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The New and Extended CDC Order

August 4, 2021

The Greek philosopher, Heraclitus, famously said “change is the only constant in life”. Little did he know he was predicting the ever-changing fate of the Centers for Disease Control Eviction Order (“CDC Order or Order”).

Despite the United States Supreme Court having already confirmed that the CDC exceeded its legal authority in establishing this national “eviction ban”, and our prior memorandum advising that the CDC Order had expired as of July 31, 2021, the CDC has now issued a new Order reinstating the prohibition against evictions of a “covered person” for non-payment of rent through October 3, 2021. The “new” CDC Order confirms that a landlord is still prohibited from physically evicting a tenant that has at any time submitted a declaration form to the landlord confirming that they are a “covered person”. Tenants are not required to submit new declarations in response to this Order; if they submitted one prior, they would remain covered as indicated below. Specifically, the tenant must still confirm to the landlord, either on the form provided by the CDC or in any other format they elect, that they:

- (1) have used best efforts to obtain all available governmental assistance for rent or housing; and
- (2) either (i) earned no more than \$99,000 in Calendar Year 2020 or expect to earn no more than \$99,000 in annual income for Calendar Year 2021 (\$198,000 for joint tax return filers), (ii) were not required to report any income in 2020 to the IRS; OR (iii) received an Economic Impact Payment (stimulus check); and
- (3) are unable to pay full rent due to a substantial loss of household income, hours of work, layoff, or extraordinary out-of-pocket medical expenses; and
- (4) have used best effort to make timely partial payments; and
- (5) would be rendered homeless because they have no other available housing options.

The most significant difference between the new Order and the prior Order is that the new Order “only” applies to counties which have “substantial or high” rates of COVID-19 transmissions. Once a county no longer has “substantial or high” rates for fourteen (14) consecutive days, the new Order no longer applies in that county. The term “substantial or high” is defined as counties experiencing transmission levels of 50.99-99.99 new cases in the past

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seven (7) days divided by the population in the county multiplied by 100,000; and 8.00-9.99% positive nucleic acid amplification tests in the past seven (7) days.

While a determination using this dizzying mathematical calculation is clearly daunting, it is important to note that this Order only prevents the physical eviction of the tenant and does not prevent landlords from filing eviction cases or obtaining a judgment and execution. Thus, the only time a Landlord (and court) will need to determine the transmission rates is at the time the tenant is to be physically removed from the property. Specifically, the applicability of the Order will be determined based on the COVID-19 transmission rate for the fourteen (14) days prior to the physical eviction. If the transmission rate in the county has fallen below the “substantial” or “high” threshold for the previous fourteen (14) consecutive days, the Order has no effect. If the transmission rates have remained above this threshold for the fourteen (14) days prior to the levy, and the Tenant has submitted the Declaration and qualifies as a covered person, the levy cannot proceed. As a result, at the time the Landlord seeks to levy on an execution in a non-payment of rent case, it will be imperative to confirm whether the tenant is a covered person, has submitted a Declaration, and whether the Order applies in the county in which they reside. The manner in which courts will obtain this data remains to be seen and will likely create significant challenges for the Courts and litigants.

It is important to remember that this Order does NOT prevent a landlord from commencing and prosecuting an eviction action, up to and including judgment and execution, and that this Order continues to only apply to non-payment of rent actions.

Finally, while the new requirement to determine the COVID -19 transmission rate will present significant challenges for the courts and raises serious issues as to how a party will enter such data into evidence in any hearing, we have found that the availability of state and federal funding for rental assistance has resulted in few cases which are actually affected by this Order. Of course, based on the federal courts already having deemed this Order unconstitutional, and the Supreme Court already having ruled that the Order should not extend beyond July 31, 2021, it does not appear that we have heard the final word on these restrictions.

All we can say is...stay tuned.

The foregoing is for informational purposes only and should not be considered legal advice. Please feel free to contact our office if you have any questions or need assistance. We are available to assist you with your legal needs as the housing industry navigates these complex and ever-changing circumstances

The logo consists of the letters "TQ LAW" in a serif font, enclosed within a double-lined rectangular border.

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