

# The COVID-19 Eviction Impact

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*This article examines recent changes to eviction procedures resulting from the COVID-19 pandemic.*

The COVID-19 pandemic has had devastating impacts worldwide. The United States alone has seen over 600,000 deaths so far from its ravages,<sup>1</sup> and our government has spent billions to address the pandemic's health and economic consequences. Recognizing the importance of keeping people housed and at home, local, state, and federal governments have passed laws, entered health orders, and issued executive orders to stem the human and economic harms from COVID-19. Evictions in particular have been a focus of local and national efforts to address pandemic injuries. These efforts have resulted in three primary sources of protections: the CARES Act,<sup>2</sup> state and local executive orders, and Centers for Disease Control and Prevention (CDC) orders. These protections are often referred to as eviction moratoriums or bans but are more accurately described as a patchwork of partial moratoriums. This article examines the current eviction protections resulting from COVID-19 and the future of evictions in Colorado.

## The Eviction Dilemma

Housing has always been a major issue in the United States because it is a basic necessity, and the lack of housing leads to negative outcomes including increased health care costs, increased crime, job loss, and disrupted education for children whose families are evicted.<sup>3</sup> Despite these costly outcomes, those facing eviction are not given comparable legal protections to those who are accused of a crime. For example, most tenants facing eviction must represent themselves in court and hope for the best outcome.<sup>4</sup> In fact, in fiscal year 2018, 97% of all responding parties in a county court civil action in Colorado went unrepresented,<sup>5</sup> a large number of which were parties to an eviction.<sup>6</sup> Due to the legal system's complexity and practical challenges facing the socioeconomically disadvantaged, many simply do not show up to their eviction proceedings at all.<sup>7</sup>

COVID-19 has exacerbated these problems by putting many out of work. Throughout 2020, Colorado businesses were shuttered as the

state came under stay-at-home orders. Bars, restaurants, schools, and gyms, among other types of businesses, had to close or significantly reduce their operations. Without work and with limited unemployment compensation benefits, many tenants faced difficulties paying rent. At the same time, they were legally mandated to stay home. The situation put both tenants and landlords in a difficult spot. Landlords needed rental income to survive, but many recognized that it would not be socially responsible to leave tenants homeless and exposed during a worldwide health crisis.

## The Pre-COVID-19 Eviction Process

Eviction can be a cumbersome and confusing process for all involved—landlords, tenants, and even attorneys. Even the statutory term that describes the eviction process, “Forcible Entry and Detainer,” can be confusing to parties. The law requires due process for tenants facing eviction, which includes serving specific notices and demands and scheduling a hearing and trial,

and these components can be time-consuming. Before the COVID-19 executive orders discussed below were issued, Colorado landlords were generally required to give tenants a 10-day written notice of any default for nonpayment of rent.<sup>8</sup> The 10-day notice also served as a cure period for tenants. Following this period and without a cure by the tenant, a landlord could file a complaint, issue a summons, schedule a hearing, and have a trial. This process could take anywhere from a couple of weeks to a few months.

If the landlord prevailed at trial or the tenant failed to appear or file an answer by the scheduled return date, the judge entered a judgment for possession for the landlord and ordered a writ of restitution to issue 48 hours after entry of the judgment.<sup>9</sup> The writ of restitution is the court order permitting the landlord, with the assistance of the local sheriff, to remove the tenant from the premises. The 48-hour window allows the tenant to vacate rented premises voluntarily and avoid the forcible removal.<sup>10</sup> However, when tenants do not voluntarily vacate, scheduling a forcible removal can add days and sometimes weeks to the eviction process, because evictions are not typically a sheriff's highest priority.

This extended timeline has made pursuing evictions very costly for landlords, who carry the expenses of the property until the tenant is removed. Assuming a quick process of two months and an average rent of \$1,400 per month, a landlord stands to lose at least \$2,800 in lost rent plus legal fees incurred by pursuing a formal eviction. Accordingly, landlords may choose to negotiate with tenants rather than pursue legal action.

