

California Commercial Landlord Considerations During the COVID-19 Crisis

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In response to the ongoing COVID-19 pandemic, more and more states and municipalities have implemented “shelter in place” or “stay at home” orders in an effort to slow the spread of the virus and to ease the burden on our healthcare system. These orders typically call for the closure of all businesses, except those deemed essential such as grocery stores and pharmacies. This has led to an economic downturn, in which businesses have seen rapidly decreasing revenue, and employees have faced reduced pay or termination. To safeguard individuals against the economic effects of “stay at home” orders, many jurisdictions have enacted or are considering moratoriums on the eviction of tenants during this crisis.

On March 16, California Gov. Gavin Newsom issued Executive Order N-28-20, which lays out a framework for local governments to follow in enacting moratoriums on evictions of commercial tenants.¹ This order does not implement a statewide moratorium on commercial tenant evictions. It only lifts any state law restrictions that may exist that would impede the ability of California county and city governments to enact such moratoriums.

What are the basics of these eviction moratoriums?

Many cities seem to have taken the approach of announcing an eviction moratorium now and working out the details later. With this in mind, it is important to consider that any eviction moratorium enacted by a local government in California is likely to quickly evolve over time to address the needs of both tenants and landlords and to fine tune procedural requirements, particularly in light of strained court and government resources during the crisis. For example, Los Angeles Mayor Eric Garcetti issued a public order on March 15 that included a moratorium on the eviction of residential tenants who show an inability to pay rent due to circumstances related to the COVID-19 pandemic.² Mayor Garcetti expanded the moratorium on March 17 to include the eviction of commercial tenants.³

Despite the potentially fluid nature of these eviction moratoriums, we will likely see the majority of cities and counties adopt largely similar, if not identical, rules and procedures. The moratorium implemented by the city of Santa Monica provides a

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comprehensive framework that we may look to in understanding how these moratoriums will work.⁴

Residential or Commercial Tenants

The Santa Monica moratorium applies to both commercial and residential tenants. However, be aware that some cities have to date only provided protection for residential tenants. Many local governments have not yet enacted a moratorium on the eviction of commercial tenants.

Types of Prohibited Evictions

These moratoriums are not blanket prohibitions on all evictions. They specifically disallow eviction for nonpayment of rent if the tenant demonstrates that the inability to pay is due to financial impacts related to COVID-19.

Financial Impacts Related to COVID-19

Commercial tenants seeking relief must demonstrate financial impacts relating to COVID-19. Each city or county will determine what circumstances are included in the definition of such financial impacts. For example, the Santa Monica moratorium defines financial impacts to include lost business income as a result of: (1) the commercial tenant or its employees, being sick with COVID-19, or caring for a household or family member who is sick with COVID-19; (2) reduction in or closure of hours of operation, increase in costs and labor, delays or interruptions or any other economic impacts of COVID-19; or (3) compliance with a recommendation from a government health authority to stay home, self-quarantine or avoid congregating with others during the state of emergency.⁵

Actions Required of the Tenant

To be afforded these protections, commercial tenants must, within 30 days after the date the rent is due, notify the landlord in writing of tenant's lost income and resulting inability to pay full rent due to financial impacts related to COVID-19. The tenant must also provide the landlord with documentation supporting the claim.

The eviction moratorium does not relieve the tenant of the need to pay rent. Following the expiration of the emergency declaration, the tenant will have a period of time to pay the back rent owed to the landlord. Under the Santa Monica moratorium, this repayment period is six months.⁶ Other cities or counties have set shorter repayment periods. The city of Los Angeles moratorium on commercial evictions includes a repayment period of only three months.⁷

Additional Restriction on Landlord

The landlord may not charge or collect a late fee for the rent that is delayed in accordance with the eviction moratorium.

What should I do as a commercial landlord?

Interactions with Tenants

Understand now that you may soon be facing nonpayment of rent by your tenants during the ongoing COVID-19 crisis. Local governments are adopting eviction moratorium rules and procedures that are pro-tenant, at least for the duration of the

emergency declaration and until the back rent is due. However, be certain whether the eviction moratorium in the jurisdiction of your property is applicable to commercial tenants. Many of these eviction moratoriums currently only apply to residential tenants. Keep in mind that tenants will only be protected from eviction for nonpayment of rent if the nonpayment is related to a COVID-19 cause recognized by your jurisdiction. Tenants may still be evicted if the nonpayment is due to other breaches of their lease not related to nonpayment for a COVID-19 cause.

