

Impact of San Francisco's Commercial Tenant Eviction Moratorium

Following California Governor Gavin Newsom's executive order permitting local municipalities to regulate residential and commercial evictions,¹ on March 17, 2020 San Francisco Mayor London Breed announced a moratorium on commercial evictions for small and medium-sized businesses.²

The full text of San Francisco's order regarding commercial evictions was made public on March 19, 2020.³ The Order specifies that if a tenant has less than \$25 Million in worldwide gross receipts based on calendar year 2019, it is entitled to an automatic one month extension on its next rent payment due on or after March 17, 2020. To the extent a qualifying tenant fails to make said rent payment, landlords must provide written notice to those tenants offering them an opportunity to defer the rent payment for at least one month, and landlords are "encouraged to offer longer periods." The offered deferral period is referred to as the "cure period".

A qualifying tenant has the full cure period to either pay the deferred rent or, if the tenant believes it will be unable to pay its rent during the cure period, provide documentation to a landlord that it has suffered a "financial impact" as a result of COVID-19. "Financial impact" as defined in the Governor's March 16 Order means a substantial decrease in income due to illness, business interruption, reduced hours, closure, or lower customer demand as a result of COVID-19 and any associated government orders.

The San Francisco Order states that upon receipt of documentation from a tenant that it cannot pay rent as a result of the financial impact of COVID-19, the cure period is automatically extended for an additional month (i.e. – now a two month deferral period) so the landlord and the qualifying tenant can discuss the rent deferral in good faith and develop an individualized payment plan for the repayment of the delinquent rent. If the parties are not able to come up such a plan, then prior to the expiration of the new extended cure period (i.e. – the end of the second month of rent deferral) the tenant must either pay the past due rent or request an additional month extension and provide landlord with further documentation of the tenant's continuing inability to pay rent due to the financial impact of COVID-19 on its business. This process may continue for up to six months after the date the rent was originally due.

¹ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.16.20-Executive-Order.pdf>

² <https://sfmayor.org/article/mayor-london-breed-announces-moratorium-commercial-evictions-small-and-medium-size>

³ https://sfmayor.org/sites/default/files/Supplement_v4_03182020_Stamped.pdf

It is important to note that there is ambiguity in the text of the Order as it appears that only the first rent payment due on or after March 17, 2020 is eligible for the deferral. This is because the Order is only in effect for a period of (i) 30 days, (ii) until the proclamation of local emergency is terminated or (iii) if otherwise ordered by the Mayor. The Mayor does have the authority to extend the Order to apply for an additional 30 days if emergency conditions at that time warrant extension, which would mean that an additional month's rent deferral might be automatically triggered. Regardless of when the Order expires or is otherwise rescinded, any and all cure periods set forth above survive, allowing tenants the right to defer at least one rent payment for up to six months.

It is important to note that the Order does not prevent landlords from commencing or completing eviction actions against tenants who were already in default of their leases prior to March 17, 2020 or for non-monetary lease defaults occurring on or after the effective date of the Order. In addition, if a tenant does not pay all outstanding deferred rent at the end of the applicable cure period (which as noted above maybe extended – based on proof of a continuing financial impact – for up to six months) the landlord may proceed with eviction for non-payment. Last, while not specifically stated, it appears implied that a breach by a tenant of its agreed upon payment plan entitles the landlord to commence eviction proceedings on the unpaid rent.

Landlords are also offered the ability to get relief from the Order. A waiver from the Order by the Office of Economic and Workplace Development (“OEWD”) may be granted if a landlord can demonstrate that being unable to evict a tenant would cause them significant financial hardship, including, but not limited to, defaulting on debt or similarly enforceable obligations.

The Order states that nothing therein relieves a tenant of the obligation to pay rent and that a landlord retains the ability to recover rent through measures “other than an eviction for non-payment.” It is unclear what this means, however, other than application of a security deposit or offset against monies owed by landlord to the tenant. Enforcement of lease guaranties also appears permitted (if you can get a court to enforce).

There are several questions raised by the Order, and specific advice should be sought on assessing late charges, the impact on exercising options to extend if rent has not been paid, and the impact on using allowances or other rent credit rights.

While San Francisco's commercial eviction moratorium order follows the same general structure as the City's residential eviction moratorium⁴, it is not the only municipality to take such action. Similar to San Francisco, Los Angeles has instituted its own commercial eviction moratorium. In addition, a bill is currently being debated in the California legislature that would make a commercial eviction moratorium mandated statewide.⁵

As stated above, the most important point to take away regarding the existence of any commercial eviction moratorium in California is that tenants are at no time relieved from their obligations to pay rent. The intent of these moratoria is simply to provide small and medium-sized businesses with temporary relief from having to make rent payments at a time when they are making little to no revenue.

In light of the San Francisco Order, landlords should do an internal evaluation of the impact on its cash flows and tenant liquidity and consider the effect rent deferrals may have on other lease provisions. Loan documents with secured lenders may also need to be reviewed and determinations will need to be made as to what documentation landlords will deem necessary from a tenant in response to a request for rent deferral.

Buchalter understands that this is uncharted territory and we remain committed to providing our clients with the most up-to-date information and advice regarding how COVID-19 will affect their businesses. If we can be of assistance and to discuss various options and specific situations, please feel free to contact any of the Buchalter Real Estate attorneys below.



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⁴ https://sfmayor.org/sites/default/files/SupplementalDeclaration2_03132020_stamped.pdf

⁵ <https://sd11.senate.ca.gov/news/20200314-senators-wiener-and-gonzalez-introduce-emergency-legislation-halting-commercial>