



## NHLP and WCLP Recommendations for Applying CDC Protections in CA

### **Summary of CDC Order and Its Application in California**

On Sept. 1, 2020, the Centers for Disease Control and Prevention issued an order entitled “Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19.” See 85 Fed.Reg. 55292 (Sept. 4, 2020). The order, which took effect upon publication in the Federal Register on Sept. 4, declares a national moratorium on certain residential evictions for nonpayment (of rent, as well as other fees or charges) under the authority of 42 C.F.R. § 70.2 (authorizing the CDC Director, upon a finding that state health authorities have not taken sufficient measures to prevent the spread of a communicable disease, to “take such measures to prevent such spread of the diseases as he/she deems reasonably necessary”). See 85 Fed.Reg. at 55293; see also 42 U.S.C. § 264. The moratorium lasts through December 31, 2020. See 85 Fed.Reg. at 55296. It applies only when tenants present their landlords with a signed hardship declaration, the required text of which appears as an attachment to the order. See 85 Fed.Reg. at 55293.

The CDC order applies in every U.S. state and territory with reported cases of Covid-19, except for states, local territorial, or tribal areas that already have “a moratorium on residential evictions that provides the same or greater level of public health protection than the requirements listed in this Order.” 85 Fed.Reg. at 55294. Thus U.S. jurisdictions having no eviction moratoria of their own are clearly covered. For states like California that have some tenant protections in place, no criteria are listed for determining which should be considered a “moratorium on residential evictions that provides the same or greater level of public health protection.”

The CDC Order goes on to state that “in accordance with 42 USC § 264, this Order does not preclude local authorities from imposing additional requirements that provide greater public-health protection and are more restrictive than the requirements in this Order.” 85 Fed.Reg. at 55294. The referenced statute, 42 USC § 264 states that “[n]othing in this section....may be construed as superseding any provision under State law ...except to the extent that such a provision conflicts with an exercise of Federal authority....” Given that eviction protections fall squarely within the police powers reserved to state and local governments, this provision makes it clear that the CDC order does not preempt the tenant protections in California’s state law, AB 3088. Instead this language allows state and local flexibility in enacting more robust protections from eviction beyond those provided by the CDC order.

In determining how the CDC order should operate in California, where we have a patchwork of local protections plus state law (AB 3088) the CDC language is more logically interpreted to create a floor of protections which state and local laws may exceed in any given case. It is not administratively practical to analyze each individual city and county protection across California to determine whether each is a “residential eviction moratorium” that “provides a greater level of public health protection,” especially where local moratoria are constantly changing and expiring. With regard to state law, AB 3088

cannot reasonably be called a “moratorium on residential evictions” because it only protects tenants from being evicted for nonpayment of rent if they meet specified criteria and continues to allow all other evictions other than “no fault” evictions. Even if AB 3088 were considered a “moratorium on residential evictions,” it is not at all clear whether it provides a greater level of protection than the CDC order because it is structured so differently and leaves out so many tenants. As discussed in greater detail below, AB 3088 provides long term protection for tenants facing eviction for nonpayment of rent during a specified period, but only for those who meet its complex requirements. Other than pausing “no cause” evictions and limiting evictions based on “substantial renovations,” AB 3088 does nothing to stop any other evictions. In contrast, the CDC order prohibits nearly all evictions for covered tenants, and allows a declaration of hardship to be provided to a landlord at any time.

The CDC makes it clear that prompt and immediate action is required: “[c]onsidering the public-health emergency caused by COVID–19, it would be impracticable and contrary to the public health, and by extension the public interest, to delay the issuance and effective date of this Order.” 85 Fed.Reg. at 55296. Thus, it is imperative that the CDC Order’s directive be implemented immediately in California despite this complex legal landscape.

Since AB 3088 is not “a moratorium on residential evictions that provides the same or greater level of public-health protection than the requirements listed in this Order,” the Order applies in California. And, applying 42 USC § 264, AB 3088’s eviction protection are not pre-empted. This leaves us with only one practical approach, which is to treat the CDC order as establishing a “floor” of protection, with local eviction moratoria or related tenant protections able to afford equal or greater protection against eviction but irrelevant if they afford less protection. *See Barrientos v. 1801-1825 Morton LLC* (9th Cir. 2009) 583 F.3d 1197, 1211 (discussing the way in which federal eviction protections act as a “uniform federal floor below which protections for tenants could not drop” while allowing local governments to enact additional protections for tenants.) This means that the CDC order would be compared to local and state moratoria on a case-by-case basis, with the more protective provision applying in each case. Where a state or local tenant protection does not create a “moratorium on residential evictions” but provides some additional protection for tenants, that protection could work in tandem in the CDC order. In this way, a tenant may benefit from both the CDC order and state and local protections, depending on their individual circumstances, and need not choose between the CDC protections and any “additional requirements [from state or local law] that...are more restrictive” than the CDC order. 85 Fed. Reg. at 55294.