### Eviction-Related Orders

COVID-19 changed many aspects of life, and the process for pursuing eviction was not exempted. All levels of government implemented changes in processing evictions that were based on public health grounds, the idea being that increased homelessness as a result of job loss or mounting health care expenses would only exacerbate exposure to the disease.

Governor Polis issued Executive Order D 2020 101 on June 13, 2020, which suspended

the 10-day notice requirements of CRS §§ 38-12-204(1), 38-12-204.3(2), and 13-40-104(1)(d) and replaced them with a 30-day notice requirement.<sup>11</sup> This temporary order was subsequently amended and extended several times in 30-day increments. The amendments retroactively applied the eviction order to March 10, 2020, the date the governor initially declared a state of emergency.<sup>12</sup>

On a national level, the CDC issued an Eviction Order (CDC Order) that resulted in a partial moratorium on residential evictions based on nonpayment of rent. That order became effective on September 4, 2020, and has been extended several times, and as of this writing was scheduled to expire July 31, 2021.<sup>13</sup> The moratorium was issued in accordance with the Public Health Service Act, which allows the Department of Health and Human Services Secretary to take measures to prevent the entry and spread of communicable diseases from foreign countries into the United States and between US states and US territories.<sup>14</sup> The CDC Order serves as a floor and does not prevent jurisdictions from providing more stringent protection for residents facing evictions.

The CDC Order halts evictions for covered persons, meaning any tenant, lessee, or resident of a residential property who provides a declaration under penalty of perjury that:

- (1) the individual has used best efforts to obtain all available government assistance for rent or housing;
- (2) the individual either expects to earn no more than \$99,000 in annual income for calendar year 2020 (or no more than \$198,000 if filing a joint tax return), was not required to report any income in 2019 to the US Internal Revenue Service, or received an economic impact payment (stimulus check) pursuant to CARES Act § 2201;
- (3) the individual is unable to pay full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a layoff, or extraordinary out-of-pocket medical expenses;
- (4) the individual is using best efforts to make timely partial payments that are as close to the full payment as the individual's

circumstances may permit, taking into account other nondiscretionary expenses; and

(5) eviction would likely render the individual homeless, or force the individual to move into and live in close quarters in a new congregate or shared living setting, because the individual has no other available housing options.

The CDC Order defines eviction as any action "to remove or cause removal of a covered person from residential property," except for foreclosure on a home mortgage.<sup>15</sup>

Colorado tenants and their lawyers should note that the protections listed above are not outright prohibitions on evictions but apply only to evictions for nonpayment of rent. Tenants may still be evicted for other reasons, including engaging in criminal activity while on the premises, threatening the health or safety of other residents, damaging or posing an immediate and significant risk of damage to property, violating any applicable building code or health ordinance, and violating any other contractual obligation other than timely payment of rent or a similar housing-related payment.<sup>16</sup> Stated simply, tenants do not have free rein to conduct themselves unacceptably simply because of the pandemic. Landlords retain the right to manage their property as they see fit in accordance with lease agreements.

The governor's initial executive orders did not provide an absolute moratorium for nonpayment of rent, so they did not meet the floor set by the CDC Order. Initially, Colorado only required increased notice. But Governor Polis responded to the federal requirements by issuing Executive Order D 2020 202, requiring landlords to notify tenants in writing of the federal protections provided by the CDC Order before initiating eviction actions. This executive order was amended and extended again in Executive Orders D 2020 223, 227, and 255 to be consistent with the CDC definition of "covered persons" listed above.<sup>17</sup> Significantly, these amendments provided tenant protections above the CDC Order's floor. For tenants who demonstrated financial hardship, Executive Order D 2020 227 prevented evictions based solely on violation of a contractual obligation

and against tenants who overstayed their rental term.<sup>18</sup>

Governor Polis continued to issue executive orders with increased tenant protections on a regular basis through fall 2020. Although most of those orders have now expired, he reissued the order requiring landlords to provide a 30-day notice before an eviction case can be filed when the basis for the eviction is nonpayment of rent. This new order, Executive Order D 2021 088, was extended by orders D 2021 105, 110, and 120 and was set to expire 30 days from June 30, 2021.<sup>19</sup>

