

San Francisco Extends Commercial Eviction Moratorium and Provides Repayment Relief for Qualified Small Businesses

By Jonathan August and Manuel Fishman

On November 17, 2020, the San Francisco Board of Supervisors unanimously approved an extension to the commercial eviction moratorium that had been previously enacted and extended on a month-to-month basis by mayoral declaration. The new commercial eviction ordinance (the "Ordinance") keeps the majority of the terms of the current moratorium in effect, while providing a new four-tiered system for qualified tenants for repayment of deferred rent. The new Ordinance goes into effect immediately when signed by the mayor.

Similar to the prior mayoral orders, the Ordinance maintains that the only businesses that qualify for the eviction moratorium in San Francisco are those that have less than \$25,000,000 in gross receipts in 2019 (prorated for the portion of time the business was registered to do business in San Francisco) and that are not otherwise "excluded tenants." As further discussed below, most office tenants are excluded from the scope of the Ordinance – meaning that such tenants are not entitled any further extension of the eviction moratorium protections expiring on November 30, 2020.¹ In addition, the Board of Supervisors included in the Ordinance a recently added exclusion to the mayoral eviction moratorium for a class of landlords that may be adversely impacted by COVID 19.

Under the Ordinance, if a qualifying business cannot pay its rent as a result of the financial impact related to COVID-19, a landlord may not evict that tenant for such failure, and the qualified tenant has the right to defer payment of rent for an "open ended" period. As was also the case in the prior eviction moratoria enacted by the mayor, interest and late charges may not be assessed on past-due rent for qualified tenants entitled to rent deferral.² Under the Ordinance, the period of rent deferral generally lasts until the State of California rescinds the state of emergency related to COVID-19.³ This is the first time the City of San Francisco has tied its eviction moratorium ordinance to the State of California, rather than its own month-by-month determination –and, as of today, this is until March 31, 2021.

As noted above, certain classes of tenants are excluded from the protections of the Ordinance. The Board of Supervisors exempted tenants or subtenants who occupy property that is "zoned or approved for use as Office Use" or are tenants leasing property from the City itself.⁴ This exemption is particularly important to many commercial landlords who had been unable to evict qualified office tenants, but now may do so as such tenants no longer receive the protections of the moratorium. However, nonprofit 501(c)(3) entities and businesses located within areas zoned as Production, Distribution, and Repair, are included in the group of qualified tenants, and may not be evicted if they meet the other thresholds of the Ordinance.

The Ordinance does not specify what amount of financial impairment qualifies as a “financial impact related to COVID 19” although it offers an example based on a 25% reduction in revenue over the previous year. The use of this specific example is likely to lead to disputes in the future. Further, the Ordinance does not provide for any means of redress if a landlord and tenant cannot agree on whether a financial impact has occurred.

The other significant change in the Ordinance as compared to the City’s prior rent relief orders is that the period for repayment of deferred rent is based on a new four tier system. Tier 1 tenants are defined as those tenants with 9 or fewer employees; Tier 2 tenants are those with 10-24 employees; Tier 3 tenants are those with 25-49 employees; and Tier 4 tenants have 50 employees or more. Under the prior orders, qualified tenants had up to six months following the original rent due date until such rent was required to be repaid. Now, the forbearance period is based on the number of full-time equivalent employees a business has, regardless of revenue generated from the business.⁵ Tier 1 tenants have 2 years following the expiration of the moratorium period to repay past-due rent, Tier 2 tenants shall have 18 months, and Tier 3 tenants shall have 12 months. Unlike the other tiers, however, Tier 4 tenants have no additional time following the expiration of the moratorium period to repay past due rent, and deferred rent becomes immediately due and payable upon expiration of the eviction moratorium protections of the Ordinance. We note that the lack of any grace period for Tier 4 tenants may create unintended consequences for landlords and tenants. In each case, landlords are not entitled to evict tenants unless past-due deferred rent remains unpaid following the expiration of the forbearance periods described above.

The Ordinance additionally provides that landlords and tenants can freely enter into alternate rent deferral and repayment plans containing either shorter or longer periods of repayment, with such agreements superseding the statutory periods. As such, the repayment baseline provided by the Ordinance is only to be used in situations where the parties have not been able to reach a consensual agreement.

As noted above, the Board of Supervisors has carved out an exemption from the obligation to offer rent deferral for a small class of landlords. If a landlord owns less than 25,000 square feet of gross floor area within the City, such landlord is entitled to evict any tenant, even if otherwise protected by the Ordinance, if the landlord can show that being unable to evict a tenant will cause the landlord to suffer a financial hardship. Generally speaking, this protection will come into effect for smaller landlords who have loans that may be placed in default if they cannot evict and re-rent the applicable space. The Ordinance does not specify, however, if affiliated entities count for determining the total amount of square footage owned.

Nothing in the new Ordinance prohibits a landlord from filing a breach of lease suit against a tenant who has not paid rent, applying any security deposit to pay past-due rent, or declaring a default under a lease. Landlords may exercise such remedies to bring the parties to the negotiating table to reach an agreement on repayment or termination. Additionally, landlords may use a default to revoke privileges such as extension options, expansion options or rights of first refusal if the lease language so provides.

The enactment of the Ordinance comes at a moment in time when COVID-19 cases are spiking within the Bay Area, the State of California and nationwide. In an attempt to curb this increase in cases, Governor Newsom recently declared a curfew between 10 PM and 5 AM for any counties in the highest COVID tier in the state. This curfew currently affects Bay Area counties such as Alameda and Santa Clara, but, as of the time of this article, not Marin, San Mateo and San Francisco as they remain in the second highest tier.

The existence of the new commercial eviction and rent moratorium Ordinance in San Francisco, provides a statutory base line for the foreseeable future for both tenants and landlords that qualify for the protections provided therein, notwithstanding the unanswered questions raised by the language of the Ordinance.

Buchalter is committed to helping our clients assess their rights with respect to COVID-19 and stands ready to assist in navigating these uncharted waters.



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¹ As an example, if under the current, but expiring, eviction moratorium ordinance an office tenant is a qualified small business entitled to rent deferral, yet under the Ordinance it is no longer entitled to such rent relief, the previously deferred rent comes due on December 1, 2020 (unless landlord and tenant have entered into a different arrangement for repayment). Conversely, if a tenant is protected under the Ordinance and was also granted rent deferral under the expiring moratorium, the previously deferred rent gets added to the months of new deferred rent granted to the tenant under the Ordinance.

² The definition of a tenant includes direct tenants, subtenants, month-to-month tenants, and holdover tenants.

³ The language of the Ordinance links the period for the moratorium until the State of California rescinds the ability of municipalities to enact local eviction moratoria and provide rent relief, which powers were granted in the State's original emergency order, Executive Order N-28-20. While it is unlikely that the State will rescind the ability of cities and counties to enact rent relief orders prior to the end of the general state of emergency applicable to the pandemic, if infection rates decrease and local economies return to their pre-COVID conditions or if the State determines that local economies and landlords have suffered too much through local enactments, and that it is necessary to reassert a uniform State rule, it is possible the State may rescind just the portion of its emergency order related to local authority to enact eviction moratoria/rent relief.

⁴ It is unclear why the City exempted itself, as a landlord, from having to comply with the eviction moratorium of the new Ordinance.

⁵ Independent contractors do not qualify as full-time equivalent employees for the purposes of determining the applicable tier of a business.

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