
CARES Act and Landlord-Tenant Disputes: Rent, Mortgage Relief, Eviction Moratoriums, Related State Restrictions

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CARES Act: Rent, Mortgage Relief, Eviction Moratoriums, Related State Restrictions

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Topics Covered

- Federal multi-family residential mortgage relief
- Federal multi-family residential mortgage eviction moratoriums
- Fannie Mae & Freddie Mac forbearance guidance and implementation
- Other CARES Act provisions
- State eviction moratoriums
- Federal recent and future developments
- Questions

Federal Multi-Family Residential Mortgage Relief

- Requirements for Forbearance

- CARES Act requires a servicer to provide forbearance with federally backed multifamily mortgage loans that have suffered financial hardship caused by the COVID-19 emergency, if the borrower meets the following requirements:
 - Borrower has submitted oral or written request for forbearance affirming the borrower is experiencing financial hardship
 - Borrower is current on payments as of February 1, 2020

- Forbearance

- Initial forbearance will be for a period of 30 days, which can be extended for up to two additional 30-day periods
- Borrower's right to request the initial forbearance expires on the earlier of (1) end of national emergency concerning COVID-19 and (2) December 31, 2020
- Borrower may discontinue forbearance at any time

Federal Multi-Family Residential Mortgage Relief

- Eligible Loans

- Loans secured by mortgages on real property designed for 5 or more families that are:

- Made, insured, guaranteed, supplemented or assisted by any agency of the federal government
 - Made in connection with a program administered by the Secretary of Housing and Urban Development (HUD)
 - Purchased or securitized by the Federal Home Loan Mortgage Corporation (Freddie Mac) or the Federal National Mortgage Association (Fannie Mae)

Federal Multi-Family Residential Mortgage Relief

- Restrictions on borrowers that request forbearance:
 - During period of forbearance, Borrower may not:
 - Evict or initiate the eviction of a tenant solely for nonpayment of rent or other fees
 - Charge any late fees, penalties or other charges to a tenant for late payment of rent
 - Issue a notice to vacate
 - After expiration of forbearance, Borrower may not:
 - Require a tenant to vacate the tenant's unit before the date that is 30 days after the date on which the borrower provides the tenant with a notice to vacate

Federal Multi-Family Residential Mortgage Eviction Moratoriums

- Regardless of whether borrower has requested forbearance, borrower is restricted from eviction filings as follows:
 - During 120 day period beginning on date of the enactment of the CARES Act (March 27, 2020 – July 25, 2020), borrowers are prohibited from (1) initiating any legal action to recover possession of a tenant’s unit for the non-payment of rent, (2) charging fees, penalties or other charges for the non-payment of rent
 - Following expiration of the 120-day moratorium period, CARES Act also prohibits landlords from requiring a tenant to vacate the tenant’s unit before the date that is 30 days after the date on which the landlord provides the tenant with a notice to vacate
- Restrictions apply to any property where the mortgage on the property is insured, guaranteed, supplemented, protected or assisted in any way by Fannie Mae, Freddie Mac, HUD, the rural housing voucher program or the Violence Against Women Act of 1994

Agency Guidance – Fannie Mae

– Criteria for granting relief:

- Lenders and servicers to review current financial condition of Borrower using prudent commercial underwriting standards to determine whether relief is warranted under circumstances.
- Documentation to be requested by lender and/or servicers to include financial information, borrower's proposal regarding forbearance and borrower's projections
- Borrower will be required to sign a pre-negotiation letter on Fannie's standard form before servicer or lender enters into discussions
- Lender or service will not be permitted to charge a fee for granting the forbearance

– Terms of relief

- Borrower required to execute a forbearance agreement on Fannie Mae promulgated form
- Modifications to form of forbearance agreement required to be approved by Fannie Mae
- Borrower must bring loan current within earlier of 12 months after end of forbearance or receipt of business income insurance proceeds or any financial relief from any other source
- Borrower required to waive all claims by borrower against Fannie Mae, lender, servicer, officers, directors etc.
- Net operating income to be paid to Fannie Mae during forbearance

Agency Guidance – Freddie Mac

– Criteria for granting relief:

- Borrower required to submit hardship letter explaining facts and circumstances that justify granting relief.
- Documentation provided by borrower must include tenant delinquency report and forbearance report demonstrating the effect of COVID-19 emergency on property's operation and performance.

– Terms of relief

- Borrower required to execute a forbearance agreement on Freddie Mac promulgated form
- Terms generally similar to Fannie Mae form
- Net operating income not expressly required to be paid to lender during forbearance; but revenue may only be used for operation and maintenance of property or making payment to lender
- Other Key Terms

Other CARES Act Provisions relevant to real estate

Fixing the “Retail Glitch”

- Qualified Improvement Property is now eligible for 100% bonus depreciation.
- This provision is also known as the “retail glitch fix” and corrects a typo from the 2017 Tax Cuts and Jobs Act that required businesses, especially in the hospitality industry, to depreciate the cost of these improvements over 39 years.
- Restaurants and retailers may now take an immediate full income tax deduction for the cost of those improvements and may amend tax returns for prior years since enactment of the 2017 Tax Cuts and Jobs Act to take the bonus depreciation for qualified improvement costs in those years.