Despite providing increased protections, the executive orders did not specify an enforcement mechanism. However, the CDC Order provides enforcement mechanisms under federal criminal and public health laws. Pursuant to 18 USC § 3559, 42 USC § 271, and 42 C.F.R. § 70.18, individual violators are subject to up to \$250,000 in fines and/or one year in jail, and organizations can be fined up to \$500,000 per event.<sup>20</sup>

### Legal Challenges

Many landlords have understandably opposed the partial eviction moratorium. While they are still entitled to recover losses in rent, they are forced to absorb the carrying costs of units with non-paying tenants. As a result, various landlord groups have brought federal challenges seeking to have the CDC Order struck down as unconstitutional. Essentially, the lawsuits claim that (1) the CDC Order restricts landlords' right of access to the courts for purposes of eviction, and (2) the moratorium violates the Supremacy Clause and the 10th Amendment to the US Constitution.<sup>21</sup>

The Department of Justice (DOJ) filed a brief opposing many of the legal claims and explained that the CDC Order does not prohibit a landlord from commencing a state court eviction proceeding, provided that the actual eviction does not occur while the order remains in effect. One of these cases, *KBW Investment Properties v. Azar*, was dismissed based on a stipulation between the DOJ, CDC, and the parties that affirmed the DOJ's interpretation of the CDC Order.<sup>22</sup> Subsequently, the CDC issued a Frequently Asked Questions (FAQ)

document regarding the CDC Order, which also expressed that the CDC Order was not intended to prevent landlords from starting eviction proceedings.<sup>23</sup> Curiously, the DOJ's brief and the CDC's FAQ make concessions that seem to contradict a strict reading of the CDC Order. More recently, in *Terkel v. Centers for Disease Control*, a Texas federal district court found that the CDC Order and partial eviction moratorium exceeded Congress' powers under the Commerce Clause and the Necessary and Proper Clause of the US Constitution.<sup>24</sup> The DOJ has appealed the *Terkel* decision to the US Court of Appeals for the Fifth Circuit.<sup>25</sup>

On May 5, 2021, in *Alabama Ass'n of Realtors v. U.S. Department of Health and Human Services*, Judge Friedrich of the US District Court for the District of Columbia granted plaintiff's expedited summary judgment motion and denied defendant's partial motion to dismiss and ordered that the nationwide eviction moratorium issued by the CDC be vacated. In doing so, Judge Friedrich found that the plain language of the Public Health Services Act, 42 USC § 264(a), did not grant the CDC the legal authority to impose a nationwide eviction moratorium.<sup>26</sup> This decision was appealed, and the district court issued a stay of its own judgment pending appeal. The Alabama Association of Realtors asked the US Supreme Court to vacate the stay.<sup>27</sup> On June 29, 2021, the Court denied the application to vacate the stay in a 5 to 4 decision. In his concurrence, Justice Kavanaugh agreed with the district court that the CDC exceeded its existing statutory authority by issuing a nationwide eviction moratorium but cited practical reasons for denying the request to vacate the stay, mainly that the CDC planned to halt the moratorium on July 31, 2021.<sup>28</sup> Judge Friedrich is just one of several federal judges weighing the validity of the CDC Order. The Northern District of Georgia and the Western District of Louisiana have both ruled, at least at the preliminary injunction stage, that the eviction moratorium is valid, further contributing to the split among the federal courts on the CDC Order's validity.<sup>29</sup>

While federal courts debate the issue, Colorado courts continue to allow eviction cases to be filed and, in some cases, litigated where

the basis for the eviction does not involve nonpayment of rent or where tenants have not properly availed themselves of the CDC Order's protections. Colorado courts are also allowing parties to raise the issues set forth in the federal litigation, but as of the time this article was published, no Colorado decision on the validity of the CDC Order has been issued.

### Practical Tips

Eviction cases are currently more complex than ever, so hiring an attorney, seeking co-counsel, or getting advice from an expert in the area is critical for both tenants and landlords. The following are tips for handling eviction situations.

