

## Extension of San Francisco Commercial Tenant Eviction Moratorium and Impact of Proposed California Senate Bill 939

On May 14, 2020, San Francisco Mayor London Breed issued a second extension of the City's commercial eviction moratorium and rent deferral program for small businesses with less than \$25 Million in 2019 gross receipts. The extension grants rent relief for rent due and payable through June 16, 2020. On April 15, 2020, Mayor Breed previously extended the original order through May 17, 2020.

As previously outlined in Buchalter's Client Alert [Impact of San Francisco's Commercial Tenant Eviction Moratorium](#), the San Francisco Order provided that rents that came due between March 17, 2020 and April 16, 2020 (meaning, generally rent due on April 1, 2020 for the month of April 2020) under leases entered into with qualifying small businesses were automatically deferred for one month and at the end of the automatic one month extension period were subject to up to a total of five more one-month extensions if the tenant could show a continuing material impact of the COVID-19 virus on its business operations. The Order also stated that no qualifying small business tenant could be evicted as a result of failing to pay the deferred rent during the effective period of the Order.

Although the language of the two extensions of the San Francisco Order is somewhat ambiguous, it is our reading of the intent behind these orders that qualifying tenants now have up to three (3) months of automatic rent deferral so long as rent became due and payable between March 17, 2020 and June 16, 2020 (meaning rents that came due in April, May and now June, 2020). Crucially, it appears that any rent previously deferred under the original San Francisco Order (or the first extension) continues to be deferred until the expiration of the cure period set forth in the latest extension order, and continues to be subject to the additional extensions contained in the original Order. As an example, rent that otherwise became due on April 1, 2020 and was immediately deferred did not simply become due thirty (30) days after notice from landlord was received, but instead remains deferred until at least thirty (30) days following further written notice from landlord regarding rent otherwise due June 1, 2020. In addition, the total amount of deferred rent is subject to the additional five, one-month extensions if a tenant can show a continuing material impact on its business for each of those five months.

The rent relief assistance program offered to qualifying small business tenants in San Francisco is one of the furthest reaching programs in California. However, this pales in comparison to the relief assistance proposed by California Senate Bill 939.

Introduced by State Senator Scott Wiener, SB 939 creates two new rights for commercial tenants. First, for commercial tenants of any size and of every kind—office, industrial and retail—all eviction actions taken by a landlord, which are defined more broadly than simply filing an eviction suit, are strictly prohibited during the state

of emergency period announced by Governor Newsom. Second, for any qualified tenant that operates a small business, or any tenant (other than a tenant that is a publicly traded company or an affiliate of a publicly traded company) that operates a restaurant, bar, place of entertainment or performance venue whose business has been materially impacted by the COVID-19 virus, if said tenant and its landlord do not reach a mutually agreeable payment plan on deferred rent which has accrued following the declaration of the COVID-19 state of emergency, the tenant has an automatic right to terminate its lease with no payment of future rent damages and all guarantors are released from any obligations under their guaranties. The only lease termination fee payable by the tenant is the sum of (i) a maximum of three months' worth of past due rent incurred during the state of emergency period and (ii) all past due rent unrelated to COVID-19. The entirety of the termination payment need not be paid to Landlord for up to twelve (12) months following a tenant's exercise of this termination right. This new tenant termination right sunsets on the later of December 31, 2021 or two months after the California state of emergency is terminated. This is a critical distinction because there is a likelihood that due to the contagious nature of COVID-19 and lack of current treatments or a vaccine, the state-wide "state of emergency" is likely to continue indefinitely even if a local shelter-in-place requirement is lifted.

Not only does the "eviction moratorium" proposed by SB 939 expand eviction relief throughout California to all commercial tenants (including non-profits), it also expands the restrictions on what a landlord can do in the face of a tenant's failure to pay rent. Under the proposed law no landlord can service a notice to evict, use lockout procedures, take any other action to attempt to evict a commercial tenant or impose late charges on unpaid rent coming due during the period of the state of emergency. A violation is deemed a misdemeanor subject to a fine, as well as an unlawful business practice and an act of unfair competition, opening up landlords to statutory damages.

The rights afforded under SB 939 would effectively rewrite every commercial lease in California (subject to the exclusion for publicly traded companies). Not only does SB 939 supersede all applicable commercial leases by adding new terms that were not bargained for between the parties, including a unilateral tenant termination right, it also provides for the unprecedented exoneration of guarantors. Additionally, SB 939 seems to cast all landlords – whether they are small families, joint ventures, closely held entities or large funds – in the same group, all of whom are subject to an impairment of their contracts, and provides leverage to qualifying commercial tenants.

It is difficult to reconcile this proposed law with long-standing constitutional precedent, but the law notes that it is being enacted for the immediate preservation of the public peace, health, or safety of the citizens of the State of California, a legislative intent to which courts often show deference. While the future of the bill is uncertain, its introduction appears to reflect a change in the policy considerations in play in Sacramento.

For now, the takeaway is that—at least in San Francisco—qualifying small tenants have been granted additional rent deferral that may continue through the end of calendar year 2020.

Buchalter is committed to helping clients navigate through these challenging and rapidly changing times. We have attorneys experienced in adapting and navigating clients through these trying environments and are here to help however, you need. If we can be of assistance, please feel free to contact any of the Buchalter Attorneys below.

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