities, or any other fees or charges for 120 days starting March 27, 2020.

The CARES Act’s eviction moratorium also contains language that appears to prohibit non-renewing a tenant’s rental agreement until the expiration of the 120-day moratorium period.

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CARES Act Residential Multi-Family Property Mortgage Forbearance for Federally Backed Loans.

Section 4032 of the CARES Act allows for forbearance of residential mortgage loan payments for multi-family properties with federally backed loans. Under those provisions, any borrower with a federally backed multifamily mortgage loan that is current on its payments as of February 1, 2020, may submit an oral or written request for forbearance to the borrower’s loan servicer “affirming that the multifamily borrower is experiencing a financial hardship during the COVID-19 emergency.”

Upon receipt of such request, the servicer is to document the financial hardship and to provide forbearance for “up to 30 days.” It may also extend the forbearance for “up to 2 additional 30 day periods upon the request of the borrower” provided the borrower makes the extension request during the “covered period” (which starts March 27, 2020 and ends on either the termination date of the national emergency declaration due to COVID-19 or December 31, 2020, whichever is sooner) and at least 15 days before the end of the initial 30-day forbearance period.

Any borrower who receives such forbearance is subject to the same rules regarding eviction as already set forth in Section 4024 of the CARES Act (described above). Note that this is only forbearance—not forgiveness. In other words, the payments are delayed but are still owed.


Paycheck Protection Program.

Section 1102 of the CARES Act contains the “Paycheck Protection Program.” These provisions expand the qualification criteria for U.S. Small Business Administration loans. Under this program, a business with no more than 500 employees (with certain exceptions) may be eligible for an SBA loan to cover payroll costs, costs for group healthcare benefits, employee salaries or other compensations, mortgage interest payments, rent, utilities, and interest on certain debt obligations. The interest rate for these SBA loans is not to exceed 4%. The maximum loan available is the lesser of either 10 million dollars or an amount calculated using a payroll formula set forth in the Act. The SBA is to direct lenders to defer all payments (principal, interest, and fees) on any Paycheck Protection Loan for a minimum of 6 months and a maximum of 12 months. Collateral or personal
guarantees will not be required. The Act also allows for some forgiveness of the loan during the 8-week period beginning on the date the loan is funded as long as the employer maintains certain levels of full-time equivalents and payroll.

III. Who Qualifies for the temporary delay under the Governor’s Order?

Even if a property is not affected by the CARES Act, their right to evict a resident may be obstructed by Governor Ducey’s 3/244/2020 Executive Order (“EO”). The EO allows landlords to file and pursue all eviction judgments, but prevents landlords from executing writs of restitutions when the resident has been affected by COVID-19.

The main differences between the EO and the CARES Act are that the CARES Act applies to all residents in a covered property, while the EO only applies to those persons affected by COVID-19. Also, the EO allows landlords to pursue and obtain judgments from non-paying residents and merely delays execution of a writ. The CARES Act prevents landlords from filing evictions against non-paying residents.

Under the EO, a tenant who is seeking a delay in the issuance of the writ of restitution following an eviction judgment must prove one or more of the following circumstances exist:

1. The individual is required to be quarantined based on their diagnosis of COVID-19.
2. The individual is ordered by a licensed medical professional to self-quarantine based on their demonstration of symptoms as defined by the Centers for Disease Control and Prevention.
3. The individual is required to be quarantined based on someone in the home being diagnosed with COVID-19.
4. The individual demonstrates that they have a health condition, as defined by the Centers for Disease Control and Prevention, that makes them more at risk for COVID-19 than the average person.
5. The individual suffered a substantial loss of income resulting from COVID-19, including: (a) Job loss; (b) Reduction in compensation; (c) Closure of place of employment; (d) Obligation to be absent from work to care for a home-bound school-age child; or (e) Other pertinent circumstances.

The Governor’s Order requires that the tenant notify the landlord in writing with any available supporting documentation of their temporary financial hardship. Unfortunately, the Governor’s Order fails to establish what documentation is
enough to establish that the eviction order should be delayed. We believe that the following examples should be considered sufficient evidence of hardship:

1. Written documentation from their employer establishing job loss/reduction in compensation/closure of place of employment.
2. Documentation of receipt of or application for unemployment benefits.
3. Pay stubs establishing reduction in compensation for the past thirty days.
4. Proof of employment in an industry that has seen a forced closure/reduction in business that has resulted in temporary financial hardship and direct loss to that resident.

As you can see there are significant limitations on the landlord’s ability to proceed with eviction actions as a result of the CARES Act. The Governor’s Order further limits a landlord’s ability to regain possession of a leased premises even if an eviction action is appropriate.

In closing, an eviction action can still be filed if the property is not a covered property, explained above. Even if the eviction action proceeds however, the writ of restitution may be delayed by the Governor’s order. Another important point to remember is that neither the CARES Act nor the Governor’s Order prevents an eviction action if it is based on another reason besides nonpayment of rent or non-renewals. Material and irreparable breaches, health and safety violations, and other non-compliances may still result in delivery of legal notice and if necessary, the filing of an eviction action.

We will continue to update you with additional information as it becomes available. Please continue to reach out to us with any questions.

Sincerely,

Attorneys at
ZONA LAW GROUP P.C.