#### For Landlords

Landlords considering an eviction should review the CARES Act, the CDC Order, and any new executive orders and legislation. Some orders may have expired. Landlords should also check for local court administrative and other orders regarding eviction cases.

Common issues in eviction cases include failing to adhere to the notice requirements, such as those set forth by Colorado statutes or the CARES Act. While many CARES Act provisions expired on December 31, 2020, some courts have found that § 4024(c)(1) has not expired and requires a 30-day notice to a tenant in an eviction proceeding before filing a complaint with the court. A careful review of § 4024 will help determine if the property at issue is a CARES Act "covered dwelling"<sup>30</sup> and, if it is, whether the 30-day notice is required.<sup>31</sup> Also, many courts require a landlord to file a CARES Act affidavit to help the court determine if the property is a covered property under the Act. Because there are some inconsistencies among local courts on the applicability of § 4024(c)(1), the best practice is to review the local court's procedural orders related to eviction matters and consider providing a 30-day notice if the property is a covered property under the Act.

Other common issues in eviction cases relate to the CDC Order. Before providing notice to the tenant, the landlord should review the CDC Order to determine if it has been extended or if it is applicable. As mentioned above, the CDC Order provides residents in nonpayment of rent

cases certain protections if they qualify and avail themselves of the Order’s protections. As noted, the CDC Order was extended to July 31, 2021,<sup>32</sup> but it could potentially be extended again. The landlord also needs to consider the basis for the requested relief. If the basis is nonpayment of rent, the CDC Order would apply and could potentially be invoked by the tenant. But if the basis is a substantial violation or expiration of the lease term, the CDC Order would not be applicable. Accordingly, the landlord should consider all factual grounds for relief before beginning the eviction process.

If the CDC Order applies, the landlord should determine if the tenant has provided the landlord or the court a signed CDC Declaration. All residents over 18 years old are generally required to provide an executed CDC Declaration to avail themselves of CDC Order protections. While the requirement is to provide this declaration to the landlord, many courts have accepted CDC Declarations filed directly with the court or provided to landlord’s counsel. If a tenant provides a CDC Declaration, a party may seek a veracity hearing before the court to test the truth of the statements therein. While the CDC Order does not provide for this type of relief, some courts have permitted a veracity hearing in limited circumstances based on the filing of a motion or affidavit establishing good cause. And many courts require or accept CDC Order affidavits from a landlord that notifies the court when the landlord has received a CDC Declaration. This affidavit, like the CARES Act affidavit, can assist the court in determining the applicable legal authority and could result in a case moving forward more quickly.

Finally, with the advent of virtual court hearings, proper notice to the parties is essential. This includes notices required by local court rules and notices on how the parties can connect to the court through an online virtual platform or by telephone. Information on how to connect to the court virtually or by telephone is often found on the court’s website and can be obtained from the court clerk. Many courts require notice to parties in a case to include the virtual login and telephone contact information. As was common before COVID-19, the court will inquire whether the opposing party had

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proper notice of the hearing. Most courts now also ask if the opposing party was provided the virtual and telephone contact information for the hearing. These links and numbers may change periodically, so it is important to keep up with any changes.

**For Tenants**

Tenants must consider several issues when filing an answer in an eviction case. First, the tenant must determine when the answer is due. CRS § 13-40-110 requires an answer to be filed by the date and time of the return date. However, many courts have extended the time

deadline for a party to file an answer and are not entering default judgments until after 5:00 p.m. on the date of the scheduled return on the summons. Therefore, tenants must review local court procedures and the summons to determine the deadline for filing an answer. Further, due to the shift to virtual proceedings, some courts are accepting answers and motions to waive filing fees by email from pro se parties. Of course, counsel can continue to e-file their answers and other documents.

**Resources for All**

There are many resources for landlords and tenants in eviction matters. Foremost, attorneys and other providers may assist a party in an eviction case through the court self-help center,<sup>33</sup> Colorado Legal Services,<sup>34</sup> and the COVID-19 Eviction Defense Project.<sup>35</sup> Tenants and landlords can obtain assistance with finding financial help through agencies and organizations including local human services departments, the Department of Local Affairs, and various faith-based organizations. And programs such as the Temporary Rent and Utility Assistance (TRUA),<sup>36</sup> the Emergency Housing and Assistance Program (EHAP),<sup>37</sup> and the Property Owner Preservation Program (POP)<sup>38</sup> can help tenants and landlords directly with financial assistance.

