

## Updates

April 10, 2020

### COVID-19 in California: Local Eviction Moratoriums

Last month, Governor Gavin Newsom signed an executive order which allows, but does not require, local governments to impose temporary limitations on residential and commercial evictions in certain COVID-19-related situations. These situations include a tenant's inability to pay rent caused by (1) the COVID-19 pandemic, or (2) local, state, or federal government responses to the pandemic. Shortly thereafter, cities and counties across California began adopting their own orders, ordinances, and proclamations imposing temporary moratoriums on residential and commercial evictions. The mayor of Los Angeles led the way, invoking emergency authority the day before the governor's order, and ordering that no landlord evict a residential tenant in the city of Los Angeles.

Residential and commercial tenants and landlords around the state are now faced with the task of determining which city and/or county moratorium applies to their property interests, and then analyzing how the applicable regulations affect existing lease provisions governing rent, late fees, security deposits, letters of credit, events of default, and force majeure.

#### **Eviction Moratoriums: Which Moratoriums Apply?**

There currently is no statewide California moratorium governing all evictions. Instead, numerous local jurisdictions are adopting their own eviction moratoriums that vary widely by city and county, with some jurisdictions updating their moratorium multiple times. Unlike the [San Francisco Bay Area shelter-in-place orders](#) that were coordinated among county governments, the eviction moratorium orders have not been similarly coordinated.

For example, the Alameda County order applies only to unincorporated areas of the county, while the Santa Clara County ordinance applies to both incorporated and unincorporated areas, unless a city within Santa Clara County enacts a regulation that is more protective of tenants, in which case the more protective order applies. Accordingly, landlords and tenants need to check for and carefully review both city and/or county moratoriums for each of their properties to determine which eviction regulations apply.

#### **Analyzing Applicable Moratorium Provisions**

When reviewing local eviction moratoriums that apply to their properties, landlords, and tenants should carefully consider the following provisions, which vary widely among jurisdictions:

##### **Does the moratorium apply to all tenants?**

While all the moratoriums enacted to date protect residential tenants, some moratoriums provide relief to only a narrow category of commercial tenants.

For instance, while the mayor of Los Angeles' original order included broad protections and a prohibition on evictions of all residential and all commercial tenants, the subsequent ordinance adopted by the city of Los Angeles does not apply to commercial real property leased by a multinational company, a publicly traded company, or a company that employs more than 500 employees. The San Mateo County ordinance imposes a temporary moratorium on eviction for non-payment of rent by "small business" and nonprofit entity tenants

affected by the COVID-19 crisis, with "small business" being defined as a business entity with gross receipts of less than \$25 million per year and includes persons and entities who earn income through the rental of housing. The Santa Clara County ordinance applies only to commercial real property businesses that are "small" as defined in the Small Business Administration's table of size standards. In San Francisco, the moratorium applies only to small- to medium-sized businesses with 2019 combined gross receipts for tax year 2019 equal to or below \$25 million. Likewise, Emeryville recently issued a draft ordinance with a similar gross receipts threshold provision.

Landlords need to review applicable eviction moratorium carefully, even if they are not planning to evict any tenants at this time. The city of Los Angeles ordinance requires all owners of residential property to give notice of the protections afforded by the ordinance by April 30. Failure to provide notice may result in penalties.

### **If a tenant fails to pay rent, does the eviction moratorium apply?**

Generally, tenants must demonstrate that the moratorium applies to them because their inability to pay rent is due to COVID-19. Under the San Francisco moratorium, commercial tenants must be unable to pay the rent due to financial impacts caused by the COVID-19 pandemic, or by any local, state, or federal government response to COVID-19. In Santa Clara County, tenants must show that their failure to pay rent is related to (1) a substantial loss of income or substantial out-of-pocket medical expenses resulting from the COVID-19 pandemic or (2) any government response to the pandemic. In the city of Los Angeles, an eviction moratorium applies to commercial tenants if the tenant is able to show an inability to pay rent due to circumstances related to the COVID-19 pandemic. Similarly, under the Los Angeles County moratorium (which applies to tenants in the unincorporated areas of Los Angeles County), eviction limitations protect tenants if the tenant demonstrates an inability to pay rent and/or related charges due to COVID-19.