Below, we analyze where the CDC order may offer more protection than state law. In any given case, advocates should determine the most protective law that applies to ensure that landlords are not illegally evicting tenants during the pandemic. At the least, using the CDC order to stop or defend an eviction may buy tenants more time as the courts sort through the new laws.

### **The CDC order prohibits all no-fault evictions.**

AB 3088 provides just cause protections to all tenants temporarily, and prohibits “no cause” notices for all tenants. CCP § 1179.03.5. While this protection is significant, it allows all no-fault evictions permitted under the Tenant Protection Act of 2019, including Ellis Act evictions and owner move-ins (and substantial rehabs on a limited basis) to continue. (See Civil Code § 1946.2 for a list of allowable no-

fault evictions and CCP §1179.03.5. (a)(3)(ii) for limitations on substantial rehab evictions.) In contrast, the CDC order prohibits *all* no-fault evictions.

The CDC order specifically bars nonpayment evictions and *evictions that are not related to lease violations, including no-fault evictions*. The order lists five categories of evictions that it does not preclude<sup>1</sup> but does not explicitly provide that the list of permissible grounds for eviction is exclusive. It is noteworthy, however, that each of the five enumerated exceptions requires some form of misconduct or lease infraction (other than non-payment of rent) by the tenant; this suggests that, if allowed at all, any non-enumerated ground for eviction would similarly need to involve misconduct or a lease violation by the tenant (other than nonpayment of rent or charges). See *Beecham v. United States*, 511 U.S. 368, 371 (1994) (“That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.”); see also *U.S. v. Williams*, 553 U.S. 285, 294 (2008) (“common sense canon of *noscitur a sociis* ... counsels that a word is given more precise content by the neighboring words with which it is associated”).

The Administration issued a fact sheet on the order which provides further support for this position: It states in its summary of the order:

*Landlords are still permitted to pursue eviction against tenants committing criminal acts, threatening the health or safety of other residents, and damaging property, among other offenses.*<sup>2</sup>

A no-fault eviction such as an owner move in doesn't involve any type of offense. Therefore, advocates in California should argue that so long as a tenant submits a CDC hardship declaration to their landlord (assuming they meet the criteria), the landlord is barred from filing any notice related to a no-fault eviction. And again, advocates should consider this strategy particularly when representing tenants who are at risk of eviction for something other than nonpayment of rent.

There is also an argument that the CDC order applies to evictions at the expiration of a lease term. However, in CA, we don't have to worry about evictions for lease terminations being covered by the CDC order because AB 3088 temporarily stops these evictions for all tenants. As discussed above, AB 3088 extends AB 1482 just cause protections to *all* tenants, regardless of the usual AB 1482 exemptions, until February 2, 2021, well past the expiration of the CDC Order. CCP § 1179.03.5. Under AB 1482, lease expiration does not constitute just cause for eviction, so lease expiration may not serve as the basis for an eviction during this time period.

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<sup>1</sup> “Nothing in this Order precludes evictions based on a tenant, lessee, or resident: (1) engaging in criminal activity while on the premises; (2) threatening the health or safety of other residents; 1 Though the order uses the term “public-health protection,” this term appears synonymous with protection from eviction in this context because the threat to public health under discussion is the anticipated spread of Covid-19 that residential evictions would cause. 3 (3) damaging or posing an immediate and significant risk of damage to property; (4) violating any applicable building code, health ordinance, or similar regulation relating to health and safety; or (5) violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment (including non-payment or late payment of fees, penalties, or interest).” See 85 Feg.Reg. at 55294.