Most importantly, maintain communications with your tenants so that you become aware of potential nonpayment of rent as early as possible. Make sure to keep a record of all communications between you and the tenant and all documentation provided by the tenant regarding inability to pay due to COVID-19. Remember that tenants are only afforded protection if their communication to the landlord regarding inability to pay rent is in writing and made before or within 30 days of the rent due date.

Understand that tenants will still be responsible for the rent that they are unable to pay on time. The eviction moratoriums do not forgive tenant's missed rent payment. Following the expiration of the emergency declaration made by your local government, tenants will likely have six months to pay all of the missed rent in full. As landlord, you cannot charge late fees for the delayed rent. Protection from late fees and eviction expires at the end of this six month period.

In addition to the requirements set by the eviction moratoriums, some landlord advocacy groups, including the California Apartment Association and the National Multifamily Housing Council, have published other recommendations for landlords.^{8,9} These include freezing rents, waiving late fees, offering flexible payment plans, directing tenants to available government and community resources and developing response plans for potential COVID-19 exposure at the leased properties.

Financial Considerations

Despite tenants' legal obligation to pay the back rent, the landlord must consider the possibility that the economy will be in recession even when the emergency declaration has expired. At that time, tenants may be either unwilling or unable to pay the larger accumulated lump sum or larger modified payments of rent owed. The landlord will then be required to commence the eviction process, which may take longer than usual if courts are understaffed due to furloughs or otherwise overwhelmed by a backlog of cases. Ultimately, the landlord should plan for the possibility that it may not receive rent payments for a long period of time, including the duration of the emergency declaration period, the six-month repayment period and if necessary, a potentially drawn out eviction process. It remains to be seen whether financial institutions or future legislation will provide landlords with adequate mortgage relief that contemplates such extended rent repayment timelines. The landlord should anticipate and budget for the possibility that repayment of rent does not align with mortgage payment obligations.

For a commercial lease, especially one involving a business that has closed under a "stay at home" order, the landlord may consider ways to reduce property operating expenses without breaching their obligations to tenants under the terms of their lease. Although the tenant may temporarily not be conducting their business at the property, the lease may still require the landlord provide the tenant access to the premises.

Further, the lease agreement may obligate the landlord to continue to provide essential services, such as utilities and HVAC. Depending on the specific lease language, landlord actions that inhibit tenant access or essential services may result in a tenant rent abatement right. The landlord should review its leases to see what access and essential service and maintenance obligations it has to its commercial tenants. This is especially important because the landlord will want to avoid affirmative defenses or counterclaims by tenants that may arise during an eviction process, if the landlord eventually commences eviction as described above.

The eviction moratoriums protect tenants for missed rent payments but do not provide relief for the landlord with respect to mortgage payments and other property expenses such as utilities. The landlord should consider applying for low-interest loans under the United States Small Business Administration's Economic Injury Disaster Loan Program or Paycheck Protection Program.^{10 11}

What else can be expected?

As California cities and counties decide whether to implement eviction moratoriums and continue to work out the details, Governor Newsom has indicated that the state reserves the right to examine other measures. On March 27, the Governor issued Executive Order N-37-20, which implemented a statewide moratorium on evictions of residential tenants.¹² Governor Newsom has not enacted a similar statewide moratorium on evictions of commercial tenants, yet that remains as a potential additional measure. Commercial landlords must understand that the situation is changing on a daily basis. The government response is fluid and will be fine-tuned as the economic impacts of this crisis become more clear. Landlords should be adjusting their budgets now and preparing for a regulatory regime that may not provide for short-term solutions.

¹ California Executive Order N-28-20.

² Los Angeles March 15 Public Order.

³ Los Angeles March 17 Public Order.

⁴ Santa Monica March 17 Executive Order Supplement.

⁵ *Id.*

⁶ *Id.*

⁷ Los Angeles March 17 Public Order.

⁸ California Apartment Association's Safe at Home Guidelines.

⁹ Apartment Industry Committed to Supporting Residents Impacted by COVID-19, NMHC.

¹⁰ Coronavirus (COVID-19): Small Business Guidance & Loan Resources, U.S. SBA.

¹¹ CARES Act Summary – Small Business, Akin Gump, dated March 26, 2020.

¹² California Executive Order N-37-20.

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