

Landlords in California Must Prepare to Address COVID-19 Based Rent and Eviction Moratoria

As landlords in California experience yet another month of rent deferrals allowed under COVID-19 based rent and eviction moratoria, landlords must ensure they are familiar with the varying requirements of applicable moratoria to properly enforce their rights and to avoid exposing themselves to additional liability. Unfortunately for landlords, COVID-19 based rent and eviction moratoria have been promulgated from multiple jurisdictions, running the gamut from state, county, and local ordinances. Owners must understand not only what jurisdictions control, but be cognizant of the nuances and variations in moratoria.

This Alert is intended to apprise real estate owners of the basic constructs of COVID-19 rent and eviction moratoria and to discuss variations that exist, with a focus on navigating the complexities of moratoria in California. A one-size-fits all or blanket approach to landlord action in response to rent deferrals is simply not an option.

Nexus Requirement

Virtually all COVID-19 moratoria in California require a nexus with the COVID-19 pandemic. In other words, a tenant may only defer rent when it is unable to pay rent due to a loss of employment or business income due to COVID-19, due to illness from COVID-19, or as a result of government action taken to address the pandemic, such as stay-at-home orders requiring closure of non-essential businesses. Importantly, however, jurisdictions vary widely as to whether or not landlords may demand proof or substantiation that a nexus exists. For example, Los Angeles County allows tenants to self-certify inability to pay. In jurisdictions that do not require substantiation it could be a violation of the moratorium to do so.

Notice Requirements

Some jurisdictions place the burden on the tenant to give its landlord notice it is unable to pay rent due to COVID-19 within a set time frame in order to avail itself of its moratorium. For example, Los Angeles County requires the tenant to provide notice within seven days after the rent was due unless extenuating circumstances prevent notice. Some jurisdictions have complex procedures, such as San Francisco, which require the landlord to provide a tenant with notice of a missed payment and the opportunity for the tenant to cure or substantiate that it is unable to pay rent due to COVID-19 within 30 days. Some jurisdictions require particular information be provided to tenants. The cities of Long Beach and Oakland require all eviction notices to have COVID-19 related content apprising tenants of their rights under their moratoria. The city of Los Angeles requires all residential landlords to give their tenants notice of the moratorium within 30 days of its enactment or potentially face penalties.

Duration

California moratoria typically are set to expire on a certain date with many set to expire on May 31, 2020. However, there are also moratoria whose expiration dates are linked to the lifting of the local state of emergency. With gradual or partial lifting of stay-at-home orders trending now, there is a concern that these moratoria may last much longer.

Exemptions

Most moratoria apply to all commercial tenants, but some do not. For example, the city of Los Angeles does not protect commercial tenants that are publicly traded, are multi-nationals or have more than 500 employees. The city of San Francisco chose to afford protection only for those commercial tenants whose gross receipts for tax year 2019 are at or below \$25 million. In the city



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of Oakland the moratoria applies only to small businesses with average annual gross receipts of \$10 million or less over the previous three years (further defined in California Govt. Code Section 14837(d)(1)(A)).

Late Fees

Virtually all California moratoria prohibit charging late fees and interest for the rent protected by the moratoria, but some moratoria do not address whether late fees may be charged.

Rent Deferrals

Landlords are rightfully concerned about the duration of rent deferrals under the moratoria. Jurisdictions have exercised their police power to reschedule payments due under leases. Some jurisdictions provide for the deferred rent to be paid when the moratorium ends. Others provide for the rent to be paid from the expiration of the moratorium. Still others provide the rent to be paid no later than a set time from the date the rent was originally due. The deferral periods range from three months (e.g. Los Angeles), to six months (e.g. San Francisco), to a year (e.g. Los Angeles County). Tenants may wait until the end of the deferral period to pay the entire amount of the deferred rent, but California moratoria do not preclude the tenant and landlord from agreeing to an installment plan during the deferral period.

Security Deposits

California landlords have asked whether they may draw on tenants' security deposits without the tenants' consent. Logically, if the applicable moratoria defer the rent, tenants may object to the landlord's application of the security deposit. When a moratorium is lifted, a tenant whose security deposit was drawn against could contend it must be applied to the rent charges accruing after the lifting of the moratorium, which leads to potential disputes related to the security deposit and accounting of the rents. Few, if any, jurisdictions in California have addressed security deposits specifically. One example is San Francisco, which permits a landlord to draw against a security deposit, but protects tenants from any demands to replenish it.

Default and Eviction Notices

California moratoria have not directly addressed whether service on commercial tenants of a non-statutory (non-eviction) notice of default is permissible. If the rent has been deferred pursuant to a moratorium and all conditions of deferral have been met by the tenant, then a notice of default with respect to the deferred rent will likely be ineffectual. Many other jurisdictions (e.g. Torrance and Thousand Oaks) bar landlords from service of an eviction notice if a landlord knows or is deemed to know a tenant cannot pay rent due to COVID-19 financial impacts.

Eviction Defense

Nearly all California moratoria expressly provide an affirmative defense to eviction if the tenant is unable to pay rent due during the moratorium for COVID-19 related reasons.

Penalties and Liability

California COVID-19 related rent moratoria present landlords with varying degrees of penalties and exposure. Importantly, landlords should expect tenants to raise any violation of the technical requirements of COVID-19 moratoria as an affirmative defense to evictions and suits to collect rent. Some jurisdictions provide tenants with remedies such as injunctive relief, money damages, attorneys' fees, and even treble damages (e.g. Alhambra). Another jurisdiction, Culver City, subjects landlords to an administrative fine of \$1,000 per day for each violation or imprisonment up to six months. Many moratoria also contain anti-harassment provisions (e.g. Santa Monica). Even if a moratorium does not provide a specific remedy, a landlord must be concerned that a violation falls under general omnibus remedies a jurisdiction has for violation of its ordinances.

Pre-emption

In California, the state has left most of the moratorium details to local jurisdictions. Some counties have applied their moratoria to unincorporated areas only, while others are applying them to unincorporated areas and cities that have not issued their own moratoria (e.g. Los Angeles

County).

Modifications

COVID-19 related rent moratoria are subject to both modification and extension, so it is imperative to continuously monitor them. For example, the Los Angeles County moratorium originally applied to unincorporated areas of Los Angeles County. Later, it was modified to apply to all cities within Los Angeles County that did not issue their own COVID-19 rent moratoria.

State Court Closures

In considering the enforcement of their rights and remedies under rent moratoria, landlords must also have an understanding of the condition of the state courts, which presents an additional challenge due to closures and backlog. In California, Rule of Court Emergency Rule 1 prohibits the issuance of an eviction summons until 90 days after Governor Newsom's declaration of state of emergency is lifted.

In conclusion, real property owners must familiarize themselves with all applicable rent moratoria governing their properties and cannot take a blanket approach with respect to enforcement of their rights and compliance with moratoria. Taking any action against a commercial or residential tenant must be preceded with due diligence and a review of the specific controlling moratoria to ensure compliance. Taking blanket action, or the use of boilerplate forms and procedures that do not take into account specific applicable moratoria, may invalidate legal notices by landlord. Even worse, a blanket approach may result in violations and liability under the moratoria.
