

# NOW +

# NEXT

AFFORDABLE HOUSING ALERT | NIXON PEABODY LLP

MAY 27, 2020



## Reopening housing: Business and property management issues

By Harry J. Kelly

To deal with COVID-19 over the long run, what are the steps housing providers need to consider to “reopen housing”? Of course, housing never actually “closed.” Indeed, for most of the last three months, our primary national strategy to cope with the virus was to send everyone home. To the extent that we have managed to avoid the worst envisioned effects of the virus, it was because Americans heeded that advice and stayed at home, mitigating the virus’ spread.

But now, calls are mounting to reopen broad swaths of the economy. That puts housing providers in a dilemma. On the one hand, as governments move to reopen the economy, owners and managers will face pressures to scale back some of the efforts they have taken to contain the spread of COVID-19 among the residents of their properties. At the same time, if reopening the economy renews the spread of the virus—which many health experts fear—housing providers should assume that residents who return home from work or social events are likely to bring the virus with them, potentially exposing other residents to the virus and undoing much of the good that has been accomplished over the last three months.

Until there is a vaccine or a widely available and effective treatment for COVID-19, it will continue to affect the operations of housing providers. Housing providers will need to evaluate the policies they have adopted since the pandemic began and whether—and if appropriate, how—those policies should change going forward. Here are some issues that housing providers should bear in mind as they contemplate the “new normal” in a not-post-pandemic world:

### **The virus hasn’t gone away; either should social distancing**

Housing providers adopted a number of steps to stall the spread of the virus to their properties, including limiting on-site staff and closing public and common areas. Owners and managers will need to decide how many of these measures to keep in place going forward. Pressure to open access to outdoor common and public areas—such as playgrounds, basketball courts, and similar amenities—will be increasing as the weather improves. Some housing providers have taken steps to begin relaxing restrictions, like scheduling appointments to use picnic areas, athletic facilities, and playgrounds. Among problems to consider is “crowd creep”—if common areas are opened with a

limit of four users, why not six or eight? Some owners may decide that keeping flat prohibitions on using public and common spaces is easier than policing residents' usage.

## **Dealing with the eviction moratoriums**

The CARES Act imposed a 120-day moratorium on initiating evictions for nonpayment of rent, or charging fees for nonpayment of rent, on most housing that is assisted or insured by the federal government, or that has Fannie Mae or Freddie Mac mortgages. In addition, the act also imposed an eviction moratorium on properties that undertook mortgage forbearance permitted by the act. Meanwhile, many states and local governments have adopted their own eviction moratoriums and many courts are closed or have announced that they are not hearing eviction cases. All of this means that housing providers need to understand how eviction moratoriums affect them and carefully communicate with residents who are not paying rent.

The 120-day moratorium found in the CARES Act will, unless extended, expire in late July and evictions can commence 30 days later. So housing providers need to decide how they will proceed when the moratoriums are lifted. HUD has taken the view that the 120-day moratorium does not constitute rent forgiveness, and so owners and managers will need to decide what happens to uncollected rent at that point. Some owners have entered into formal rent forbearance agreements with tenants, which set out the rights of the parties with respect to collection and any repayment terms that they settle on.

Late last week, HUD issued an updated set of COVID-19 FAQs that included additional guidance concerning the 120-day eviction moratorium. In response to questions from owners, HUD warns that owners may not collect late fees for rents that were not paid during the moratorium, warning “fees and charges that could not be assessed during the eviction moratorium should not accrue and should not be charged after the moratorium ends.”<sup>1</sup>

Housing providers that intend to start collection and eviction proceedings after the moratoriums expire need to understand the challenges that they may face in decontaminating and refitting vacated units (do you want third-party crews who may be carrying the virus walking through your property?) and the challenges of re-renting units in a vastly different market where credit-worthy replacements may be hard to find.

Because Congress provided additional funding to existing housing programs, many owners and managers of affordable housing properties have not experienced a large surge in rent arrearages, at least not yet. And indeed, at the national level, it appears that the majority of tenants are continuing to pay their rent on time. But all housing providers need to understand the moratoriums that apply to their properties and the rights and limitations they face in collecting any unpaid rents.

## **Revamp business practices to deal with the virus over the long term**

Many housing providers took steps to keep their businesses resilient and functioning during the pandemic. This involved reducing on-site operations, closing “home” offices, and directing employees to work remotely. Owners and managers also adopted electronic and remote methods for tenant transactions, including paying rent and submitting maintenance requests. With many

---

<sup>1</sup> [Questions and Answers for Office of Multifamily Housing Stakeholders: Coronavirus \(COVID-19\)](#) dated May 21, 2020 (“May 21 FAQs”) at 14.

businesses making plans to reopen, now is a good time to evaluate what has worked over the last two months and what needs to change going forward. Plans for workers to return to business offices and on-site management offices need to be developed. These could include some combination of staggered shifts, office social distancing, and continued liberal remote work options for some period of time. As businesses, housing providers need to be mindful of sick pay, health insurance, overtime, and childcare issues that may complicate these decisions.

