

# 2020 Eviction Law Update

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# Agenda

Statute Update

Right to Jury Trial

CDC Eviction Moratorium

# Statute Update

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# 2020 Amendment – 72 Hour/7 day Rule

6-316. JUDGMENT — RESTITUTION. . . .

(2) If, upon the trial, the verdict of the jury or, if the case is tried without a jury, the finding of the court is in favor of the landlord and for the possession of the premises, **a residential tenant shall have seventy-two (72) hours to remove his belongings from the premises, and a commercial tenant or a tenant with a tract of land five (5) acres or more shall have seven (7) days to remove his belongings from the premises; . . . . After the time required for a tenant to remove his belongings under this subsection and three (3) days after the finding of the court, the sheriff shall restore possession of the premises to the plaintiff by causing immediate removal of the tenant, and the landlord or his agents may, subject to any security interests under chapter 9, title 28, Idaho Code, remove and dispose of all remaining property of the tenant, . . . .**

# 72 Hour/7 Day Rule - Notice Requirement

6-303. UNLAWFUL DETAINER DEFINED. A tenant of real property, for a term less than life, is guilty of an unlawful detainer: . . .

2. Where he continues in possession, in person or by subtenant, without permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three (3) days' notice, in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him, and if there be a subtenant in actual occupation of the premises, also upon such subtenant. **Such notice shall also notify the tenant that if a court enters judgment against him, then he will have seventy-two (72) hours, if he is a residential tenant, and seven (7) days, or longer if granted by the court, if he is a commercial tenant or a tenant with a tract of land five (5) acres or more, to remove his belongings from the premises before the landlord may remove and dispose of such property pursuant to section 6-316, Idaho Code.**

# Applicability

72 hour/7 day notice is only required in part 2 of I.C. § 6-303 (non-payment)

Parts 1 (holdover), 3 (other breach), 4 (assignment, sublet, or waste), and 5 (drug activity) do not have the notice requirement

But, I.C. § 6-316 applies the 72 rule to *all* judgments for possession in forcible and unlawful detainer cases

This could include post foreclosure evictions under I.C. § 45-1506(11) per the intro language in I.C. § 6-310



# Right to Jury Trial

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## Jury trial available in eviction actions

6-313. TRIAL BY JURY. Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending.

## BUT – Not in all cases

6-311A. JUDGMENT ON TRIAL BY COURT. In an action exclusively for possession of a tract of land of five (5) acres or less for the **nonpayment of rent** or on the grounds that the landlord has reasonable grounds to believe that a person is, or has been, engaged in the **unlawful delivery, production, or use of a controlled substance** on the leased premises during the term for which the premises are let to the tenant, or for **forcible detainer**, or if the tenant is a **tenant at sufferance pursuant to subsection (11) of section 45-1506**, Idaho Code, **the action shall be tried by the court without a jury. . . .**

# Law changed in 1996

Legislature repealed I.C. § 6-311B and amended 6-311A:

**6-311B. Verdict and judgment on trial by jury.** — In an action exclusively for possession of a tract of land of five (5) acres or less for the nonpayment of rent, if the action is tried by a jury and they find the complaint true, they shall render a verdict against the defendant; if not true, they shall render a verdict setting forth the facts they find, and the court shall render judgment according to the verdict. [I.C., § 6-311B, as added by 1974, ch. 308, § 6, p. 1803.]

# 1996 amendment to 6-311A

6-311A. JUDGMENT ON TRIAL BY COURT. In an action exclusively for possession of a tract of land of five (5) acres or less for the non-payment of rent, if the action is shall be tried by the court without a jury. If, and after hearing the evidence ~~it~~ the court concludes that the complaint is not true, it shall enter judgment against the plaintiff for costs and disbursements. If the court finds the complaint true or if judgment is rendered by default, it shall render a general judgment against the defendant and in favor of the plaintiff, for restitution of the premises and the costs and disbursements of the action. If the court finds the complaint true in part, it shall render judgment for the restitution of such part only, and the costs and disbursements shall be taxed as the court deems just and equitable. No provision of this law shall be construed to prevent the bringing of an action for damages.

*Irony: change in statute to eliminate jury trials was recommended by the Idaho Supreme Court because of the logistics involved in trying to have jury trials on an expedited basis.*

# Is there a right to a jury trial?

Idaho Constitution, Article I, Section 7: “The right of trial by jury shall remain inviolate.”

“This provision’s ‘function is to preserve the right [to a jury trial] as it existed at the date of the adoption of the Constitution.’” *Rudd v. Rudd*, 105 Idaho 112, 116, 666 P.2d 639, 643 (1983) (citing *Anderson v. Whipple*, 71 Idaho 112, 227 P.2d 351 (1951)).

The right applies to all actions “so triable under the common law and territorial statutes in force at the date of the adoption of our Constitution.” *Comish v. Smith*, 97 Idaho 89, 92, 540 P.2d 274, 277 (1975).

I.R.C.P. Rule 38(a): “Right to Jury Preserved. The right of trial by jury as declared by the Constitution or as provided by a statute of the state of Idaho is preserved to the parties inviolate.”

