

California Urgency Legislation (SB-939) May Significantly Affect Commercial Rent Obligations and Lease Termination Rights

Update: SB-939 was on the California Senate Appropriation Committee's agenda June 18. As discussed in the original update below, this bill would have placed a moratorium on commercial evictions for qualifying tenants and allowed certain tenants to both terminate their leases and void third-party guarantees. The Appropriations Committee held the bill, meaning it will not move to a floor vote before this legislative session ends, effectively killing it.

Original Text: On Friday, May 22, 2020, the California Senate Judiciary Committee voted in favor of an amended version of SB-939, which would limit the rights of many commercial landlords to enforce certain provisions of their leases. The two critical provisions in SB-939 are:

1. A right of rent deferral for all eligible commercial tenants and a prohibition on serving commercial tenants with notice of eviction based on non-payment of rent during the pendency of the state of emergency related to COVID-19 proclaimed on March 4, 2020, by Governor Gavin Newsom
2. A right of a commercial tenant that is an eating or drinking establishment, place of entertainment, or performance venue that meets specified financial criteria, including experiencing a specified decline in revenue after a shelter-in-place order took effect, to engage in negotiations with its landlord to modify rent or other economic requirements and to terminate the lease if those negotiations do not lead to agreement

Because SB-939 is an urgency statute it would go into effect immediately once passed by the state legislature and approved by the governor.

Rent Deferral. If the legislation is enacted: (1) all eligible commercial tenants may defer rent payments until 12 months after the end of the state of emergency; (2) landlords are not permitted to impose late fees for this delinquent rent; and (3) landlords may not serve tenants with termination notices for either failure to (a) pay rent or (b) replenish a security deposit that was used to pay rent that accrued during the state of emergency until 90 days after the state of emergency is lifted. Landlords would be required to provide commercial tenants with written notice of these protections within 30 days of the effective date of SB-939.

In order to be eligible for the rent deferral, a commercial tenant must operate primarily in California and have (1) experienced a decline of 20% or more in average monthly revenue across the past two months in comparison to the average of either the two calendar months before the applicable shelter-in place order or the same months in 2019; (2) been prevented from opening or required to delay opening because of the state of emergency; or (3) suffered a decline of 15% or more in capacity due to an official health order or occupational health and safety guidelines. The tenant also must serve written notice on the landlord affirming that they meet one of these eligibility requirements.

Lease Termination. SB-939 also enables a tenant that is an eating or drinking establishment, a place of entertainment, or a performance venue that meets specified criteria to engage in good faith negotiations with their landlords, regardless of the term remaining on the lease, to modify rent or other economic terms of their respective leases. If the parties fail to reach agreement within 30 days after the landlord receives the request for required negotiations from a tenant, then within 10 days thereafter, the tenant may terminate the lease without

any liability for future rent or incurring the penalties imposed by the lease.

In the event of a lease termination, the landlord will be entitled to recover incurred and unpaid rent, in an amount capped at the sum of rent incurred and unpaid during a time unrelated to COVID-19 plus up to three months of past-due rent incurred and unpaid during the state of emergency related to COVID-19, which amount is payable by the tenant within 12 months of vacating the premises. Nor will the landlord be allowed to enforce any third-party guaranties associated with the lease after it is terminated.

To qualify for these lease termination rights, the tenant must operate primarily in California, have its principal office in California, have its officers domiciled in California, have 500 or fewer employees, not be dominant in its field of operation, and not be publicly traded or owned by or affiliated with a publicly traded company. The tenant also must meet one of the following three criteria: (1) have experienced a decline of 40% in average monthly revenue across the past two months in comparison to the average of either the two calendar months before the applicable shelter-in-place order or the same months in 2019; (2) have been prevented from opening or required to delay opening because of the state of emergency; or (3) have suffered a decline of 25% or more in capacity due to an official health order or occupational health and safety guidelines.

If enacted, these lease termination provisions will be in effect until December 31, 2021, or two months after the declared state of emergency ends, whichever is later.

The amended bill is available on [pages 21-26 of this document](#).

We will continue to monitor SB-939 as it moves through the legislative process.

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