



# Evictions During a Declared Public Health or Other Emergency

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**A** declaration of a state of emergency does not in and of itself affect evictions, but both courts and the executive branch may act to suspend or alter normal eviction procedures in light of a declaration of a state of emergency. That is exactly what has occurred during the current public health emergency. The governor and the secretary-designee of the Department of Health Services issued an emergency order suspending evictions, and the courts—both the Wisconsin Supreme Court and several circuit courts—have issued temporary orders impacting evictions.

This publication sets forth the normal statutory procedures for evictions, how they are impacted by a state of emergency, the orders related to evictions that have been issued during the current emergency, and under what authority these orders were issued. The publication also briefly addresses what actions other states have taken.

## The statutory eviction process

### Notice requirements for termination

Under the normal statutory eviction process, a landlord may seek to evict a tenant for one of several reasons. Eviction actions are handled exclusively in small claims court and apply to both residential and commercial tenancies.<sup>1</sup> A landlord may proceed with an eviction action only after following certain steps, including providing appropriate notice to the tenant.

If a tenant is late in paying rent, the landlord may give the tenant a notice that requires the tenant to pay rent or vacate the premises within at least five days after the notice is given. If the tenant fails to pay the rent by that date, the tenancy is terminated.<sup>2</sup> For certain tenants, a landlord may give a notice requiring the tenant to vacate within at least 14 days after the notice is given, without providing the tenant an option to cure by paying rent.<sup>3</sup>

A landlord may also terminate a tenancy, upon providing the appropriate 5-day or 14-day notice to the tenant, if the tenant commits “waste,” meaning that there are damages to the premises and the tenant fails to repair them or reimburse the landlord for repairs, or if the tenant breaches a condition of the lease or rental agreement.<sup>4</sup> For tenants with a lease that lasts for more than one year, the notice for failing to pay rent, for committing waste, for damaging the premises, or for breaching the lease must provide at least 30 days to cure the default.<sup>5</sup>

A landlord may terminate a tenancy and require a tenant to vacate the premises within five days, without an option to cure, if the landlord receives written notice from a law enforcement agency or district attorney that a nuisance exists in the tenant’s rental unit

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1. Wis. Stat. § 799.01 (1) (a).

2. See Wis. Stat. § 704.17 (1p) (a) and (2) (a).

3. *Id.*

4. See Wis. Stat. § 704.17 (1p) (b) and (2) (b).

5. Wis. Stat. § 704.17 (3) (a).

or was caused by the tenant on the landlord's property.<sup>6</sup> A landlord may also terminate a tenancy and require a tenant to vacate within five days, without an option to cure, if the tenant, a member of the tenant's household, or a guest (1) engages in any criminal activity that threatens the health or safety of, or right to peaceful enjoyment of the premises by, other tenants or neighbors; (2) engages in any criminal activity that threatens the health or safety of the landlord or landlord's employee; or (3) engages in any drug-related criminal activity on or near the premises.<sup>7</sup>

Finally, a landlord may terminate a tenancy and require a tenant to vacate the premises within five days, without an option to cure, if the tenant commits any acts, including making verbal threats, that cause another tenant or a child of another tenant who occupies the same rental unit to face an imminent threat of serious physical harm, and if that offending tenant is the named offender in certain types of injunction orders or criminal complaints.<sup>8</sup>

### **Court procedures and execution of a writ of restitution**

Once a landlord has given the appropriate notice, the landlord may bring a small claims eviction action against a tenant whose tenancy has terminated and who remains on the premises.<sup>9</sup>

In an eviction action, if the court finds that the landlord is entitled to possession of the premises, the court must enter an eviction judgment.<sup>10</sup> Under Wis. Stat. § 799.44 (2), "at the time of ordering judgment for the restitution of premises, the court shall immediately order that a writ of restitution be issued, and the writ may be delivered to the sheriff for execution in accordance with s. 799.45." That section further provides that "[n]o writ shall be executed if received by the sheriff more than 30 days after its issuance." The court may, in cases for which it determines there is a hardship, stay the issuance of the writ for up to 30 days from the date of the order for judgment.<sup>11</sup>

Under Wis. Stat. § 799.45, a sheriff receiving a writ of restitution must then execute it by removing the tenant and the tenant's personal property from the premises.