# Was there a right to a jury trial in 1889?

At the time of the adoption of the Idaho Constitution, in 1889, summary proceedings for obtaining possession of real property were triable by a jury.

Revised Statutes of Idaho Territory:

**SEC. 5103.** Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending.

# Right to jury trial also existed at common law

The United States Supreme Court traced the origins of modern summary eviction proceedings and found them to be descendants of the action at common law for ejection.

Considering the District of Columbia's summary eviction actions, the Court in *Pernell v. Southall Realty*, determined that those actions, “while a far cry in detail from the common law action of ejection, serve[] the same essential function—to permit the plaintiff to evict one who is wrongfully detaining possession and to regain possession himself.” 416 U.S. 363, 375 (1974).

Ejection was an action at law in Idaho in 1889, and remains so today. Actions “such as ejection, or other actions where the right to possession is the paramount issue . . . have always been regarded as within the province of the courts of law” and therefore triable by jury as of right. *Anderson v. Whipple*, 71 Idaho 112, 121, 227 P.2d 351, 356 (1951).

# *ILAS v State of Idaho*

Filed in Ada County in early June 2020.

Sought declaratory judgment that 6-311A is unconstitutional and that a jury trial is available in all eviction actions, and sought injunction prohibiting enforcement of 6-311A and to require CAO forms and instructions to include references to the right to a jury trial.

State of Idaho defended, primarily based on standing and ripeness. *2019 AG opinion letter – concluded that statute violated right to jury trial.*

Judge Reardon issued a written decision on July 20, finding “relaxed standing” and declaring 6-311A unconstitutional to the extent it deprives parties of the right to a jury trial in instances where “an issue of fact is presented by the pleadings.” (Denied injunctive relief.)

# Application and impact

Must file a written answer and demand for jury trial, and Answer must show that there is “an issue of fact.” *What about a verbal response and demand for jury trial at the hearing?*

Potential issues of fact: Is there a lease? Was proper notice given? Was payment tendered? Retaliatory eviction? Discrimination?

When the CARES Act moratorium was in place, there was always at least one issue of fact – was the property subject to the moratorium?

If right to jury trial exists and is properly invoked, then essentially stayed based on lack of civil jury trials.

# Imposition of bond requirement?

At least one magistrate judge has indicated an intent to require a tenant who demands a jury trial to post a bond under 6-311 “Continuance”:

In an action exclusively for possession of a tract of land of five (5) acres or less for the nonpayment of rent or if a landlord has alleged that the landlord has reasonable grounds to believe that any person, is or has been, engaged in the unlawful delivery, production, or use of a controlled substance during the term for which the premises are let to the tenant, or if the person is in possession of the property and is a tenant at sufferance pursuant to subsection (11) of section 45-1506, Idaho Code, no continuance shall be granted for a longer period than two (2) days unless the defendant applying therefor gives an undertaking to the adverse party with good and sufficient security, to be approved by the court, conditioned for the payment of the rent that may accrue if judgment is rendered against the defendant.

# Does 6-311 apply?

No. The key language from the statute is the following: “no continuance shall be granted for a longer period than two (2) days unless the defendant applying therefor gives an undertaking . . . .”

The ONLY time an undertaking is required under this statute is when the defendant APPLIES for a continuance of more than two days. By demanding a jury trial, a defendant is not “applying” for a continuance. It is not the defendant’s fault that the Court is not conducting jury trials at this time.

Also potentially violates Equal Protection - *Lindsey v. Normet*, 405 U.S. 56, 77, 92 S. Ct. 862, 876, 31 L. Ed. 2d 36 (1972).

# CDC Eviction Moratorium

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# CDC Order

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Temporary Halt in Residential Evictions To Prevent  
the Further Spread of COVID–19

<https://www.federalregister.gov/documents/2020/09/04/2020-19654/temporary-halt-in-residential-evictions-to-prevent-the-further-spread-of-covid-19>

Effective September 4, 2020 through December 31, 2020

# Findings and Action

Therefore, I have determined the temporary halt in evictions in this Order constitutes a reasonably necessary measure under 42 CFR 70.2 to prevent the further spread of COVID-19 throughout the United States. . . .

Based on the convergence of COVID-19, seasonal influenza, and the increased risk of individuals sheltering in close quarters in congregate settings such as homeless shelters, which may be unable to provide adequate social distancing as populations increase, all of which may be exacerbated as fall and winter approach, I have determined that a temporary halt on evictions through December 31, 2020, subject to further extension, modification, or rescission, is appropriate.

**Therefore, under 42 CFR 70.2, subject to the limitations under the “Applicability” section, a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action shall not evict any covered person from any residential property** in any State or U.S. territory in which there are documented cases of COVID-19 that provides a level of public-health protections below the requirements listed in this Order.

# Authority

42 U.S.C. § 264(a) authorizes the Secretary of HHS to “make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States . . . or from one State . . . into any other State.”

42 C.F.R. § 70.2 states that whenever the Director of the CDC determines that the measures taken by the health authorities of any state or local jurisdiction are insufficient to prevent the spread of a communicable disease, “he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.”