**Going Forward**

Evictions will remain a focus of many local, state, and federal leaders for some time as the landscape for eviction-related matters continues to change. When this article went to press, new programs, rule changes, and legislation were being contemplated and proposed to address issues in eviction matters. Proposals include requiring landlords to provide tenant resource information in the summons, mandatory disclosures in eviction cases, longer notice periods, additional time for answers to be filed, additional cure timeframes, new default judgment procedures when a tenant appears in court on the summons return date, and additional time between the first appearance and trial.<sup>39</sup> Many of these proposals are focused on providing more consistency, additional due process to tenants, and better court access.

While the outcome of the measures under consideration remains uncertain, it is fair to say that eviction practice prior to COVID-19 has become more complex and will continue to evolve as we move forward. **CL**



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## NOTES

1. Mundell and Foster, "US COVID Death Toll Tops 600,000," *U.S. News and World Report* (June 16, 2021), <https://www.usnews.com/news/health-news/articles/2021-06-16/us-covid-death-toll-tops-600-000>.
2. Coronavirus Economic Stabilization (CARES Act), 15 USC §§ 9001 et seq.
3. Philadelphia Bar Association, Economic Return on Investment of Providing Counsel in Philadelphia Eviction Cases for Low Income Tenants at 23-29 (Nov. 13, 2018), <https://www.philadelphiabar.org/WebObjects/PBA.woa/Contents/WebServerResources/CMSResources/PhiladelphiaEvictionsReport.pdf>.
4. See, e.g., Hasvold and Regenbogen, Facing Eviction Alone: A Study of Evictions Denver, Colorado 2014-2016, [https://cclponline.org/wp-content/uploads/2018/04/Facing-Eviction-Alone-2017-Report\\_Final-1.pdf](https://cclponline.org/wp-content/uploads/2018/04/Facing-Eviction-Alone-2017-Report_Final-1.pdf).
5. Colo. Office of the State Court Admin'r, Cases and parties without Attorney Representation in Civil Cases FY 2018 at 5 (Jan. 2018), [https://www.courts.state.co.us/userfiles/file/Administration/Planning\\_and\\_Analysis/Research%20and%20Data/Cases%20Parties%20without%20Attorney%20Representation/Cases%20and%20Parties%20Without%20Attorney%20Representation%20in%20Civil%20Cases%20FY2018.pdf](https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Research%20and%20Data/Cases%20Parties%20without%20Attorney%20Representation/Cases%20and%20Parties%20Without%20Attorney%20Representation%20in%20Civil%20Cases%20FY2018.pdf).
6. In 2018 there were 25,922 civil cases filed in Denver County Court and 9,501 of those cases (about 37%) were for forcible entry and detainer. That means that in approximately 9,215 of those cases the defendant was not represented by counsel. These statistics are on file with the Denver County Court and are available for review with the court data analyst.
7. Hasvold and Regenbogen, *supra* note 4.
8. CRS § 38-12-204(1) and (2); § 13-40-104(1) (d).
9. CRS § 13-40-115.
10. CRS § 13-40-122. See also [https://www.courts.state.co.us/userfiles/file/Court\\_Probation/20th\\_Judicial\\_District/Court%20Info%20Center/Understanding%20Evictions%20-%20Website%20Version%20-070710.pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/20th_Judicial_District/Court%20Info%20Center/Understanding%20Evictions%20-%20Website%20Version%20-070710.pdf).
11. <https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20101%20Evictions.pdf>.
