

Updates

July 13, 2020

Oregon COVID-19-Related Borrower Protections Signed Into Law

Oregon Governor Kate Brown signed [House Bill 4204](#) (HB 4204) into law on June 30, 2020. [The new statute](#) affects lenders of both commercial and residential loans secured by Oregon real estate. It requires lenders to defer loan payments and refrain from enforcing default remedies on certain secured obligations during the "emergency period" beginning March 8, 2020, and ending September 30, 2020, unless modified by the governor in an executive order issued not later than August 31, 2020. The following update summarizes the temporary lender restrictions, as well as the affirmative obligations imposed on lenders to provide notice to Oregon borrowers.

Borrowers

Borrowers must provide notice to lenders if they are unable to make periodic installment payments due to a loss of income related to the COVID-19 pandemic. If the subject property is a residence with four or fewer units, the notification must attest that the borrower's failure to pay is a result of a loss of income related to the COVID-19 pandemic. If the subject property is a commercial property or residential property with more than four units, notice must include financial statements or other evidence demonstrating that loss of income is related to the pandemic. The notice must also disclose funds received from the U.S. Small Business Administration under the Paycheck Protection Program, as implemented under the Paycheck Protection Program Flexibility Act of 2020 (P.L. 116-142) or other state or federal relief programs. Borrowers are required to give notice only once.

Lenders

Lenders are required to provide written notice by mail to all borrowers of their rights for accommodation within 60 days of June 30, 2020. Once lenders receive a notice from borrowers, and absent an agreement among a lender and borrower to modify, defer, or otherwise mitigate a loan, lenders may not treat a borrower's nonpayment of periodic installment payments during the emergency period as a default. Further, lenders cannot invoke any contractual remedies in connection with the failure of a borrower to make a periodic payment during the emergency period. In connection with such monetary defaults covered by HB 4204, lenders cannot collect or impose charges, fees, penalties, or attorneys' fees, or impose a default rate of interest or use the borrower's failure to make a periodic payment as an ineligibility for a foreclosure avoidance measure.

Additionally, and during the emergency period, lenders cannot:

- Require a charge for inspection, appraisal, or a broker opinion of value, not otherwise permitted in the absence of a default.
- Initiate cash management not already in existence before June 30, 2020.
- Implement lockbox procedures not already in existence before June 30, 2020.
- Take control of operating revenue from real property secured by the financing documents unless the control was established before June 30, 2020.
- Declare a default based on the failure of a borrower to meet financial covenants due to inadequate operating revenue resulting from the COVID-19 pandemic (e.g., financial covenants such as a debt service coverage ratio or debt yield).

Moreover, subject to limited exemptions set forth in subsection (10) of HB 4204, lenders may not at any time during the emergency period:

- Foreclose a deed of trust by advertisement and sale.
- Bring an action or suit to foreclose a mortgage or deed of trust or to enforce an obligation under a retail installment contract for subject property.
- Enforce a forfeiture remedy.
- Bring an action or suit to foreclose a lien or other security interest on, or petition for an order of foreclosure by advertisement and sale of, subject property.

Instead, upon receiving sufficient notice from borrowers, lenders must:

- Defer from collecting payments during the emergency period.
- Permit the borrower to pay the deferred amounts owed when full performance of the obligation is due at maturity.

HB 4204 gives borrowers a cause of action to recover actual damages, costs, and attorneys' fees if a lender violates any provisions in the statute.

Tolling of Actions Arising Before Emergency Period

If the lender initiated a foreclosure with respect to subject property before the emergency period, the period of time that must elapse between the initiation and the time of the trustee's sale, forfeiture remedy, or other foreclosure is tolled during the emergency period. After the emergency period, a trustee's sale may continue without interruption if the lender complies with ORS 86.782 (12), a lender may obtain a forfeiture remedy if the lender complies with ORS 93.918, and for other types of foreclosure proceedings, a foreclosure may continue if the lender complies with the requirements of applicable law.

Judgments of Foreclosure and Sale, Writ of Executions, and Trustees Sale

During the emergency period, courts are prohibited from entering judgments of foreclosure or issuing a writ of execution and trustee's or execution sales are prohibited.

HB 4204 does not relieve a borrower of the duty to repay the full amount of any obligation that is subject to a waiver, deferral, modification, or forbearance. HB 4204 also does not apply to judgments of foreclosure and sale, writs of execution, or notices of a trustee's sale that:

- Were issued or given before the emergency period began.
- Occur in connection with a tax foreclosure proceeding under ORS 312.010 to 312.120 or 312.130 to 312.240.
- Occur after a person recorded notice of intent to abandon real property under ORS 93.770 (2)(a) or a judicial order that authorizes an abandonment of real property under ORS 93.770 (2)(b).

Considerations for Lenders Moving Forward

Once a sufficient notice is received from a borrower for a failure to pay periodic installment payments, it is prudent for lenders to proceed in accordance with the requirements under HB 4204. Lenders may still collect payments for obligations accrued before the emergency period and may be able to exercise remedies due to defaults that are nonmonetary in nature. Borrowers whose loss of income is not a result of the COVID-19 pandemic are still required to make timely payments. Further, in lieu of treating a failure to pay as a default, lenders have the option to work out a modification, deferral, or use other means of mitigation for the loan.

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