

Client Advisory: Multi-Family Practice Group COVID Bulletin: Update on COVID/Tenant Disclosures

We have received numerous inquiries from multifamily and student housing clients about their legal responsibilities to tenants, in the event that a tenant or employee at a given property tests positive for the COVID-19 virus, is under home quarantine due to the virus, or is otherwise known or suspected of having the illness.

Your short-term practical goal most likely is to help preserve the health of tenants, while maintaining standard property operations to the extent feasible. You and your personnel are probably extremely busy addressing the immediate crisis at each of your properties. However, we urge you to keep in mind that short-term operational decisions may have long-term legal consequences, in terms of your legal exposure to tenants. In particular, you will need to carefully balance your legal obligations to individual afflicted tenants, and your obligations to other tenants as a group.

1. **Operations and Tenant Notices.** Many multifamily clients have already adjusted their operations, or are in the process of doing so, to meet current CDC and local guidelines or requirements. A number of clients have also sent one or more formal notices about COVID-19 to property tenants, voluntarily or as required under local law. The notices generally provide the tenants with basic public health information, and also describe the actions being taken at the property to address the crisis. Aside from the immediate utility of such notices, we encourage you to provide them to your tenants if you have not already done so, as this may help to demonstrate that you have complied with a legal duty of care to your tenants. We will be happy to review any proposed notices from a legal perspective.
2. **Duty of Inquiry.** So far, the general notices described above usually stop short of requesting that tenants inform the operator of individual COVID-19 testing or infection. At this time, we are not aware of any general, affirmative legal duty to inquire about the health status of individual tenants at your multifamily or student properties. Please bear in mind that if you would like tenants to notify you of their health status (or if you have already made this request), we expect the Americans with Disabilities Act will continue to apply. It may be necessary under the ADA to provide reasonable accommodations to affected tenants, although we do not believe this principle has yet been tested in court.
3. **Specific Disclosures to Tenants.** You are probably aware that the Health Insurance Portability and Accountability Act (“HIPAA”) imposes significant restrictions on distribution of individuals’ private health information. To clarify, HIPAA itself does not apply to businesses other than “covered entities,” such as healthcare providers and insurers. Multifamily operators are not regarded as HIPAA-covered entities, unless a given property is also a health care facility. That being said, state privacy laws may apply to your tenants’ health information, particularly in California. Tenants in most jurisdictions may also have common-law legal rights that would apply, which may give rise to claims against you for invasion of privacy, “false light”/reputational damage, and the like.

If you learn that a tenant or employee at a property has the COVID-19 virus, we strongly recommend doing what you can to protect the affected individual first, out of consideration for the individual’s privacy rights. To the extent that it is necessary to disclose personal information regarding an affected person to other residents, we encourage providing the least amount of information, and the least-sensitive information, that you can (unless, of course, you are required to disclose additional information to them under public safety codes). For example, informing tenants that “a resident tested positive” is better than saying “a resident in Unit A tested positive,” and telling tenants that “a resident in Unit A tested positive” is better than saying “[Name] in Unit A tested positive.”

In most cases, we do not anticipate that you will have a legal duty to identify an affected individual by name to other residents, particularly for larger complexes with multiple separate buildings. We do, however, encourage that you work with local health authorities and the CDC to manage quarantines, and if requested, help to contact people with whom the impacted individual has recently interacted.

Some additional considerations:

- ▶ First, as of today's date, known individual infections vary widely by area, and the total number of actual infections in any area, or nationally, remains to be seen. As a result, responses to the crisis at every level of government have also varied widely and may continue to do so. We strongly recommend that you stay informed regarding any governmental measures that may affect your legal rights or obligations in each location where you own or manage properties. We will work keep you advised of those developments, in specific markets and nationwide, as we learn of them.
- ▶ Further, most legal issues pertaining to commercial real estate are heavily affected by pre-existing state and local statutes and regulations, along with state case law. Therefore, your legal position may vary depending on your property's location, regardless of whether emergency measures are enacted.

Please do not hesitate to contact us during this time. All of our offices are currently open, and while some attorneys are working remotely, we remain intent on serving client needs as they develop. Nelson Mullins also has robust practice areas specializing in healthcare law, employment law, governmental relations, privacy and data security and other fields, and we stand ready to help you in those additional areas as needed.