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Ongoing Implications of COVID-19 Orders on Rent Payments for Commercial Leases



While some states (such as Georgia, South Carolina, Texas, Montana, and Oklahoma) have commenced, or will soon commence, phased or soft business reopenings, other jurisdictions (including the [six San Francisco Bay Area counties in California](#), Connecticut, New York, and Rhode Island) have recently extended their "shelter-in-place" and eviction moratorium orders.

These government orders, together with additional health and safety recommendations related to COVID-19, have shut down most of the country's physical workplaces, including office, retail, hospitality, and industrial locations. While some tenants with shuttered storefronts were able to pay their April rent, many of those businesses have now been closed for over six weeks with no source of income. Some tenants have received relief from loans issued through the CARES Act and the Paycheck Protection Program, but many businesses have not yet received funds and any amounts received may not be enough to cover missed rent for April, May, and upcoming months. This leaves landlords and tenants across the country asking: "What rights do I have?"

One place to look for the answer is the various orders issued in conjunction with shut-down orders which restrict commercial evictions. Many states and local jurisdictions have issued moratoriums on commercial evictions. These orders each have differing scopes and applicability, and many of the orders are more than just a prohibition on evictions, addressing other rights between landlords and tenants. However, there is no single answer as to what jurisdictions across the country permit or require with respect to commercial leases. In order to understand their rights, parties to leases must determine what orders apply, what the orders mean, and how the orders may affect the explicit terms of their contracts. Suddenly the analysis of each party's rights if rent is not paid during this pandemic is more complicated than it has ever been.

While each situation is different, below is some practical guidance from our Real Estate & Land Use team on how to approach some of the issues raised by COVID-19 orders as they pertain to commercial leases and the payment of rent.

Do the Orders Apply Automatically to All Commercial Leases?

- Some orders only apply to residential leases. The order(s) at issue should be checked to make sure that commercial tenants are included.
- Even if an order applies to commercial tenants, it may not protect all commercial tenants. For instance, the protections of some orders are only for small businesses or specific types of commercial businesses unable to pay rent due to the impact of COVID-19. In the [city of Los Angeles](#), for example, the prohibition on commercial evictions does not extend to commercial real property leased by a multi-national company, a publicly traded company, or a company that employs more than 500 employees.

Does a Party Need to Provide Any Notice to the Other in Order to Seek the Protection of an Applicable Order?

- Some orders require a tenant to give notice and/or provide evidence that it cannot pay rent due to COVID-19 in order to be protected. For example, in [Massachusetts](#), a landlord may not impose a late fee for non-payment of rent if the tenant provides notice and documentation to the landlord no later than 30 days after the missed rent payment that the non-payment was due to a financial impact from COVID-19.
- Some orders require landlords to give specific notice to tenants of their rights and the possible applicability under the applicable order before commencing evictions or exercising remedies. For example, in the [county of Santa Clara, California](#), any notice of termination served on a tenant must also include a notice of the tenant's rights under the county ordinance and must be on an [approved form](#).

Do the Orders Require Rent to be Deferred or Abated?

- The current orders that have been issued do not generally **require** a landlord to abate rent and most orders explicitly state that the rent is not being wiped out. Thus, unless an agreement is reached between the parties amending the terms of the lease, rent will need to be paid at some point.
- Some orders, while not mandating rent deferrals, provide guidance or best practice standards on rent payment issues for qualified tenants. For example, in [Ohio](#), landlords are "requested" to suspend rent payments for at least 90 days. In [Arizona](#), landlords are asked to "consider" deferring or adjusting rent payments and "encouraged" to work with tenants to waive late fees, penalties, and interest. The directive from Nevada "encourages" landlords and tenants to negotiate payment plans or other agreements after termination of the directive.
- Other orders do not advise rent deferrals, leaving that to the parties to negotiate, but provide that a landlord cannot charge default interest or penalties in the event of non-payment of rent during the period at issue to qualifying tenants. For example, the directive from Nevada prohibits landlords from charging any late fees or penalties for any nonpayment. However, many orders are silent on the enforceability of the accrual of

late fees or default interest even where they may restrict a landlord from commencing an eviction or demanding rent during the time period in question.

Do the Orders Prevent a Landlord from Drawing on the Tenant's Existing Security Deposit?

- While many orders do not explicitly address whether a landlord may draw on a security deposit if rent is not paid, a few prohibit the application of security deposits or the "refilling" of security deposits if drawn. For example, in [San Francisco](#), California, while the eviction moratorium does not expressly prohibit a landlord from withdrawing unpaid rent from a tenant's security deposit, the order **discourages** landlords from doing so. In addition, following a landlord's reduction (of rent) from the security deposit, if a lease requires the tenant to replenish the security deposit, a landlord cannot evict the tenant for failure to replenish the security deposit due to the financial effects of COVID-19. [New Jersey](#), contrarily, has released an executive order that allows landlords to draw from security deposits to pay rent at the direction of their tenants.

As these examples show, jurisdictions vary in their responses to the COVID-19 pandemic just as lease terms vary. It is important to look at the specific orders in the jurisdiction at hand (and not only state, but also county and municipal orders) to identify if any orders apply and how far such orders go in dealing with rent payments. If the applicable orders are silent on an issue, it is just as important to review the pertinent lease provisions to determine what the contract requires. For instance, a prohibition on eviction may not necessarily be a prohibition on a landlord exercising other remedies under the lease, but the lease at hand may specify notice and/or cure periods or provide other limits. And finally, even where a moratorium on commercial evictions might not apply, it is still uncertain whether the courts will be open to hear cases or issue rulings and how sympathetic they will be to landlords and tenants who failed to negotiate in good faith during this global pandemic.

Perkins Coie's Real Estate & Land Use team can help landlords and tenants walk through applicable orders, review lease terms, provide guidance in negotiating revised lease terms, and aid in the crafting of notices, response letters, and amendments.

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