<sup>2</sup> President Donald J. Trump is Working to Stop Evictions and Protect Americans' Homes During the Covid-19 Pandemic, found at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-stop-evictions-protect-americans-homes-covid-19-pandemic/>

**Tenants can provide a CDC declaration to their landlords at any time.**

The CDC Order requires a tenant to provide a declaration, sworn under penalty of perjury, to the landlord, although there is no time stated within which the tenant must comply. See 85 Fed.Reg. at 55293. The order includes, as an attachment, a form declaration for tenants to use—though the order also makes clear that tenants may use a different form so long as the required contents are present and the declaration is sworn under penalty of perjury. See 85 Fed.Reg. at 55292. Both the preamble to the form and the supplementary information accompanying the order state that “[e]ach adult listed on the lease, rental agreement, or housing contract should complete this declaration,” though it is unclear what the effect of having fewer than all listed adults sign the declaration would be. See 85 Fed.Reg. at 55292, 55297.

In order to avoid eviction based on nonpayment of rent for the covered time period, AB 3088 requires the tenant to submit a declaration only after a 15 day nonpayment notice has been served by the landlord. CCP § 1179.03. Submitting this declaration for rental debt accrued between March 2020 and August 31, 2020 will prevent the landlord from ever evicting the tenant for that rent. And, service of the declaration in response to every nonpayment notice for each month between September 1, 2020 and January 31, 2021 plus payment of 25% of the rent for those 5 months will prevent the tenant from ever being evicted for the remaining 75% of the rent for those months. So, tenants in California should ensure that they timely respond to 15 day termination notices with the AB 3088 financial distress declaration if they qualify. However, a qualified tenant who meets the criteria in the CDC declaration should also submit a CDC declaration to their landlord immediately, instead of waiting to receive a termination notice from their landlord. This could avoid tenants missing the 15 day deadline in AB 3088 due to sewer service or other landlord maneuvers.

Note that there is a safeguard in AB 3088 that allows a tenant to later submit a hardship declaration with a good cause showing. CCP §1179.03(h). The tenant must submit the declaration within the time for an Answer. However, a tenant who submits the declaration late must attend a hearing where the judge determines the reasonableness of the late submission under a CCP § 473 standard. A tenant who has already provided a CDC declaration to their landlord should be in a much better position in that hearing if the landlord is already on notice of hardship and should not have proceeded with the eviction. Regardless of this safeguard, tenants should be advised to timely return the AB 3088 declaration even if they have already submitted a CDC declaration.

**The CDC order prohibits a landlord from taking any steps to evict a tenant, including moving an unlawful detainer action forward or seeking a writ of execution.**

The CDC order prohibits a landlord from “evict[ing]” a covered person from residential rental property. See 85 Fed.Reg. at 55296. “‘Evict’ and ‘Eviction’ means any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a covered person from a residential property.” 85 Fed.Reg. at 55293. Hence the CDC order appears to reach all phases of the eviction process (issuance of notices to vacate, filing unlawful detainer actions, holding hearings, entering judgments for possession and writs of restitution, physical execution of writ). CDC officials confirmed this interpretation to New York Times

columnist Rob Lieberman shortly after the order was released.<sup>3</sup> Consistent with this interpretation, under the order a covered person likely cannot be evicted until after Dec. 31, 2020.

This is important in CA for two main reasons. First, as explained above, AB 3088 allows a landlord to serve a 15-day notice of nonpayment of rent to the tenant, even if the basis of the nonpayment is loss of income because of Covid (see below for a comparison of hardships). The notice may not be acted upon if the tenant submits the proper hardship declaration to the landlord. On the other hand, so long as a tenant provides the CDC declaration to the landlord, the CDC order would bar the service of this initial 15-day notice. Therefore, in California, advocates should advise tenants who qualify to sign the CDC declaration, and to do so immediately to avoid any further notices until January 1, 2021.

The CDC's broad prohibition on any eviction notices is also important in CA because it prohibits a landlord from seeking a writ of execution to enforce a judgment against a tenant or taking any further steps toward eviction after an unlawful detainer has been filed. AB 3088 may not protect a tenant who serves the hardship declaration after the answer deadline<sup>4</sup> (CCP § 1179.03.5(a) "a court may not find a tenant guilty of an unlawful detainer...") whereas the CDC order allows a tenant to submit the CDC declaration at any time. So a tenant who qualifies for the CDC protection could serve the CDC declaration to the landlord after the answer deadline, or even after a default judgment had been entered or after a writ of execution has been filed. (Tenants in this situation could then also file a motion to set aside judgment and then provide the AB 3088 declaration in order to gain permanent protection from eviction for this rental debt).