### **Evaluate property management practices to keep the lid on the virus**

Housing providers took strong action to fight the virus at an early stage. These included more intensive cleaning and disinfecting, and urgent-only maintenance practices. Since there is no evidence the virus will disappear on its own, housing providers should maintain active schedules for **cleaning and disinfecting common and public areas**, including all surfaces (door handles, elevator buttons, railings, etc.) that residents and staff come in contact with. Where they have been adopted, **policies to restrict visitors** should be evaluated for effectiveness and consistency. Especially in projects with a large population of elderly residents, housing providers should discourage unnecessary visits by person who may introduce the virus. **Emergency-only maintenance protocols** also need to be reexamined: a “non-urgent” maintenance issue two months ago may be urgent today, and housing providers should not encourage DIY solutions that may actually worsen maintenance problems or result in personal injury or property damage. In the coming months, personal protective equipment—masks, gloves, etc.—may become more widely available, making both residents and maintenance staff more comfortable with in-unit maintenance operations.

### **Maintain effective communications with staff and residents**

It was difficult enough to explain to staff how they would work from home, and to communicate project-level news to residents as the shutdown began. Now, as the economy begins to reopen, it is especially important to keep staff and residents informed about your plans going forward. Regular updates to staff and residents are the best way to allay rumors and unnecessary worries. A proactive communications policy will bolster confidence that management is aware of new developments, understands everyone’s fears, and is developing policies in the best interest of all. Nothing instills confidence like the perception that the people in charge are thinking ahead and taking wise action.

One communication issue that has worried housing providers from the start is whether they should notify other residents if a staff member or resident tests positive for the virus. In the past, HUD essentially said owners and managers can disclose positive cases, pointing to guidance from the CDC. In its newest guidance, HUD leans toward disclosure even more, stating it “suggests that owners and [managers] immediately notify the local health department and communicate with staff, residents, volunteers, and visitors about potential COVID-19 exposure,” and adding that if they “receive information about a positive case,” housing providers should “communicate the possible COVID-19 exposure to all residents and workers, volunteers, and visitors.” May 21 FAQs at 4. HUD urges housing providers to contact local public health agencies in such cases, which is good advice, considering that some local public health agencies have discouraged housing providers from disclosing the presence of the virus in their communities, apparently out of concern that disclosing the identity of virus-positive persons will discourage people from seeking testing and treatment. HUD confirms that housing providers “must ensure the notification **does not disclose** any names, apartment numbers, and other personally-identifiable information” about persons who test positive, and urges them to “attempt to counter potential stigma and discrimination.” Id. (emphasis

original). HUD also confirms that “[r]esidents are not required to notify administrators if they have or may have a positive case of COVID-19.” Id.

### **Identify a COVID-19 coordinator and follow a COVID-19 Response Plan**

The challenges posed by COVID-19 will vary from place to place, company to company, and project to project. One size does not fit all, and housing providers need to be nimble in responding to unexpected developments. That meaning having a Response Plan that outlines the steps the housing provider will take to deal with the virus and a single official—a COVID-19 coordinator—responsible for tracking best practices and local health developments, responding to internal and external questions, and, when necessary, recommending changes to the Response Plan to deal with exigencies.

### **Avoid fair housing mishaps**

As one wag once said, no good deed goes unpunished. HUD and the Justice Department have already warned that in responding to COVID-19, housing providers must avoid policies that violate the Fair Housing Act and other anti-discrimination laws. For example, if owners decide to open some common areas but continue restrictions on playgrounds and other facilities used by children, they may face familial status discrimination claims. And while infectious diseases themselves are not normally considered disabilities under federal laws, at least some advocates contend COVID-19 should be treated that way. In any event, it is likely that people with other types of pre-existing disabilities, such as respiratory disease, may ask for additional assistance or changes in policies to minimize the risk of contracting the disease. Such inquiries are likely to be deemed to be reasonable accommodation requests and need to be handled pursuant to the housing provider’s reasonable accommodation policies. Staying alert to the potential impact of policy decisions is the best way to avoid discrimination complaints later.

### **Looking ahead**

Reopening housing—just like reopening the economy in general—is likely to be more like turning a dial than flipping a switch. And it will involve at least as much planning and forethought as the initial shutdown required. Housing providers need to understand that, because the virus will persist indefinitely, they will need to factor it into the risk matrix of their business and property management operations over the long-term. Evaluating what has been done so far, making practical plans moving forward, and communicating those plans to staff and residents, will pay dividends in the future.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

— Harry J. Kelly, 202-585-8712, [hkelly@nixonpeabody.com](mailto:hkelly@nixonpeabody.com)

---