

10 FAQs for Business Clients During the COVID-19 Pandemic

1. I own several residential rental properties. What do I do if my tenant doesn't pay? Can I evict them? Can I change the locks or otherwise block their access? Can I charge late fees for unpaid rent?

On March 25, 2020, the Tennessee Supreme Court issued Order NO. ADM2020-00428, which provided in part "...no judge, clerk, or other court official shall take any action to effectuate an eviction, ejection, or other displacement from a residence during the effective dates of this order based upon the failure to make a rent, loan, or other similar payment absent extraordinary circumstances as determined by a judge in a court of competent jurisdiction. Nothing in this order affects the obligations, terms, or conditions for payment under existing contracts."

This means that if you own and lease residential property in Tennessee and your tenant does not pay rent, for now you cannot evict that tenant absent "extraordinary circumstances". The Order also provides that it is intended to be interpreted broadly for protection of the public, which I suspect means that the facts would have to be truly extraordinary before a judge would allow a landlord to evict a residential tenant during this time.

You should **not** access the rental property and try to evict the tenant yourself by removing their belongings, changing the locks, or otherwise attempting to block the tenant's access. Doing so would be a "self-help eviction" and in almost all cases, those types of evictions are prohibited in Tennessee. By doing so, a tenant could sue you for damages and for possession of the property.

The Order does not prohibit charging late fees or otherwise enforcing the terms of your lease. I would strongly recommend reviewing your leases with counsel and determining what options you may have.

While this Order will likely frustrate some landlords, we are seeing landlords use this as an opportunity to work with their tenants to reach a compromise that is mutually beneficial. If your tenant is not paying rent, I would recommend talking with them before taking action. It is possible the tenant cannot afford any rent at all but it is more likely that the tenant can afford some amount of rent. Because your remedies are limited for the time being, working out a compromise will likely be your best option. We have already had clients engage us to prepare lease amendments to reflect reductions in rent or rent forgiveness for a certain amount of time and that seems to be working well for both landlords and tenants. Before making any changes to the lease, you should work with your counsel to make sure the agreed upon arrangement is lawful and to properly document the changes.

2. *I own several commercial rental properties. What do I do if my tenant doesn't pay? Can I evict them? Can I charge late fees?*

The Order referenced above does not apply to commercial properties. However, the courts have suspended in-person hearings until April 30, 2020, so from a practical perspective, you will likely not be able to pursue an eviction during this time. Review your leases with counsel to see what remedies (such as late fees) are available to you and would recommend communicating with your tenant to see if there is a mutually beneficial arrangement that can be found.

3. *What do I do if I can't afford to pay the mortgage payment on the property I am leasing because my tenants are not paying rent?*

There is not an easy answer to this question. At the federal level, President Trump froze foreclosures for Federal Housing Agency (FHA), Fannie Mae, and Freddie Mac loans for at 60 days beginning March 18, 2020. If you are struggling to make your loan payments, speak with your lender sooner rather than later to see if your loan is included in the foreclosure freeze or if there is other assistance for which you may qualify – like a forbearance program.

4. *I keep hearing about having to provide additional Paid Sick Leave to my employees. Do I just automatically give my employees two weeks of Paid Sick Leave on April 1, 2020?*

No. Beginning April 1, 2020, you will only provide up to two weeks of Paid Sick Leave to eligible employees if both you and the employee meet certain criteria. A quick summary of the requirements are:

Paid Sick Leave –

- For Employers with less than 500 Employees
- An Employee is eligible upon hire
- Employer must provide Employee with up to 2 weeks of paid sick leave (max of 80 hours) if Employee:
 1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
 2. has been advised by a health care provider to self-quarantine related to COVID-19;
 3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
 4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
 5. is caring for his or her child whose school or place of care is closed (or childcare provider is unavailable) due to COVID-19 related reasons; or
 6. is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services.
- If the Employee qualifies under reasons 1 – 3 above, she will be eligible for her full rate of pay up to \$511/day (\$5,110 total for the full 2 weeks).
- If the Employee qualifies under reasons 4 – 6 above, she will be eligible for 2/3 of her regular pay or up to \$200/day (\$2,000 total for the full 2 weeks)