#### **The CDC Order protects tenants from eviction for rent that accrued before March 1, 2020.**

The CDC Order prohibits landlords from filing any eviction action for nonpayment of rent (and any other non-permissible grounds). The notice does not specify that the rent must have accrued during a specific period of time. On the other hand, AB 3088 does not protect tenants from eviction for unpaid rent prior to March 1, 2020. CCP §1179.03.5(a)(1) . In CA, a tenant could receive a valid eviction notice for rent due prior to March 2020 (the rent debt would be legal basis for an eviction, and not converted to consumer debt, as it would be if accrued after March 1, 2020). In this case, serving an AB 3088 declaration of financial distress to the landlord would not avoid an eviction whereas serving a CDC declaration with the landlord would halt the eviction for the pre-March unpaid rent until at least January 1, 2021.

#### **The CDC Order does not require that economic hardship be related to COVID-19.**

In order to qualify for the AB 3088 protections, a tenant must assert that their hardship is related to Covid-19 (CCP § 1179.02), which is not required under the CDC order. That means that the protections of the CDC order may be available to California renters who have reduced income or increased medical expenses due to reasons that may not be COVID-19 related, such as a major medical

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<sup>3</sup> See Ron Lieberman, "The New Eviction Moratorium: What You Need to Know," NY Times (Sept. 2, 2020) ("Does the order halt evictions that are already in process? Yes, according to administration officials."), on-line at: <https://www.nytimes.com/2020/09/02/your-money/eviction-moratoriumcovid.html?referringSource=articleShare>, last visited Sept. 4, 2020

<sup>4</sup> As in any other case, tenants have various options after missing filing deadlines, including seeking relief from default. That discussion is beyond the scope of this memo.

condition or accident or a reduction in work hours that the renter does not believe to be related to the pandemic.

However, it is important to note that there are other provisions in the CDC declaration that the tenant must sign under penalty of perjury, including income requirements. See 85 Fed.Reg. at 55293. The contents of the declaration, which essentially function as eligibility criteria for the protection of the CDC order, are as follows (from the form declaration at 85 Fed.Reg. 55297):

- Expect to have income less than \$99,000 in 2020 (\$198K for joint tax filers), or have received a stimulus check, or not have been required to report income to the IRS in 2019;
- Unable to pay full rent due to an income loss or “extraordinary” medical bills
- Have used best efforts to obtain governmental rent assistance,
- Likely to become homeless or forced to “live in close quarters” in another residence if evicted, and
- Promise to “make timely partial payments that are as close to the full payment as the individual’s circumstances may permit.” See 85 Fed.Reg. at 55293.

Tenants must fit into these vaguely defined categories in order to qualify for the CDC protections. The order includes, as an attachment, a form declaration for tenants to use—though the order also makes clear that tenants may use a different form so long as the required contents are present and the declaration is sworn under penalty of perjury. See 85 Fed.Reg. at 55292 (“To invoke the CDC’s order these persons must provide an executed copy of the Declaration form (or a similar declaration under penalty of perjury) to their landlord...”), 55297 (form declaration). Both the preamble to the form and the supplementary information accompanying the order state that “[e]ach adult listed on the lease, rental agreement, or housing contract should complete this declaration,” though again, it is unclear what the effect of having fewer than all listed adults sign the declaration would be. See 85 Fed.Reg. at 55292, 55297.

### **The CDC Order includes enhanced penalties against landlords.**

The CDC order imposes significant penalties against a landlord for illegal evictions. The definition of “eviction” likely includes some, if not all, conduct such as threats, intimidation, misinformation, or self-help measures taken to remove a tenant.

AB 3088 temporarily increases the penalties against landlords who attempt to illegally evict a tenant using certain means (lock-outs, utility shut-offs, and others). For these violations, civil penalties are increased to between \$1,000 and \$2,500 but the penalties only apply if the tenant has submitted an AB 3088 declaration.

The significant criminal penalties available under the CDC order may pose a more powerful deterrent against such practices than AB 3088’s provisions—or enable a truly far-reaching remedy for egregious violators. Note that the order may be enforced by certain state and local authorities as well as federal authorities. See 85 Fed.Reg. at 55296 (“This Order shall be enforced by Federal authorities and cooperating State and local authorities through the provisions of 18 U.S.C. 3559, 3571; 42 U.S.C. 243, 268, 271; and 42 CFR 70.18.”).

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