Even if a commercial tenant who fails to pay rent is not protected by the applicable eviction moratorium, courts throughout California have been suspending eviction proceedings. On April 6, 2020, the California Judicial Council adopted emergency rules due to COVID-19 which (1) suspend the issuance of a summons in an unlawful detainer action (which effectively restricts the filing of new unlawful detainer cases), (2) prevent entry of default and/or default judgments in unlawful detainer cases, (3) continue all trials on calendar as of April 1 for at least 60 days, and (4) remain in effect until 90 days after the governor declares that the state of emergency related to the COVID-19 pandemic is lifted. The inability to bring an unlawful detainer claim is a de facto limitation on evictions.

Some residential tenants are afforded additional protection under the CARES Act passed by the U.S. Congress. The CARES Act prohibits the eviction of residential tenants of certain properties secured by government-backed mortgage loans for a 120-day period commencing on March 27, 2020.

### **When is the tenant responsible for repaying rent?**

In all jurisdictions, tenants are still responsible for eventually paying rent. The applicable repayment period is again jurisdiction specific. For example, Santa Clara County requires applicable tenants to pay all past rent due within 120 days from the expiration of the Ordinance. In the city of Los Angeles, the tenant has up to three months following the expiration of the order to repay the past-due rent. In Los Angeles County, tenants have six months to repay late rent. In San Francisco, commercial tenants can extend the cure period to repay up to six months, but must provide documentation as developed by San Francisco's workforce agency demonstrating the financial impact of COVID-19, and landlords and tenants are encouraged to "discuss the matter in good faith and attempt to develop a payment plan for the tenant to pay the missed rent." Failure to pay rent "at the end of the applicable cure period" permits the landlord to proceed with an eviction proceeding. Finally, some eviction moratorium orders prohibit a landlord from collecting a late fee or charging default interest on any missed rental payments during the term of the order and through the repayment period, while other jurisdictions remain silent

on the issue of late fees and charges.

The orders are not rent-forgiveness programs; instead, in specific situations, they prohibit landlords from evicting tenants for failure to pay rent due to COVID-19. As of the writing of this update, no jurisdiction in California has enacted a rent forgiveness ordinance. If tenants are in default for reasons other than failure to pay related to COVID-19, the eviction moratorium generally do not apply (i.e., nuisance, violation of occupancy clause). As discussed above, upon the expiration of the eviction moratorium, tenants are required to eventually repay all rent that accrued during the applicable moratorium period.

### **Can a landlord apply a security deposit towards a missed rental payment?**

While most jurisdictions remain silent on this issue, San Francisco recently clarified that landlords may draw down on security deposits (if permitted by the lease); however, if a tenant is required to replenish a security deposit that the landlord has drawn from, and a tenant fails to do so because of the financial impacts of COVID-19, tenant's failure to replenish the security deposit shall not be a basis for eviction until six months after the moratorium expires. Despite the foregoing clarification on the application of security deposits during the COVID-19 pandemic, San Francisco further advised "landlords are discouraged from using tenants' security deposits to cover missed rent payments during the moratorium."

### **When does the eviction moratorium expire?**

While the moratoriums on evictions are temporary, the expiration date of an applicable eviction moratorium is jurisdiction specific. Most eviction moratoriums across the state (1) expire on May 31, 2020, tracking the timing set forth in Governor Newsom's executive order, (2) remain effective until the expiration of the state of emergency, or (3) have other explicit deadlines set forth therein, but expressly allow for extensions by the enacting authority. Across the state, as these orders and ordinances continue to change, the expiration dates on all eviction moratoriums can be expected to change as well.

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