## **Effect of a public health or other declared emergency on landlords and tenants**

In general, the declaration of a public health or other state of emergency does not in and of itself change the eviction process. There is nothing in the statutory process for eviction

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6. Wis. Stat. § 704.17 (1p) (c) and (2) (c).

7. Wis. Stat. § 704.17 (3m) (b) 1.

8. Wis. Stat. § 704.16 (3) (b).

9. Wis. Stat. §§ 704.23, 704.25 (1), and 799.40 (1).

10. See Wis. Stat. § 799.44 (1).

11. Wis. Stat. § 799.44 (3).

that changes during the period of a declared emergency, and such a declaration does not by itself affect the rights or privileges of either landlords or tenants during such a time.<sup>12</sup> As discussed below, with regard to the fair housing law, a declaration of an emergency, particularly a public health emergency, could provide grounds for a landlord to institute certain limitations on access to areas in an apartment, or in certain circumstances, allow a landlord to refuse tenancy, but there is nothing in a declaration itself that directly changes evictions procedure.

A declaration of an emergency may incorporate separate orders based on the declaration or, as has occurred during the current public health emergency, subsequent orders may be issued based on the declaration. Orders issued by state or local authorities or courts based on the declaration of an emergency (and, of course, any new legislation passed relating to the emergency) can affect the rights, privileges, and remedies available to landlords or tenants, depending upon the scope of the specific order. As discussed below, during the current declared public health emergency, both an emergency order and several court orders have affected the eviction process.

## Fair housing law; common areas and evictions

Generally, under Wis. Stat. § 106.50, a landlord may not discriminate against an individual who is disabled by refusing to rent, renew a lease, or prevent the individual from full use of the property that the individual has rented, including shared spaces such as laundry rooms.

Under the state law, a disability includes a physical impairment that substantially limits one or more major life activities. If an individual has a diagnosis of a COVID-19 infection, or is regarded as having the virus, whether real or perceived, that individual could be considered to be disabled under the law and afforded the protections under Wis. Stat. § 106.50.

However, Wis. Stat. § 106.50 (5m) (d) explicitly exempts from prohibited discrimination the refusal to allow the tenancy of an individual whose tenancy would be a *direct threat* to other tenants or personnel who work on the premises. This is limited, though, if the threat to others can be mitigated or adequately reduced, and there must be evidence that the individual “by behavior by the individual that caused harm or damage, that directly threatened harm or damage, or that caused a reasonable fear of harm or damage to other tenants, [or] persons employed on the property.” Under the current public health emergency, a landlord could probably enact limitations on access to shared spaces, such as a laundry room, or meeting room, but only to the extent the landlord couldn’t mitigate danger, by, say, having specific times that individuals use the shared space, and cleaning adequately.

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12. See Wis. Stat. §§ 323.10 and 323.11.

# Actions taken during the current public health emergency declared March 12, 2020

## Court orders

On March 22, 2020, the Wisconsin Supreme Court issued an order suspending jury trials through May 22, 2020, and suspending in-person court appearances through April 30, 2020.<sup>13</sup> Subsequently, in an order dated March 31, 2020, the court extended the March 22 order with respect to noncriminal jury trials, approving an interim rule that “suspends the deadlines for noncriminal jury trials . . . effective the date of this order and until further order of this court, subject to pending further review and consideration at a public hearing to be conducted on May 1, 2020.”<sup>14</sup> The March 31 order specifically suspends deadlines under the statutes for jury trials for “small claims actions involving residential evictions” under Wis. Stat. § 799.20 (4) and further suspends any other deadline “requiring a jury trial within a specified period of time in a non-criminal action or proceeding in any other statutory provision.”<sup>15</sup>

The court orders suspending jury trials operate to stop eviction proceedings that have been initiated from reaching a resolution, thus effectively suspending evictions. Except as limited by Emergency Order #15, discussed below, depending on the county and the technology available for the county to perform certain functions telephonically or by video conference, it could be possible for a proceeding for an eviction to be initiated but then suspended before its resolution.<sup>16</sup>

Various circuit courts have independently issued orders to suspend or postpone certain proceedings. Dane County, for example, by court order, has temporarily prohibited the execution of writs of restitution, which would otherwise allow a sheriff to evict a tenant if the court in an eviction case has already issued an order of eviction, and has now extended that order until April 30, 2020.<sup>17</sup> Further, specifically with regard to evictions, the court, on April 2, 2020, issued a new order in light of the terms of Emergency Order #15. In that order, the court states:

New eviction filings will be scheduled before June 1, 2020 only if they involve significant property or personal safety concerns. Such filings will be screened by a circuit judge

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13. The Wisconsin Supreme Court suspended all jury trials through May 22, 2020. See Order In re the matter of jury trials during the COVID-19 pandemic, Wisconsin Supreme Court (2020), <https://wicourts.gov/>.

