

**A GUIDE FOR LANDLORDS AND TENANTS¹ TO COMMERCIAL LEASE
DEFAULTS IN 2021 – CITY OF LOS ANGELES**

A commercial tenant has defaulted, or will default, on its obligation to pay rent or another covenant in the lease. Given the various statutory enactments in 2020 and local eviction moratoria, where do landlords and tenants stand at the beginning of 2021 and beyond²? What are the rules for enforcing prior or future defaults under commercial leases? When can landlords terminate tenancies, evict tenants and recover unpaid rents?

I. FEDERAL, STATE AND LOCAL EVICTION MORATORIA

A. Federal and State Laws/Order

On March 16, 2020, Governor Newsom issued Executive Order N-28-20 which, in effect, allowed local governments (i.e., county and city) to impose substantive restrictions on both residential and commercial evictions that are based upon nonpayment of rent or foreclosure arising from a documented “decrease in household or business income” caused by the COVID-19 pandemic or any federal, state or local response to the COVID-19 pandemic.

Executive Order N-28-20 was set to expire on May 31, 2020, but was extended until September 20, 2020³.

On August 31, 2020, the California Legislature enacted sweeping legislation (AB 3088) relating to residential tenancies impacted by the COVID-19 pandemic. Shortly thereafter, the Centers for Disease Control and Prevention (“CDC”) issued an order halting residential evictions, effective September 4, 2020 through December 31, 2020⁴.

Neither AB 3088 nor the CDC order applies to commercial tenancies. Thus, on September 23, 2020, Governor Newsom issued Executive Order N-80-20, which extended the expiration date of Executive Order N-28-20 to March 31, 2021 (for commercial tenancies only). This means that local governments may continue to impose upon landlords substantive restrictions on commercial evictions that are based upon non-payment of rent arising out of documented decreased household or business income caused by COVID-19.

B. Los Angeles County Temporary Eviction Moratorium

Los Angeles County issued a Temporary Eviction Moratorium, with current effective dates of March 4, 2020 until **February 28, 2021**, which prohibits commercial evictions for non-payment of rent due to (1) “financial impacts” “related to the COVID-19 pandemic,” (2) the state of emergency regarding COVID-19, or (3) following government-recommended COVID-19 precautions (“County Moratorium”).

¹In this article, lessors/landlords are referred to as “landlords” and lessees/tenants are referred to as “tenants.”

²This article is intended as a summary overview. Specific questions should be addressed to legal counsel.

³Executive Order N-66-20, issued May 29, 2020, extended the expiration date for two months. Executive Order N-71-20, issued June 30, 2020, extended the expiration date until September 30, 2020.

⁴Congress recently extended the effective date of the CDC’s order until January 31, 2021.

C. City of Los Angeles Temporary Eviction Moratorium

On March 17, 2020 and March 23, 2020, Mayor Eric Garcetti issued Public Orders Under City of Los Angeles Emergency Authority relating to commercial evictions, but those orders were rescinded on March 31, 2020 upon the enactment of L.A. City Ordinance No. 186585 (amended by L.A. City Ordinance No. 18606) (the “City Moratorium”), which applies from March 4, 2020 until the end of the local emergency period as declared by the Mayor. **The City Moratorium on commercial evictions expires 3 months after the end of the local emergency period as declared by the Mayor.**

II. ISSUES PRESENTED BY THE MORATORIA

A. What Law Applies to the Commercial Tenancy?

As notes above, neither the CDC order nor AB 3088 applies to commercial tenancies. On the state level, Executive Order N-28-20 allows counties and cities to impose substantive restrictions on evictions of tenants for nonpayment of rent arising out of documented decreased household or business income caused by COVID-19. Executive Order N-28-20, unless extended further, is set to expire on **March 31, 2021**.

Thus, commercial landlords must look to the County Moratorium and the City Moratorium to determine their rights.

B. Between the County Moratorium and the City Moratorium, Which Applies?

In the City of Los Angeles, the City Moratorium will apply if (a) it is in effect; (b) it is *not* inconsistent with the County Moratorium; (c) it is *not* preempted by state or federal regulations; (d) it addresses commercial tenancies; and (e) it imposes the same or greater protections for tenants.

As of now, the City Moratorium is in effect and is not preempted by state or federal regulations, and does address commercial tenancies. Thus, landlords must analyze both the City Moratorium and the County Moratorium to determine any inconsistencies and whether the City Memorandum imposes the same or greater protections for tenants

The County Moratorium provides the following non-exclusive examples of greater protections that cities can impose:

- a. Additional time for tenants to notify landlords of inability to pay;
- b. Removing notice requirements;
- c. Removing documentation requirements;
- d. Expanding prohibited grounds for eviction;
- e. Increasing rent repayment periods; and
- f. Extending protections beyond expiration of County Moratorium.

C. Is the Tenant Covered by the City Moratorium?

The following tenants are excluded from the City Moratorium: (1) multi-national companies⁵; (2) publicly traded companies; and (3) companies with more than 500 employees⁶.

