



COMMERCIAL REAL ESTATE INSIGHT & NEWS

The Bowditch & Dewey Real Estate Blog

MA Executive Office of Housing & Economic Development Issues Regulations and Guidance on COVID-19 Eviction Moratorium

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Earlier this month, the Massachusetts legislature passed Chapter 65 of the Acts of 2020 (the “Act”), which imposes a moratorium on certain evictions and foreclosures during the COVID-19 state of emergency. On April 28, the [Executive Office of Housing and Economic Development \(“EOHED”\)](#) issued [regulations implementing the Act](#) (See 400 CMR 5.00) (the “Regulations”).

As set out in our [previous alert](#), landlords are currently prohibited from instituting eviction proceedings for residential tenants and certain “small business units” until the earlier of August 17, 2020 or 45 days from the expiration of the March 10th state of emergency, which as of today is scheduled to expire on May 18, 2020.

In addition to setting out certain procedures which landlords and tenants must follow, Section 5.03(1) of the Regulations reiterates that all tenants are still responsible to pay rent when due “if and to the extent the tenant has the means to do so.” EOHED has created forms for both tenants and small businesses to demonstrate financial hardship (links to these forms are included in this alert).

LANDLORDS OF RESIDENTIAL PROPERTY

My tenants just told me they won’t be able to pay rent. What should I do?

Provide residential tenants with written notice of *each* missed payment (the “Landlord’s Non-Payment Letter”). EOHED has not provided a form for landlords’ use, but Section 5.03(2) explicitly requires several statements that the Landlord’s Non-Payment Letter must include and that they be “prominently displayed on the first page” of the letter. [Those statements are described here.](#)

The Landlord’s Non-Payment Letter may include other information such as the total balance of rent due, the number of months remaining under the lease, the total remaining lease payments expected if the lease is for a term of years,

contact information for the landlord to work out revised payment arrangements and a reminder that the tenant “may face eviction if rent remains unpaid” after the state of emergency ends.

EOHED provides a form “Notice and Certification from Residential Tenant Financial Hardship Related to COVID-19 (“Tenant’s Hardship Form”). Further, under Section 5.04(2) of the Regulations, a Landlord must provide a tenant a copy of the Tenant’s Hardship Form within 5 days of the tenant’s request. Therefore, landlords should consider simply including the Tenant’s Hardship Form with the Landlord’s Non-Payment Letter. **Remember that the Landlord’s Non-Payment Letter must be sent every time a tenant misses a payment.**

If a landlord knows that a tenant is not proficient in English, they “should use reasonable efforts to deliver the notice in a language that the tenant understands” and are encouraged to include a statement that the notice is important and should be translated. This statement is available on the [EOHED website here](#). 400 CMR 5.03(3).

A tenant just asked me for that Tenant’s Hardship Form. Do I have to give it to her?

Yes. As discussed above, if a tenant requests a landlord to provide a copy of the Tenant’s Hardship Form, the landlord must provide it to the tenant within 5 days of the request. [You can access the form here](#).

Do tenants have to use the Tenant’s Hardship Form?

No. Although EOHED’s website has a form for tenants’ use, tenants are not required to use the form and may use any written notice as long as it “includes a statement from the tenant that tenant has experienced a financial impact from COVID-19 and states in reasonable detail the cause of such financial impact.” The certification by tenant that is on the EOHED form is deemed to have been included in any alternate written notification.

What exactly is a “financial impact” resulting from COVID-19?

Financial impact is defined as: (a) the loss of income or additional expenses directly or indirectly caused by the pandemic, or as a result of government action related to the pandemic; and (b) is of a magnitude that makes it “impossible or impractical” for the tenant to pay rent when it is due. 400 CMR 5.02.

Can I charge a late fee?