14. See Wisconsin Supreme Court order, issued March 31, 2020: Order In re suspension of deadlines for non-criminal jury trials due to the COVID-19 pandemic: Public hearing notice, Wisconsin Supreme Court (2020), <https://www.wicourts.gov/>.

15. *Id.* at pages 8–9.

16. For example, as of March 25, 2020, Adams County was allowing small claims intake to be conducted via video conferencing. See Temporary order regarding access to and participation in court hearings, Adams County Circuit Court (2020), <https://wicourts.gov/>.

17. See Dane County Circuit Court order, issued March 12, 2020: Order regarding emergency temporary measures, Dane County Circuit Court (2020), <https://courts.countyofdane.com/>. The order was extended by the Order extending emergency temporary measures, Dane County Circuit Court (2020), <https://www.wicourts.gov/>.

and scheduled as deemed necessary and appropriate. Landlords are required, if filing an eviction action, to include an affidavit stating the extraordinary circumstances for which they believe the Court should act before June 1, 2020. Failure to pay rent is not sufficient grounds for an eviction before June 1, 2020, although rent will continue to accrue and be due and payable.<sup>18</sup>

The Milwaukee County Circuit Court has also acted, suspending in-person proceedings until May 15.<sup>19</sup> The Waukesha County Circuit Court issued a specific order regarding eviction proceedings on March 20, 2020, allowing such actions to proceed using telephonic hearings.<sup>20</sup> Any circuit court order in conflict with a Wisconsin Supreme Court order, however, would be superseded by the supreme court's order. The Wisconsin Court System website, under a tab labeled "COVID-19," has a [listing](#) of each circuit court order that has been issued relating to the current public health emergency.

### **Emergency Order # 15**

Emergency Order #15, issued jointly by Governor Evers and DHS Secretary-designee Andrea Palm on March 27, 2020, prohibits, for 60 days, landlords from doing any of the following based on a failure to pay rent: (1) serving a notice terminating a tenancy; (2) commencing a civil action of eviction; or (3) delivering a writ of restitution to the sheriff. Based on the order, a landlord will need to wait until after Emergency Order #15 expires to evict a tenant for failure to pay rent.

The order does not affect any residential lease terms other than those relating to the eviction process. Under provision 11 of Emergency Order #15, a tenant must still pay rent according to the terms of the tenant's lease.

The fifth provision of the order clarifies that the order does not affect the operation of Wis. Stat. § 704.25, which allows a landlord to evict a tenant if the tenant holds over after the expiration of a lease.

Unless a landlord produces an affidavit attesting that an action is based on a reasonable belief that the failure to proceed would result in an imminent threat of serious physical harm to another person, Emergency Order #15 prohibits a landlord from serving a notice terminating a tenancy, commencing a civil action of eviction, or delivering a writ of restitution to a sheriff for a reason other than a failure to pay rent. In order to commence a civil action of eviction or deliver a writ of restitution to the sheriff, a land-

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18. See Dane County Circuit Court order relating to small claims cases: [Order regarding temporary procedures for Dane County small claims court](#), Dane County Circuit Court (2020), <https://courts.countyofdane.com/>.

19. See Milwaukee County Circuit Court order issued March 23, 2020: [Chief Judge directive 20-06 regarding emergency temporary measures](#), Milwaukee County Circuit Court (2020), <https://www.wicourts.gov/>. Before the Wisconsin Supreme Court's order, Racine County also suspended in-person contested proceedings until April 12, 2020. See [Order regarding emergency temporary measures](#), Racine County Circuit Court (2020), <https://wicourts.gov/>.

