

**August 18, 2021**

## **San Francisco Provides New Evidentiary Presumption in Continued Push to Provide Rent Relief to Limited Commercial Tenants**

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

Following the passage of its commercial eviction moratorium for certain qualified tenants in December 2020,<sup>1</sup> the San Francisco Board of Supervisors, on August 4, 2021, provided additional assistance to the same class of “Covered Commercial Tenants” by establishing a new evidentiary presumption aimed at excusing payment of past due rent. To the extent applicable, the presumption applies to all past due rent as of March 16, 2020.

The new evidentiary presumption is set forth in San Francisco Board of Supervisors Ordinance 122-21 and states that if a Covered Commercial Tenant was legally prohibited from operating in its leased space due to a state or local health order concerning COVID-19, it is presumed that such order frustrated the purpose of the lease and therefore the payment of rent for such period is excused. This evidentiary presumption relies upon and flows from the existing commercial eviction moratorium set forth in San Francisco Board of Supervisors Ordinance 254-20, which remains in effect through September 30, 2021.

While the legislative purpose and findings section of the new Ordinance is broad in scope, the actual evidentiary presumption is significantly more limited. The new Ordinance serves as a modification of Ordinance 254-20 and provides that the new presumption only applies to Covered Commercial Tenants. These are commercial tenants who had less than \$25 million in combined gross receipts in 2019, and specifically excludes office tenants, other than office tenants who maintain 501(c)(3) nonprofit status.

In addition to the restricted number of tenants who qualify as Covered Commercial Tenants, the new presumption further is limited in its application only during such periods where there was a specific health order issued by the State of California or the County of San Francisco mandating the shutdown of operations at a tenant’s place of business. As an example of how limited the scope of this new presumption is, restaurants were at no point shut down in their entirety and as such, it is unlikely that such a tenant could avail themselves of this new protection. Unlike restaurants, however, gyms and certain retailers were mandated to close their doors and the new presumption may apply to their businesses to the extent they otherwise qualify as a Covered Commercial Tenant.

In the event a tenant's business was shut down due to a legal order at one time during the pandemic, when such orders were repealed and those tenants were permitted to reopen in their premises, the presumption contained in the new Ordinance no longer ceases to be operative. Accordingly, the presumption is likely to be limited solely to periods earlier in the pandemic. Furthermore, the new Ordinance does not give any tenant a right to terminate its lease as a result of a prior shutdown order and solely provides tenants with this evidentiary presumption in the event a suit is brought by a landlord to recover past due rents.<sup>2</sup>

Even if a tenant is a Covered Commercial Tenant, such tenant's place of business was shut down by a legal order, and the tenant seeks to raise the presumption of frustration of purpose as a defense to the payment during the period of such forced closure, landlords still have the ability to rebut the presumption and provide evidence that the purpose of a tenant's lease was not frustrated. The trend of recent case law where tenants have argued that the payment of rent is excused due to the defense of frustration of purpose has not been favorable to tenants. California courts historically have narrowly applied the frustration of purpose doctrine as a defense to claims since the courts have been reluctant to disrupt an existing bargained-for exchange. The type of evidence that may be acceptable to a court to rebut the new presumption is untested, but so long as the primary bargained-for exchange between a tenant and landlord was not undermined, such evidence may exist.<sup>3</sup>

Lastly, Ordinance 122-21 provides an additional clause which states that if a tenant and landlord previously entered, or will enter, into a written agreement providing for any waiver, extension or reduction in the deadline to pay past due rent, such agreement supersedes the new evidentiary presumption for any and all rent payments covered therein. This evidences a further policy of the Board of Supervisors to encourage tenants and landlords to enter into such agreements rather than rely on statutorily mandated rent relief.

The recently passed San Francisco Board of Supervisors Ordinance 122-21 makes it more difficult for landlords to pursue past due rents during periods of time in which certain commercial tenants were legally obligated to shut down their places of business by creating a rebuttable presumption that the underlying lease's purpose was frustrated. Despite providing tenants with this additional rent relief, the scope of Ordinance 122-21 is limited due to the narrow number of tenants that are covered, the rebuttable nature of the presumption, the constricted time period for which tenants were mandated to close, and the carve out provided for written rent relief agreements.

Still unanswered is what the Board of Supervisors will do if the existing eviction moratorium set forth in Ordinance 254-20 is not extended beyond September 30, 2021. While there are still numerous instances of retail (and office) tenants who have not re-opened and have chosen not to pay rent, given market forces, it is

unclear whether eviction is the right remedy in such circumstances. These cases should be reviewed on an individual basis with legal counsel.

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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<sup>1</sup> Ordinance 254-20 provides rent relief solely for "Covered Commercial Tenants," a category of tenants discussed in this article.

<sup>2</sup> Tier 1 Covered Commercial Tenants, however, still maintain their lease termination right set forth in Section 37C.3(c) of Ordinance 254-20.

<sup>3</sup> For example, there may be evidence that the permitted use clause of the lease was broad enough to have permitted the tenant to conduct business in the premises for a use that was not legally required to close.