

San Francisco Commercial Eviction Moratorium Update

By [Jonathan August](#) and [Manuel Fishman](#)

In an update to our client alert from November 30 regarding the San Francisco commercial eviction moratorium previously passed by the Board of Supervisors, we note that, following our publication of the client alert, the Board of Supervisors, on December 1, amended the moratorium to clarify previous language on a retail tenant's right to terminate its lease that was ambiguous.

As previously described in our November 30 alert, the City of San Francisco has divided "Covered Commercial Tenants"¹ into four tiers based on the number of full-time employees they have. Tier 1 tenants have 9 or fewer full-time employees, Tier 2 tenants have between 10 and 24 full-time employees, Tier 3 tenants have between 25-49 full-time employees, and Tier 4 tenants have 50 or more full-time employees. In the December 1 update, the Board of Supervisors explained that the date for which the number of employees is determined is November 1, 2020. This clarification prevents tenants and landlords from using different employee figures over the course of the Moratorium Period to determine both who is a Covered Commercial Tenant and what tier said tenant falls into. Determining which tier a tenant falls into is critical as Tier 1, 2, and 3 tenants each get varying periods of time to repay all debt accruing during the Moratorium Period.

The second, and more significant change, relates to Tier 1 tenants and their ability to terminate leases. The City of San Francisco has stated that the financial hardships caused by COVID-19 have most adversely affected small businesses and therefore such tenants require additional protections. As such, effective as of December 11, Covered Commercial Tier 1 tenants have been given the unilateral right to terminate their leases upon thirty (30) days' written notice to their landlords if the parties are unable to reach a mutually satisfactory agreement for repayment of past-due rent to the extent deferred during the Moratorium Period.² If a Tier 1 tenant elects the newly provided remedy, it is only liable to pay for rent that had accrued up to and through the effective date of lease termination, but the tenant is not liable for any future rents or penalties or interest on the past-due rent. In the previous iteration of the

¹ As we noted in our prior Client Alert, the definition of "Covered Commercial Tenants" excludes all office tenants in the City of San Francisco, except for 501(c) nonprofit entities.

² Per our prior Client Alert, the "Moratorium Period" runs from March 16, 2020 to March 31, 2021. The Moratorium Period may be extended by the State of California if it elects to amend Executive Order N-80-20 to provide municipalities the ability to offer eviction protections beyond March 31, 2021.

moratorium ordinance, the language drafted by the Board of Supervisors left open the question of whether or not this right was actually granted to Tier 1 tenants.

The action taken by the Board of Supervisors for Tier 1 tenants is a step not provided elsewhere in the State, including California's largest metropolitan area – Los Angeles County. In Los Angeles County, commercial tenants with one hundred (100) or fewer employees are entitled to eviction moratorium protections through the end of January 2021, and each such business is entitled to at least six (6) months following the expiration of the moratorium to pay back such rent, with businesses having nine or fewer employees receiving up to a year following the expiration of the moratorium to pay back such rents. Tenants that are multi-national, publicly-traded or have greater than 100 employees are not entitled to any such eviction protections. In Los Angeles city proper, the moratorium period is automatically extended up to the maximum period designated by the Governor for permitting local municipalities to grant rent relief (currently through March 31, 2021)³ and allows for protections for tenants with up to 500 employees.

In addition, it is not clear that the unilateral termination right provided by the San Francisco Board of Supervisors is constitutional under the California Constitution. The decision to allow Tier 1 tenants the right to unilaterally terminate a lease for which the parties to the lease did not otherwise contractually agree to can be construed as impairing the obligations of the contract. Section 9 of Article I of the California Constitution provides that "a bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed." In addition, the Governor's executive orders granting municipalities the right to impose restrictions with respect to commercial tenancies only provides that it applies "to the imposition of limitations on evictions" and therefore the right provided by the City of San Francisco appears to be outside the scope of the authority granted to municipalities by the Governor.

Notwithstanding the foregoing, as it stands, San Francisco Tier 1 Covered Commercial Tenants now have the right to terminate their leases (at least through the end of the Moratorium Period) without penalty. Unless challenged in court or otherwise stayed, landlords should prepare for an influx of small tenants seeking significant modifications to their lease obligations with threats to simply walk away. This new right granted by the City of San Francisco comes at an especially problematic period for both tenants and

³ Executive Order N-80-20 can be found [here](#)

landlords alike as the Bay Area has been placed in the state's highest "widespread" tier and a mandatory stay-at-home order has been issued for all non-essential activity.⁴

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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⁴ We note that, in an attempt to curb the rapid increase in COVID cases, San Francisco has ordered a mandatory 10-day quarantine for any persons (residents and non-residents) who have travelled outside of the ten Bay Area counties (San Francisco, San Mateo, Santa Clara, Alameda, Contra Costa, Solano, Sonoma, Napa, Marin, and Santa Cruz). There are exceptions for essential government or infrastructure workers, healthcare professionals, and for employees required to return to work at an essential business due to lack of staffing. This means that that all non-essential employees, and even essential business employees not required as a result of a staffing shortage, must quarantine if they travel into San Francisco from outside of the ten Bay area counties. A copy of the new quarantine order can be found [here](#).