Prelim injunction denied by federal judge in Georgia by order dated 10/29/2020  
<https://www.courthousenews.com/wp-content/uploads/2020/10/eviction-order.pdf>

# Who is protected?

“Covered person” means any tenant, lessee, or resident of a residential property who provides to their landlord, the owner of the residential property, or other person with a legal right to pursue eviction or a possessory action, a declaration under penalty of perjury indicating that: [5 requirements are met].

To be a “covered person” the tenant must provide the declaration to his or her landlord. If an executed declaration is not provided, then tenant is not a covered person even if he or she meets the requirements.

# What types of properties are covered?

The Order applies to any property leased for residential purposes, including any house, building, mobile home or land in a mobile home park, or similar dwelling leased for residential purposes.

The Order does not apply to hotel rooms, motel rooms, or other guest house rented to a temporary guest or seasonal tenant as defined under the laws of the state, territorial, tribal, or local jurisdiction.

# Required statements

(1) The individual has used best efforts to obtain all available government assistance for rent or housing;

*In Idaho, at a minimum would require application with IHFA under the HPP program.*

(2) The individual either (i) expects to earn no more than \$99,000 in annual income for Calendar Year 2020 (or no more than \$198,000 if filing a joint tax return),<sup>[6]</sup> (ii) was not required to report any income in 2019 to the U.S. Internal Revenue Service, or (iii) received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the CARES Act;

## Required statements (cont.)

(3) the individual is unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses;

*An extraordinary medical expense is any unreimbursed medical expense likely to exceed 7.5% of one's adjusted gross income for the year.*

(4) the individual is using best efforts to make timely partial payments that are as close to the full payment as the individual's circumstances may permit, taking into account other nondiscretionary expenses; and

## Required statements (cont.)

(5) eviction would likely render the individual homeless—or force the individual to move into and live in close quarters in a new congregate or shared living setting—because the individual has no other available housing options.

Must be under penalty of perjury. Form declaration available at

<https://www.cdc.gov/coronavirus/2019-ncov/downloads/declaration-form.pdf>

Includes statements that tenant understands he or she must still pay rent or make a housing payment, and comply with other obligations under the lease, that fees, penalties, or interest for not paying rent on time may still be charged, and that at the end of the moratorium on December 31, 2020, his or her landlord can require payment in full and failure to pay may make the tenant subject to eviction.

# Exceptions to prohibition on eviction

In the “Applicability” section:

Nothing in this Order precludes evictions based on a tenant, lessee, or resident:

- (1) Engaging in criminal activity while on the premises;
- (2) threatening the health or safety of other residents;
- (3) damaging or posing an immediate and significant risk of damage to property;
- (4) violating any applicable building code, health ordinance, or similar regulation relating to health and safety; or (5) violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment (including non-payment or late payment of fees, penalties, or interest).

# What about holdovers?

Is a tenant who stays beyond the term of the lease, or who fails to vacate pursuant to a 30 day notice of termination, “violating any other contractual obligation”?

No clear answer – may depend on whether the lease has specific termination language that the landlord could rely upon to show a violation/breach.

# Penalties for violation by landlord

Several laws ( 18 U.S.C. §§ 3559 and 3571, 42 U.S.C. § 271, and 42 C.F.R. § 70.18) say that a person who violates the Order may be subject to a fine of no more than \$100,000 or one year in jail, or both, if the violation does not result in death.

A person violating the Order may be subject to a fine of no more than \$250,000 or one year in jail, or both, if the violation results in a death or as otherwise provided by law.

An organization violating the Order may be subject to a fine of no more than \$200,000 per event if the violation does not result in a death or \$500,000 per event if the violation results in a death or as otherwise provided by law.

These are criminal penalties and are determined by a court of law. CDC has no involvement in these penalties – would have to be prosecuted by the US Dept. of Justice.

# Penalties for false statements on declaration

The required declaration must be made under penalty of perjury.

Anyone who falsely claims to be a covered person under the Order by attesting to any material information which they do not believe to be true may be subject to criminal penalties under 18 U.S.C. § 1621 (perjury) or other applicable criminal law.

I.C. § 18-5401. PERJURY DEFINED. Every person who, having taken an oath that he will testify, declare, depose, or certify truly, before any competent tribunal, legislative committee, officer, or person in any of the cases in which such an oath may by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury.

I.C. § 18-5409. PUNISHMENT FOR PERJURY. Perjury is punishable by imprisonment in the state prison not less than one (1) or more than fourteen (14) years.

# Misc issues

Do landlords have to make their tenants aware of the CDC order and Declaration?

No, landlords are not required to make their tenants aware of the Order and Declaration.

What can a landlord do if a tenant has declared that they are a covered person under the CDC Order, but the landlord does not believe the tenant actually qualifies?

The Order does not preclude a landlord from challenging the truthfulness of a tenant's declaration in court. The protections of the Order apply to the tenant until the court decides the issue. (Related question – is the applicability of the Order an affirmative defense and an “issue of fact” for the purpose of demanding a jury trial?)