D. What Factors Determine Whether the Tenant is Unable to Pay Rent and, Therefore, is Covered by the County Moratorium or City Moratorium?

As noted above, the County Moratorium broadly prohibits evictions of commercial tenants for non-payment of rent due to (1) “financial impacts” “related to the COVID-19 pandemic,” (2) the state of emergency regarding COVID-19, or (3) following government-recommended COVID-19 precautions.

A “financial impact” means a substantial⁷ loss of revenue or business for tenants due to business closure, increased costs, reduced revenues, or other similar reasons impacting a business’s ability to pay rent due, or other substantial loss of income, earnings or revenue that is reasonably related to the COVID-19 pandemic. “A financial impact” is “related to COVID-19” if it was a result of any of the following:

1. A suspected/confirmed case of COVID-19 or caring for a household/family member who is suspected/confirmed with COVID-19;
2. Lay-off, loss of hours or other income reduction resulting from business closure or other economic or employer impacts of COVID-19;
3. Compliance with County’s Health Officer to stay home, self-quarantine, or avoid congregating with others during state of emergency;
4. Extraordinary out-of-pocket medical expenses relating to diagnosis and testing for and/or treatment of COVID-19; or
5. Childcare needs arising from school closures related to COVID-19; or
6. Any other event or circumstance that would not have occurred but for the COVID-19 pandemic, the state of emergency regarding COVID-19, or government-recommended or mandated COVID-19 precautions, provided the event of circumstances is the direct and proximate cause of the financial impact.

⁵Multi-national company is not defined in the City Moratorium, but is defined in the County Moratorium as a company operating within the County but with its principal headquarters outside the U.S. or a company with its principal headquarters in the U.S., but which derives 25% or more of its revenue from operations outside the U.S.

⁶This last category differs from the County Moratorium, which exempts tenants with more than one-hundred (100) employees. Although not enumerated as an example in the County Moratorium, this would likely be upheld as a greater protection for tenants (e.g., a tenant with 101 employees is excluded from the County Moratorium but included in the City Moratorium).

⁷“Substantial” means the loss is greater than what would reasonably be expected had COVID-19 not occurred.

The City Moratorium seems a little broader, providing that no landlord shall evict a commercial tenant during the local emergency period if the tenant is able to show the inability to pay rent “due to circumstances related to the COVID-19 pandemic.” The City Moratorium includes as circumstances (a) loss of business income due to a COVID-19 related workplace closure, (b) child care expenditures due to school closures, (c) health care expenses related to being ill with COVID-19 or caring for a member of the tenant’s household who is ill with COVID-19, or (d) reasonable expenditures that stem from government-ordered emergency measures.

Between the County Moratorium and the City Moratorium, the most expansive definition of the factors necessary to excuse payment of rent will apply.

E. What Proof Must the Tenant Show of its Inability to Pay Rent?

There is no provision in the City Moratorium regarding proof. Under the County Moratorium, it depends upon the number of employees employed by the tenant⁸. Tenants with 9 or fewer employees may provide, and the landlord must accept, a written or verbal self-certification⁹ of the tenant’s inability to pay rent. Tenants with between 10 and 99 employees must provide written documentation demonstrating financial hardship¹⁰.

F. What Notice Must the Tenant Give of its Inability to Pay Rent?

There is no provision in the City Moratorium regarding notice. Under the County Moratorium, the tenant must provide notice of inability to pay rent within seven (7) days after the date that rent was due, unless extenuating circumstances exist that prevent the tenant from providing timely notice. Extenuating circumstances include, without limitation, the tenant’s illness or illness of a family member for whom the tenant is providing care. Although not required, the notice is encouraged to be in writing.

G. What are the Landlord’s Obligations Upon Receipt of the Tenant’s Notice that the Tenant is Unable to Pay Rent?

There is no provision in the City Moratorium regarding a landlord’s obligations upon receipt of notice. Under the County Moratorium, the landlord must immediately cease all efforts to evict the tenant including, but not limited to, dismissing a filed summons and complaint (in which the case the tenant shall not be considered a prevailing party and shall not be entitled to recover costs or legal fees as a result of the voluntary dismissal).

⁸Determining the amount of employees is beyond the scope of this article. For specifics on how to calculate the number of employees, see the November 16, 2020 Revised Guidelines to Aid in the Implementation of the Los Angeles County Eviction Moratorium During the COVID-19 Pandemic (the “L.A. County Guidelines”).

⁹ See L.A. County Guidelines for a sample form of a self-certification.

¹⁰ See L.A. County Guidelines for types of written documentation that tenants may offer.

H. What Conduct by a Landlord is Prohibited by the County and City Moratoria and What are the Ramifications for Violating the County or City Moratoria?

Under the County Moratorium, any attempt to evict a tenant is prohibited, including (1) serving or attempting to serve a notice that is a prerequisite for terminating a tenancy; (2) filing or attempting to file an unlawful detainer summons and complaint; (3) serving a summons and complaint (regardless of whether they have been filed); (4) taking any other action that can reasonably be construed by a tenant as an attempt to terminate a tenancy or cause of a tenant to vacate the premises.