Other CARES Act Provisions relevant to real estate

Cash Flow Relief for qualified individuals or small businesses

- Cash payments/loans
 - Stimulus payments
 - Unemployment benefits
 - SBA “Paycheck Protection Program” (PPP) Loans
 - SBA “Economic Injury Disaster Loan” (EIDL)
- Delayed payments
 - Delayed Federal Income Tax Payments
 - Retirement plan withdrawals
 - Delayed employer payroll taxes

Other CARES Act Provisions relevant to real estate

Federal Income Tax Benefits

- Modification for Net Operating Losses (NOLs)
 - for taxable year beginning before January 1, 2021, taxpayers may use NOLs to fully offset federal taxable income
 - Taxpayers may carryback NOLs earned in 2018, 2019 or 2020 for up to 5 years
- Modification of Deduction of Interest Expense
 - Deduction for business interest expense in 2019 and 2020 increased to sum of business interest income plus 50% of taxpayer's adjustable taxable income (compared to 30% allowed previously)
- SBA PPP Loans
 - amount of PPP loan canceled debt not included in taxable income

State Foreclosure and Eviction Moratoriums

- California:
 - Executive order banning the enforcement of eviction orders for residential tenants statewide
 - Executive order allowing local governments to pass legislation limiting commercial evictions
 - Commercial eviction moratoriums adopted by Anaheim, City of Los Angeles, Beverly Hills, Santa Monica, Sacramento, San Diego, San Francisco, San Diego County, San Francisco County, Santa Clara County and Los Angeles County
 - Time periods range for moratoriums range from 2 months to indefinitely
 - Tenants generally must demonstrate an ability to pay rent due to COVID-19 circumstances
 - Exclusions may apply
 - Judicial council adopts rule suspending judicial foreclosures and default entries in eviction cases statewide
 - In effect until 90 days after the Governor declares the state of emergency related to COVID-19 is lifted or rule is amended or repealed by the Judicial Council
 - Exclusion applies if eviction action is necessary to protect public health and safety

State Foreclosure and Eviction Moratoriums

- Illinois:
 - Evictions:
 - Executive order banning the enforcement of eviction orders for residential and commercial tenants statewide
 - Moratorium runs until end of Governor's Disaster Proclamation
 - Exclusions for health and safety of the public
 - Foreclosures:
 - No statewide foreclosure moratorium
 - Cook County Circuit Court adopted order banning enforcement of evictions or foreclosures through June 1, 2020

State Foreclosure and Eviction Moratoriums

- Massachusetts:
 - Evictions:
 - Passed legislation banning commercial and residential evictions
 - Moratorium runs until August 18, 2020 or 45 days after the Governor lifts the state of emergency
 - Exclusions for commercial tenants that operate in multiple states, multiple countries, are publicly traded or have 150 or more employees
 - Foreclosures:
 - No statewide foreclosure moratorium

State Foreclosure and Eviction Moratoriums

- New York

- Evictions:

- Executive order banning the enforcement of eviction orders for residential and commercial tenants statewide
 - Blanket moratorium runs until June 20, 2020
 - Moratorium for tenants facing financial hardship from COVID-19 runs until August 20, 2020
 - New York State Courts have also issued a memorandum postponing all eviction proceedings state-wide

- Foreclosures:

- Executive order requiring Department of Financial Services require all licensed lenders provide 90 days forbearance as to any residential mortgage borrow who demonstrates financial hardship as a result of COVID-19
 - Executive order specifically excludes commercial mortgages

State Foreclosure and Eviction Moratoriums

- Ohio

- Evictions:

- Governor DeWine signed Executive Order 2020-08D (the “Order”) on April 1, 2020.
 - The Order “requested” that commercial landlords grant rent relief to “small business commercial tenants” for 90 consecutive days (ending June 30, 2020)
 - “Small business commercial tenants” is not defined in the order
 - The Order complements Ohio Supreme Court guidance dated March 20, 2020 that temporarily continues all eviction and foreclosure filings and stays all pending eviction and foreclosure proceedings

- Foreclosures:

- The Order “requested” that commercial lenders grant forbearance to commercial borrowers using Ohio real property as mortgage collateral for 90 consecutive days (ending June 30, 2020)
 - “Lender” is defined broadly in the Order to include most banking and mortgage organizations

Federal Recent Developments

- Paycheck Protection Program Flexibility Act (the “Act”) was signed into law on June 5, 2020
 - Increases the minimum repayment period for unforgiven loan amounts from 2 years to 5 years with a maximum of 10 years.
 - Extends the “covered period” from 8 weeks to 24 weeks (ending no later than 12/31/2020).
 - Provides additional exemptions from the forgiveness reduction.
 - Changes the required ratio of payroll to nonpayroll costs from 75-25% to 60-40% for forgiveness
 - Increases the repayment deferral period from 6 months to after a decision on forgiveness is made, so that borrowers do not have to start making payments until they receive a decision on loan forgiveness.
 - Permits borrowers that do receive forgiveness of their PPP loan to defer certain employer payroll taxes.

Federal Future Developments

- May jobs report unexpectedly good (economy added 2.5M jobs; unemployment down to ~13.3%)
- In mid-May, the House of Representatives passed the \$3 trillion Health and Economic Recovery Omnibus Emergency Solutions Act (“HEROES Act”). The Senate has not yet voted on the bill that includes the following:
 - Extension of unemployment benefit protections from July 2020 to January 2021
 - More focused benefits for teachers, front-line workers and other essential workers
 - Nearly \$1 trillion in aid to state / local governments facing budget shortfalls
 - Another round of \$1,200 stimulus checks, with additional \$1,200 checks per dependent (capped at three dependents)

Questions