

**A GUIDE FOR LANDLORDS AND TENANTS<sup>1</sup> TO COMMERCIAL LEASE  
DEFAULTS IN 2021 – LOS ANGELES COUNTY**

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 beyond<sup>2</sup>? 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, 2020.<sup>3</sup>

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, 2020<sup>4</sup>.

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”).

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

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

<sup>3</sup>Executive 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.

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

## II. ISSUES PRESENTED BY THE MORATORIA

### A. What Law Applies to the Commercial Tenancy?

As noted 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 and tenants must look to county and city eviction moratoria, if any, to determine their rights.

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

#### 1. *Unincorporated Areas of Los Angeles County*

The County Moratorium applies.

#### 2. *Incorporated Cities in Los Angeles County*

The city's eviction moratorium applies 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 local protections for tenants. If the city's eviction moratoria fails to meet one of the above-referenced elements, the County Moratorium applies. 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 County Moratorium?

The following types of tenants are *excluded* from the County Moratorium: (1) multinational companies<sup>5</sup>; (2) publicly traded companies; and (3) companies with more than one-hundred (100) employees.

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<sup>5</sup>Defined 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.

**D. What Factors Determine Whether the Tenant is Unable to Pay Rent and, Therefore, is Covered by the County 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 substantial<sup>6</sup> 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.

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

It depends upon the number of employees employed<sup>7</sup>. Tenants with 9 or fewer employees may provide, and the landlord must accept, a written or verbal self-certification<sup>8</sup> of the tenant’s inability to pay rent. Tenants with between 10 and 99 employees must provide written documentation demonstrating financial hardship<sup>9</sup>.

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<sup>6</sup>“Substantial” means the loss is greater than what would reasonably be expected had COVID-19 not occurred.

<sup>7</sup>Determining 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”).

<sup>8</sup> See L.A. County Guidelines for a sample form of a self-certification.

<sup>9</sup> See L.A. County Guidelines for types of written documentation that tenants may offer.

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

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?**

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).

**H. What Conduct by a Landlord is Prohibited by the County Moratorium and What are the Ramifications for Violating 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, 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 may claim a violation by the landlord as an affirmative defense to a landlord's unlawful detainer action.

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

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?**

The lease term is extended until the expiration of the County Moratorium.

**K. When Must the Tenant Repay Amounts Due?**

Under the County Moratorium, rent is not forgiven. 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 the end of the County 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.

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

No, and a landlord may not retroactive charge such 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.

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

Yes, as long as 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 the County 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, 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 for claims not covered by the County Moratorium (i.e., certain defaults not involving the payment of rent). On the tenant side, certain notices must be given in order to be protected by the County Moratorium.

The County Moratorium is in effect until February 28, 2021<sup>10</sup>, which means that expired leases (that have been extended by the County Moratorium) will expire and, depending on the facts, a notice of termination may be served on March 1, 2021. For unexpired leases, tenants must start paying current rent on March 1, 2021<sup>11</sup>.

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<sup>10</sup>This, however, is subject to further extension.

<sup>11</sup>For repayment of back rent, see Section K above.

### **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:

Richard I. Arshonsky, Esq.  
[rarshonsky@laklawyers.com](mailto:rarshonsky@laklawyers.com)  
Levinson Arshonsky & Kurtz, LLP  
15303 Ventura Boulevard, Ste. 1650  
Sherman Oaks, CA 91403  
(818) 382-3434