20. See Waukesha County Circuit Court order issued March 20, 2020: [Chief Judge directive 20-06 regarding emergency temporary measures](#), Milwaukee County Circuit Court (2020), <https://www.wicourts.gov/>.

lord must include in the affidavit verification that the eviction is not based on a failure to pay rent.

Sheriffs are similarly prohibited from acting on these types of eviction orders without such an affidavit. A landlord, therefore, may still evict a tenant under Wis. Stat. § 704.16 (3) (b) 1. for posing a threat to another tenant, as long as the landlord complies with the affidavit requirement, in addition to the current requirements under Wis. Stat. § 704.16.

As discussed, some counties, such as Dane and Milwaukee, have issued orders suspending in-person court proceedings and, of course, the Wisconsin Supreme Court has temporarily suspended in-person proceedings. As such, even eviction actions filed under the above parameters during the public health emergency likely will not be heard until after the expiration of the emergency.

## Authority for actions affecting evictions

### Executive authority

Emergency Order #15 was issued jointly by the governor and the secretary-designee of the health services, relying upon authority under Wis. Stat. §§ 323.12 (4) and 252.02, respectively. Under Wis. Stat. § 323.12 (4) (b), the governor has broad authority, during a state of emergency declared under Wis. Stat. § 323.10, to “issue such orders as he or she deems necessary for the security of persons and property.” However, that authority is limited to the period of the state of emergency. DHS authority, however, is not so limited under Wis. Stat. § 252.02. DHS has authority, under Wis. Stat. § 252.02 (6), to “authorize and implement all emergency measures necessary to control communicable diseases,” and such authority exists at any time, not only during a declared state of emergency.<sup>21</sup>

### Court authority

The courts have long been found to have authority over their dockets, including issues such as scheduling. The Wisconsin Supreme Court has specifically held that “Wisconsin circuit courts have discretion to control their dockets” and that “[t]his power is inherent to their function.”<sup>22</sup> The court went on to state that “[e]very court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort.”<sup>23</sup> The court has also stated that “[t]he general control of the judicial business before it is essential to the court if it is to function.”<sup>24</sup>

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21. While these statutory powers under Wis. Stat. §§ 323.12 (4) (b) and 252.02 are broad, there are limits. See Wisconsin Legislature v. Evers, No. 2020AP608-OA, Order issued April 6, 2020 (enjoining the portion of Executive Order #74 issued by the governor on April 6, 2020, that ordered the suspension of in-person voting for the April 7, 2020, election).

22. *Hefty v. Strickhouser*, 2008 WI 96, ¶ 31, 312 Wis. 2d 530, 752 N.W.2d 820 (citing *Latham v. Casey & King Corp.*, 23 Wis. 2d 311 (Wis. 1964)).

23. *Id.* at ¶ 31 n. 8.

24. *Latham v. Casey & King Corp.*, 23 Wis. 2d 311, 314, 127 N.W.2d 225 (Wis. 1964).



In its March 31, 2020, order temporarily suspending noncriminal jury trials, the Wisconsin Supreme Court noted its “administrative and superintending authority over the courts and judicial system of this state and a duty to promote the efficient and effective operation of the state’s judicial system.”<sup>25</sup> The court further stated that its “authority includes the authority to create, suspend, and modify rules governing pleading, practice, and procedure in the courts of this state.”<sup>26</sup>

In addition, while not directly relying upon statutory authority, the Wisconsin Supreme Court noted in its March 31, 2020, order that the legislature has recognized the court’s authority to alter statutes and rules regarding how the court operates, citing Wis. Stat. § 757.12,<sup>27</sup> which provides, in relevant part:

Whenever it is deemed unsafe or inexpedient, by reason of war, pestilence or other public calamity, to hold any court at the time and place appointed therefor the justices or judges of the court may appoint any other place within the same county and any other time for holding court. All proceedings in the court may be continued at adjourned times and places and be of the same force and effect as if the court had continued its sessions at the place it was held before the adjournment.