In addition, under the County Moratorium, landlords may not harass or seek to intimidate a protected tenant by, among other things, (1) threatening termination of the lease or to serve a notice of termination, (2) demanding payment for rent not yet due, (3) shutting off utilities, (4) locking a tenant out or (5) verbally or physically threatening a tenant. Landlords who harass and intimidate tenants are guilty of a misdemeanor. A tenant may file in court a civil action against a landlord or, under both the County Moratorium and the City Moratorium, may claim a violation by the landlord as an affirmative defense to a landlord’s unlawful detainer action.

Under the City Moratorium, a landlord may not evict (or endeavor to evict) a commercial tenant. Endeavoring to evict a tenant means “conduct where the landlord lacks a good faith basis to believe that the tenant does not enjoy the benefit” of the City Moratorium **and** the landlord “serves or provides in any way to the tenant a notice to pay rent or quit, notice to perform covenant or quit, a notice of termination or any other eviction notice”. Also, a landlord’s violation of the City Moratorium is subject to an administrative citation.

Here, the County Moratorium appears to provide greater protections to tenants than the City Moratorium, so landlords are probably subject to a combination of both the County Moratorium and the City Moratorium.

I. What Effect Does the County Moratorium Have on a Prior Notice of Termination Served Upon the Tenant?

There is no provision in the City Moratorium regarding this issue. Under the County Moratorium, the following rules apply:

1. Notice of Termination Served Prior to March 4, 2020 - If the notice period had not run as of March 4, 2020, then the notice period is tolled during the County Moratorium.
2. Notice of Termination Served On or After March 4, 2020 – A notice served on or after March 4, 2020 is null and void.

J. What Happens if the Lease Term Ends During the County Moratorium?

There is no provision in the City Moratorium regarding this issue. Under the County Moratorium, however, the lease term is extended until the expiration of the County Moratorium.

K. When Must a Tenant Repay Amounts Due?

Under the County Moratorium and the City Moratorium, rent is not forgiven. Under the County Moratorium, the repayment of amounts due and owing for businesses depends upon the number of employees the tenant has.

1. Tenant Has 9 or Less Employees – Tenant has up to 12 months after end of moratorium to repay past due rent. Tenants are not required to (a) start paying immediately upon the expiration of the County Moratorium, (b) agree to a payment plan or (c) make payments according to a schedule mandated or requested by the landlord.
2. Tenant Has Between 10 and 99 Employees – Tenant has up to 6 months after end of County Moratorium to repay past due rent in equal installments, unless landlord and tenant agree to an alternate payment arrangement.

The City Moratorium requires repayment of past due rent within **3 months** after the expiration of the Local Emergency Period. Depending on the dates, this may be more restrictive than the County Moratorium and inapplicable.

L. Can the Landlord Charge Late Fees or Interest on Deferred Rent?

Under the County Moratorium, a landlord may not retroactively charge late fees, penalties, or other related fees or costs for rent that became due but was unpaid during the County Moratorium, provided that the tenant repays the rent within the time frames set forth in the County Moratorium.

Under the City Moratorium, a landlord cannot charge interest or late fees on rent not paid. Unlike the County Moratorium, the City Moratorium does not require the tenant to repay the rent within the required time in order for the tenant to be free from late charges or interest. Therefore, that requirement likely does not apply under the City Moratorium.

M. Can the Landlord and Tenant Enter Into an Agreement Regarding Repayment of Rent and Other Terms?

There is no provision in the City Moratorium regarding this issue. Under the County Moratorium, landlords and tenants may do so as long as the agreement it is not inconsistent with the County Moratorium.

N. What if the Tenant Commits a Non-Payment of Rent Default?

Non-payment of rent defaults are not covered by either the County Moratorium or the City Moratorium.

O. When Can the Landlord File an Action to Evict and/or Collect Rent?

Given the ramifications of a landlord's failure to abide by the County Moratorium and the City Moratorium, legal counsel should be consulted as the specific facts dictate whether or not a landlord can take action. For example, landlords may take action against a tenant who is not covered by the County Moratorium or the City Moratorium for claims not covered by those moratoria (i.e., certain defaults not involving the payment of rent). On the tenant side, certain notices may or may not need to be given in order to avail itself of protection.

The County Moratorium is in effect until February 28, 2021¹¹, but the City Moratorium on commercial evictions expires 3 months after the end of the local emergency period as declared by the Mayor. An analysis must be made as to whether the City Moratorium or the County Moratorium applies and, if so, when the applicable moratorium expires.

III. CONCLUSION

If you are a landlord or a tenant, a careful analysis must be performed to determine your rights under a commercial lease. The analysis is fact specific on both sides and compliance with the rules is of utmost importance.

This material is for informational purposes only based on information available at the time of writing and does not constitute legal advice. If you have any questions regarding these new laws and applicability to your business, please contact:

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¹¹This, however, is subject to further extension.