

MEMORANDUM

TO: Chief Justice McGrath
FROM: Jeanine Blaner
RE: Changes to Eviction Limitations under the May 19, 2020 Directive
DATE: May 22, 2020

You asked me to examine the May 19, 2020 Directive to help the Court provide guidance to the District Courts regarding evictions under COVID-19 restrictions. You also provided me with a letter the Court received from Montana Legal Services Association that brings the eviction limitations of the CARES Act to the Court's attention and notes that the Directives regarding evictions may conflict with the Act's provisions for tenants whose rental properties fall within the Act's purview.

This Memo focuses on evictions of residential tenants. It does not cover any changes to foreclosures or assistance programs between Directives.

The March 30, 2020 Directive (First Directive) provided for **no** "actions for termination of a tenancy, possession, unlawful holdover, or rent involving a residential dwelling tenancy" ("eviction") for the duration of the directive **except** for evictions "based on grounds other than nonpayment," including evictions for damage or destruction, criminal activity on the premises, or a threat to health and safety other than COVID-19. The First Directive further requested that the courts stay pending eviction actions. The restrictions applied only to residential properties where the tenant or their family members currently occupied the property.

The April 13, 2020 Directive (Second Directive) provided criteria for when eviction restrictions applied. It required the tenant to provide notice to the landlord, with documentation upon request, that the tenant met one of four criteria: (1) the tenant was quarantined because of COVID-19; (2) the tenant was required to self-quarantine or believed self-quarantine was in the public's best interest due to the tenant's exposure to a high-risk activity; (3) the tenant was over age 65 or had a health condition making them at increased risk for COVID-19; **or** (4) the tenant suffered a substantial loss of income due to COVID-19.

The May 19, 2020 Directive (Third Directive) indicates that the provisions of the First and Second Directive “remain in effect through May 24, unless modified by subsequent Directive, except as follows[.]” A literal reading of this may indicate that the First and Second Directives’ limitations expire on May 24. However, it seems more likely that the inclusion of “May 24” is a lack of clarity in drafting, and this provision should not have a date limitation: “remain in effect ~~through May 24~~, unless modified by subsequent Directive, except as follows[.]”

Assuming the latter interpretation is correct, the Third Directive significantly restricts which tenants may qualify for an eviction limitation after June 1. Under the First and Second Directives, a tenant only had to demonstrate that they met one criterion of four. To forestall eviction under the Third Directive, a tenant now must meet three criteria:

- (1) be a member of a vulnerable population;
- (2) suffer a significant financial hardship as a result of COVID-19; **and**
- (3) remain sheltered at home.

If a tenant meets these criteria, they are protected by the eviction limitations of the First and Second Directives until the end of the emergency or until 30 days after the tenant ceases to shelter at home, whichever is sooner. To obtain this protection, the tenant must make a basic showing to the landlord that they meet all three criteria. Before proceeding with an eviction, a landlord must provide the tenant with notice that they can seek the protection of the Third Directive if they meet these three criteria.

However, just prior to the issuance of the Third Directive, MLSA raised concerns that the eviction limitations of the First and Second Directives conflict with the CARES Act as applied to the rental properties subject to the eviction limitations set forth in the Act. Pub. L. 116-136, sec. 4024 (Temporary Moratorium on Eviction Filings). Under the Act, these properties (referred to in the Act as “covered dwellings”) are subject to a 120-day moratorium on eviction filings – from March 27 through July 25, 2020 – for non-payment of rent or other fees, and the landlord may not charge fees or penalties for nonpayment of rent during this period.

Although the Act only applies to “covered dwellings,” this appears to be a broad swath of rental properties. It includes rental properties covered by a broad swath of federal housing programs under both HUD and USDA, and any rental properties that have a federally backed mortgage.

Given the potentially broad swath of rental housing that may fall under the CARES Act, and given that tenants of these types of rental housing may be disproportionately likely to belong to a vulnerable class and/or to suffer financial hardship due to COVID-19, this Court may wish to include in its guidance to the courts notice that rental property that qualifies as a “covered dwelling” under the Act is subject to different, likely stricter criteria through July 25, 2020, than other rental properties under the Third Directive.