No. A landlord cannot charge a late fee or report any negative information to a credit bureau as long as the tenant provides written notice that the nonpayment results from a financial impact due to COVID-19. 400 CMR 5.04(1). The tenant must provide this notice to the landlord within 30 days of the due date of the missed payment. In order to be able to impose late fees or report the nonpayment to a credit bureau, a landlord must seek a determination from a judge that the tenant’s notice was fraudulent or contained material misrepresentations. 400 CMR 5.04(6). Remember that even in ordinary times (and notwithstanding the Regulations), under General Laws chapter 186 section 15B, a landlord cannot impose a late fee on a residential tenant until the rent is overdue by at least 30 days, and only if you have a written lease that specifies such charges.

Can I apply a tenant’s the last month’s rent or security deposit to a missed rent payment?

No. A landlord **cannot** use the security deposit. A landlord can, however, use last month’s rent paid by a tenant, but only to pay for expenses related to the tenant’s unit or the property in which the unit is located, such as mortgage payments, utilities, and property maintenance. 400 CMR 5.05(1). Unless the landlord and the tenant agree in writing, the landlord cannot apply the last month’s rent to the tenant’s rent in arrears. Instead, the landlord needs to treat the

last month's rent as if the landlord were still holding it. This essentially allows the landlord to defer the pain of a non-payment to the future. If the landlord wishes to use the last month's rent, the landlord must notify the tenant in writing that: (a) the landlord used the money before the last month of the tenancy; (b) unless the tenant agrees in writing, the landlord remains obligated to apply the amount to the rent due for the tenant's last month; and (c) the tenant is entitled to the same interest as if the landlord never touched the deposit. [The landlord must use the form on the EOHEd website](#) and the landlord must send the notice to the tenant no later than 5 business days after the deposit is used.

I used the last month's rent, and notified the tenant on the right form. The tenant does not want me to credit it towards May's rent. How do I calculate the interest owed to the tenant on money that is not actually in the bank?

If a landlord has other prepaid rent held at the same bank, that landlord should use that interest rate. If there is no other prepaid rent, then the Regulations require that the Landlord calculate the interest using the greater of: (a) the interest rate paid by the bank that was holding the deposit for the month immediately preceding the date landlord used the money; or (b) the rate of interest earned on the tenant's security deposit during the actual last month of tenancy. 400 CMR 5.05(4).

LANDLORDS OF SMALL BUSINESS UNITS

Do I have to send a notice to my commercial tenant if they miss a payment?

No. The requirement for a Landlord's Non-Payment Letter is limited to residential dwellings. 400 CMR 5.03(2). That said, it is a good practice to send a statement to a commercial tenant outlining the payments due, payments received, and amounts held by the landlord and such a notice could include reference to the resources available to the tenants, similar to the statements required for residential units.

TENANTS

I can't pay my rent. What do I have to do?

Fill out and send the Tenant's Hardship Letter *each and every* time you miss a payment. This must be sent to the landlord within 30 days of the payment due date, but it is a good practice to send it when the rent is due (or even before). For residential units, use "[Form of Notice and Documentation – COVID-19 Hardship – Residential Tenant](#)". For business units, use both the "[Form of Notice– COVID-19 Hardship – Small Business Tenant](#)" and the "[Documentation of Financial Hardship – Small Business Tenant](#)" available at the same link.

LANDLORDS AND TENANTS

I have to "send notice." What does that mean?

All communications regarding any missed rent payments should be in writing and sent to the other party using the address and method specified for notice in your lease, if you have a written lease. If you have previously used other methods of communication with your landlord or tenant, you may send your written communication using that same method or address that is "in accordance with the parties' prior customs and practice." 400 CMR 5.04(4). Best practice is to provide notice using both the method and address specified in the lease and via your usual way of communicating.

The Regulations specify that if there are no written notice provisions or "if the landlord has communicated with the tenant via email," then the last email address used for correspondence between landlord and tenant will be sufficient notice. Alternatively, a tenant may use the address where rent payments are sent as the landlord's address for notice or the address for the landlord set out in the posting of landlord's contact information required for all non-resident

landlords under 105 CMR 480.481. A landlord may use the address of the leased premises for notice to the tenant.