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California is Reopening, Will Commercial Evictions Remain on Hold?

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In early April as the statewide vaccination rate began to rise and major population centers across California began to see significant decreases in positive COVID cases and hospitalization rates, Governor Gavin Newsom announced that the State plans to reopen in full on June 15, 2021. As of the date of this Alert, California has one of the lowest number of COVID cases per 100,000 people and the fourth lowest number of COVID hospitalizations in the United States. Due to these strong metrics, Governor Newsom and politicians argue that the time has come for California to lift restrictions on occupancy in stores and other public gathering spots in a push to return the State to normalcy. So long as hospitalization rates remain low and enough vaccine supply is available for those aged 16 and older, California is scheduled to remove its occupancy restrictions on June 15.

One of the most important emergency rules that is likely to be repealed if and when Governor Newsom's pronouncement becomes effective is the suspension of rules allowing local municipalities to enact eviction moratoriums. On March 16, 2020, Governor Newsom announced in Executive Order N-28-20 that any statewide code rules preventing local municipalities from enacting eviction moratoriums would be suspended in order to allow local cities and counties to pass laws protecting residential and commercial tenants in the event they were unable to pay rent. The most immediate and pressing question for tenants and landlords is whether the lifting of the statewide state of emergency means that all commercial evictions in California can resume as early as June 16.

The answer to this question is nuanced as many municipalities, including San Francisco, have specifically tied the expiration of their local moratoriums to the date in which the eviction regulations set forth in Executive Order N-28-20 are lifted, while others such as the City of Los Angeles have set arbitrary deadlines based on local emergency declarations. While the situation on the resumption of commercial evictions is clear for those municipalities with deadlines directly tied to Executive Order N-28-20, where eviction moratorium expiration dates are not tied to Executive Order N-28-20, it is unclear whether any extensions beyond June 15 are enforceable.

Adding to this uncertainty, the California legislature is currently debating AB 255 which would grant businesses with less than: (1) 50 employees and (2) average annual gross revenues of \$2,500,000 million for calendar years 2018 through 2020, the right to force landlords into good faith negotiations over a long-term repayment plan for past due rents. If a landlord fails to enter into such discussions and thereafter attempts to evict the tenant for a failure to pay rent, the tenant will be able to assert the failure to negotiate as an affirmative defense in any unlawful detainer trial. AB 255 will likely continue to be amended and if passed, we will provide a more detailed discussion of the final law.

Notwithstanding AB 255 or the Governor's soon-to-be-lifted suspension of eviction prevention regulations, local municipalities have already begun discussing whether or not they can enact separate eviction moratoriums without the Governor's "waiver" based on their own local emergency regulations. These municipalities are taking the position that while Executive Order N-28-20 provided a clear and unambiguous ability to enact such protections, nothing in California statutory law prevents them from establishing eviction controls needed to address a locally-declared state of emergency. This position has not yet been tested in the courts, but unlike prior eviction moratoriums which were not challenged by landlords due to the express permission granted to local governments by the Governor, landlords may be more inclined to challenge any such attempts by local municipalities acting on their own accord.

Under the current San Francisco eviction control ordinance, the protections applicable to qualified commercial tenants against eviction for failure to pay rent expires on June 30, 2021. While there is no existing plan to extend such date, even if no local laws are passed to further extend eviction moratoriums, small businesses may yet see additional rental and eviction assistance in the form of AB 255. In addition, many municipalities as part of their commercial eviction moratoriums enacted "rent forbearance" ordinances applicable to commercial tenants, which ordinances extend the time given to qualified tenants to cure and repay past COVID-19 deferred rents. It is crucial that before taking any eviction actions moving forward, landlords and tenants understand their rights under these ordinances governing forbearance periods.

Nevertheless, the decision to fully reopen California's economy means that offices will begin to see employees return and retailers will see a larger influx of customers. The question remains, however, whether this reopening will lead to tenants resuming their contractual obligation to pay rent or simply give them additional time to determine their need for a physical office or brick and mortar store. The actions of these tenants will impact whether there is an increase in litigation or an increase in lease work

out agreements. In either case, clients should consult the Buchalter Real Estate group for how best to proceed.

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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