5. *Is the Paid Sick Leave the same as the Expanded FMLA Leave?*

No, they are two separate regulations. The Expanded FMLA Leave criteria is more narrow and because it is part of the more complicated FMLA, it is very detailed and there are lots of factors to consider. I would strongly advise that you consult with counsel before making any decisions regarding Expanded FMLA Leave. Below is a brief summary:

Expanded FMLA Leave –

- For Employers with less than 500 Employees
- An Employee is eligible 30 days from hire date
- Employer must provide Employee with up to 12 weeks of FMLA leave **IF** Employee is caring for his or her child whose school or place of care is closed (or childcare provider is unavailable) due to COVID-19 related reasons.
- Of the 12 weeks, the first 2 weeks can be unpaid or the Employee can elect to use some of her paid time off (including the 2 weeks of Paid Sick Leave referenced above). The last 10 weeks is paid leave at 2/3 of Employee's regular pay or up to \$200/day (\$12,000 total for the full 10-week paid leave).
- Because this requirement is part of the FMLA, an employer typically would need to hold the same or an equivalent position for that employee to return to after her leave.
 - In this case, if the employer has less than 25 employees and meets certain criteria, that may not be required.
 - If the employee is not restored to her position after the leave, the employer will be required to put her on a contact list for up to 1 year for potential rehire if an equivalent position becomes available.

6. *If my business currently is not subject to FMLA, am I exempt from the Expanded FMLA Leave now?*

No. With a few exceptions (for example, employers of healthcare providers & emergency responders), all private employers with less than 500 employees are subject to the Expanded FMLA Leave.

7. *Do I need to post something at my office regarding Employee Rights to Paid Sick Leave and Expanded FMLA Leave?*

Yes. Here is a link to the poster created by the Department of Labor. This should be printed and posted where you post your other Employee Rights notices and posters.

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

8. *I am an Employer with less than 50 employees and these leave policies could destroy my business. Am I exempt?*

Possibly. The Department of Labor has the authority to exempt employers of less than 50 employees from complying with these leave policies “when the imposition of such requirements would jeopardize the viability of the business as a going concern.” Unfortunately, no guidance has been issued as to what this means. I, along with most other small business owners, am waiting impatiently for this guidance to be issued.

9. *Should I terminate all of my employees before April 1, 2020 in order to avoid potentially having to provide them with the additional Paid Sick Leave or 12 weeks of Expanded FMLA leave?*

The short answer is almost certainly no. Every situation will vary depending on the facts, but before you take such a severe action, it is important to understand exactly who is eligible and what the criteria is for an employee to qualify for leave under either of these programs. It is possible that none of your employees will qualify under any of the existing criteria. I would strongly suggest that you consult with counsel before you take drastic action like terminating employees.

10. *I am struggling to make payroll and to otherwise pay my business expenses. Can I apply for an SBA loan? Will the loan be forgiven?*

The Coronavirus Aid, Relief, and Economic Security Act (Cares Act) was adopted by Congress last week and signed into law by President Trump on March 29, 2020. The Cares Act is an attempt to provide relief to both individuals and businesses. The Act authorizes SBA loans for small businesses (defined as 500 employees or less) for an amount up to 2.5 times the employer's average monthly payroll cost. One of the conditions to qualifying for this loan is showing that "the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations" of the business. It is unclear at this time how necessity will be proven. Assuming you are able to establish necessity and be approved, a portion of the loan may be forgiven where the loan proceeds are used for expenses such as payroll costs, interest on covered mortgage obligations, rent, or utility payments during a specific 8-week period. Payments will be deferred for one year. Additionally, in order to accelerate and encourage the loan process, they have waived certain underwriting requirements and fee waivers may be available. If you think you may qualify for an SBA loan, I recommend contacting your lender to start that process sooner rather than later.

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