## Actions taken by other states relating to eviction

As of March 31, 2020, governors in at least 21 other states have issued executive or emergency orders suspending evictions statewide for a specified period or for the duration of the state’s emergency declaration.<sup>28</sup> The vast majority of these orders prohibit landlords from filing or continuing with eviction proceedings, while at least 12 orders restrict certain eviction enforcement actions by law enforcement.<sup>29</sup> Five of these executive orders stipulate that evictions are prohibited only when the tenant can prove that nonpayment of rent is due to economic hardship related to COVID-19.<sup>30</sup> Governors in a few states, including Connecticut and Louisiana, have not explicitly suspended eviction actions but have postponed civil proceedings statewide, effectively pausing some eviction actions.<sup>31</sup>

Further, the judicial branches in the vast majority of states have issued orders suspending in-person hearings, either specifically for eviction cases or for all civil proceedings or have issued orders giving local courts discretion to do so.

As of March 31, New Jersey is the only state that has enacted legislation so far related

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25. See Wisconsin Supreme Court order, issued March 31, 2020, *supra* n. 14, at 2 (citing Wis. Const. Art. VII, § 3; In re Kading, 70 Wis. 2d 508, 519-20; 235 N.W.2d 409 (1976)).

26. *Id.*

27. See Wisconsin Supreme Court order, issued March 31, 2020, *supra* n. 14, at 2.

28. AZ, CA, CO, CT, DE, IL, IN, IA, KS, KY, LA, MD, MI, MN, NE, NV, NH, NJ, NY, OR, WA.

29. AZ, CO, DE, IL, KY, MI, MN, NH, NJ, NY, OR, WA.

30. AZ, CA, KS, MD, NE. For example, in California, tenants must declare in writing, no more than seven days after rent comes due, that the tenant cannot pay all or part of the rent due as a result of COVID-19.

31. CT, LA.

to evictions in response to the COVID-19 pandemic. On March 19, 2020, New Jersey enacted a law providing the governor with the authority to issue an executive order declaring a moratorium on removing individuals from their homes pursuant to an eviction or foreclosure proceeding.<sup>32</sup> Later that day, the governor issued an executive order in accordance with the new law.<sup>33</sup> At least three other states are considering legislation related to suspending evictions during the COVID-19 emergency.<sup>34</sup> Note that the local governments in several states have also taken various actions to suspend evictions within their jurisdictions.

At the federal level, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), signed into law on March 27, 2020, prohibits lessors with federally backed mortgage loans from filing new eviction actions for nonpayment of rent for 120 days.<sup>35</sup> It further prohibits lessors from charging fees or other penalties to tenants related to nonpayment of rent.

Overall, there are a variety of legal issues emerging around the country with regard to apartment living during this declared health emergency,<sup>36</sup> and many states and the federal government have imposed some level of moratorium on eviction actions during the current public health emergency. Beyond that, it does not appear that states have imposed new regulations specific to apartment buildings, although measures have been taken to restrict access to certain locations (nursing homes with outbreaks, for example) and such measures could conceivably be applied to buildings or portions of municipalities.<sup>37</sup> The New York City Health Department has provided some guidelines for residential and commercial building owners and managers.<sup>38</sup> ■

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32. Assemb. No. 3859, 219th Leg. (N.J. 2020).

33. NJ.

34. AK, MA, SC.

35. H.R. 748, 116th Cong. (U.S. 2020).

36. For example, one Chicago rental company is seeking to require tenants to provide diagnosis information from a doctor along with a time frame during which access to the apartment should be restricted from maintenance workers, inspectors, and prospective renters. See Ryan Smith, “COVID-19: What’s legal for renters and landlords?,” *Chicago Magazine*, March 25, 2020, <http://www.chicagogmag.com/>. See also the following, discussing various landlord and tenant issues arising in Maine, relating to building access, including by guests and maintenance: Andrew Rice, “Can landlords restrict building access during the COVID-19 crisis?,” *Sun Journal*, March 23, 2020, <https://www.sunjournal.com/>.

37. See, for example, Wis. Stat. § 252.02 (4) (quoted in relevant part):

[T]he department may promulgate and enforce rules or issue orders for guarding against the introduction of any communicable disease into the state, for the control and suppression of communicable diseases, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by a communicable disease . . . Any rule or order may be made applicable to the whole or any specified part of the state, or to any vessel or other conveyance. The department may issue orders for any city, village or county by service upon the local health officer.

38. See “COVID-19: FAQ for residential and commercial buildings,” NYC Health, <https://www1.nyc.gov/>.