12. Colo. Executive Orders D 2020 134, 164, and 185.
13. CDC Order, 85 FR 55292, <https://www.federalregister.gov/documents/2020/09/04/2020-19654/temporary-halt-in-residential-evictions-to-prevent-the-further-spread-of-covid-19>. See also <https://www.cdc.gov/media/releases/2021/s0624-eviction-moratorium.html>.
14. 42 USC 264.
15. CDC Order, *supra* note 13.
16. *Id.*
17. Colo. Executive Order D 2020 202.
18. Colo. Executive Order D 2020 227.
19. Other eviction-related orders such as Executive Order D 2020 307, as extended by Executive Orders D 2021 029, D 2021 052, and D 2021 073, expired by the time of this article's writing. These Executive Orders prohibited late fees or penalties from being assessed against tenants for not paying rent timely.
20. CDC Order, *supra* note 13.
21. See, e.g., *KBW Inv. Props. v. Azar*, Case No. 2:20-cv-04852 (S.D. Ohio Oct. 9, 2020), [https://www.courtlistener.com/recap/gov.uscourts.ohsd.245790/gov.uscourts.ohsd.245790.1.0\\_2.pdf](https://www.courtlistener.com/recap/gov.uscourts.ohsd.245790/gov.uscourts.ohsd.245790.1.0_2.pdf).
22. *Id.*
23. <https://www.cdc.gov/coronavirus/2019-ncov/downloads/eviction-moratoria-order-faqs.pdf>. See also <https://www.nhlp.org/wp-content/uploads/CDC-Eviction-Analysis-Revised.pdf>.
24. *Terkel v. Ctrs. for Disease Control and Prevention*, Case No. 6:20-cv-564-JCB (E.D.Tx. Feb. 25, 2021).
25. <https://www.justice.gov/opa/pr/departments-justice-issues-statement-announcing-decision-appeal-terkel-v-cdc>.
26. *Ala. Ass'n of Realtors v. U.S. Dep't of Health and Human Servs.*, Case No. 1:20-CV-03377-DLF (D.D.C. May 5, 2021).
27. *Ala. Ass'n of Realtors v. Dep't of Health and Human Servs.*, No. 20A169, Reply in Support of Emergency Application for a Vacatur of the Stay Pending Appeal (June 14, 2021), <https://bit.ly/3wqfwIH>. See also <https://www.cbsnews.com/news/supreme-court-cdc-eviction-moratorium>.
28. *Ala. Ass'n of Realtors v. Dep't of Health and Human Servs.*, On Application to Vacate Stay, 594 U.S. \_\_\_ (June 29, 2021), [https://www.supremecourt.gov/opinions/20pdf/20a169\\_4f15.pdf](https://www.supremecourt.gov/opinions/20pdf/20a169_4f15.pdf).
29. *Brown v. Azar*, No. 1:20-cv-03702 (N.D. Ga. Oct. 29, 2020), *appeal filed*, No. 20-14210 (11th Cir. 2020); *Chambless Enters., LLC v. Redfield*, No. 20-cv-01455 (W.D.La. Dec. 22, 2020), *appeal filed*, No. 21-30037 (5th Cir. 2021).
30. 15 USC § 9058(a)(1).
31. 15 USC § 9058(c).
32. <https://www.cdc.gov/coronavirus/2019-ncov/covid-eviction-declaration.html>.
33. [https://www.courts.state.co.us/Self\\_Help/center.cfm](https://www.courts.state.co.us/Self_Help/center.cfm).
34. <https://www.coloradolegalservices.org>.
35. <https://cedproject.org>.
36. TRUA can be reached by calling (720) 913-1311, option 6.
37. <https://cdola.colorado.gov/rental-mortgage-assistance>.
38. *Id.*
39. Notably, on June 25, 2021, Governor Polis signed two bills affecting eviction procedures. HB 21-1121, Concerning Protections for Residential Tenants Related to Actions by Landlords, updates existing required language in a court summons to include an explanation of the consequences for failing to answer, the content of a defendant's answer, and fees and deposits related to filing an answer; and prohibits a sheriff from executing a writ of restitution until at least 10 days after judgment. And SB 21-173, Concerning Rights Related to Residential Rental Agreements, and, in Connection Therewith, Making an Appropriation, addresses landlord and tenant rights in residential rental agreements and amends the landlord penalty provisions.