

Insights

U.S. COVID-19: MANDATED RENT DEFERRAL

GOVERNMENTS ACROSS THE U.S. ARE INCREASING THEIR INTERVENTIONS INTO LANDLORD-TENANT RELATIONSHIPS AS THE PANDEMIC'S ECONOMIC IMPACTS MOUNT

May 22, 2020

As the COVID-19 pandemic continues to result in missing rent payments and bankruptcy filings by major tenants, government officials at all levels are intervening in the landlord-tenant relationship through eviction moratoriums, restrictions on late fees and, most recently, rent deferral mandates. Officials are attempting to ameliorate the immediate economic impacts of COVID-19. Moreover, they believe that suspending evictions will prevent the spread of COVID-19 by keeping tenants in their homes during pandemic sheltering and by eliminating the human interactions in court proceedings necessary to carry out evictions. State and local governments, as well as courts, have suspended evictions (generally for non-payment of rent) as to residential tenants (widely) and commercial tenants (to a lesser degree). The federal government has waded into these waters as well. For example, the CARES Act imposes a moratorium on evictions (for non-payment of rent) and late fees at residential properties benefiting from various federal programs. Some local governments have also acted to stop landlords from charging late fees and penalties, mostly with respect to residential tenancies. Some of the latest governmental efforts, however, are directed towards rent deferral arrangements and giving tenants leverage to walk away or renegotiate their lease terms. We are monitoring these developments, and in this alert, we highlight some of these governmental interventions.

In California, the City of Santa Monica has been issuing orders targeted to assist certain tenants who are unable to pay rent due to COVID-19. Recently, the City adopted an order that, among other things, (i) provides residential tenants and smaller commercial tenants who are unable to pay rent due to financial impacts related to COVID-19 with up to twelve months after the expiration of the order (so, until June 30, 2021) to pay any past due rent (while giving non-retail commercial tenants up to thirty days (so, until July 30, 2020) to pay any unpaid rent), (ii) prohibits landlords of residential tenants and smaller commercial tenants from charging or collecting late fees or penalties for delayed rent if such rent is repaid by June 30, 2021 (or, in the case of certain non-retail commercial tenants, if such rent is repaid by July 30, 2020), and (iii) prohibits landlords of residential tenants and smaller commercial tenants from charging or collecting interest that would

accrue on such unpaid rent during the term of the order and for twelve months thereafter (so, until June 30, 2021) with respect to residential tenants and ninety days thereafter (so, until September 30, 2020) until with respect to smaller commercial tenants (while limiting the prohibition on accruing interest on such unpaid rent by certain non-retail commercial tenants to the term of the order only (so, through June 30, 2020)).

In what appears to be a sweeping intervention by the government into existing leases between landlords and commercial tenants, [Senate Bill 939](#) is under consideration by the California State Legislature. Senate Bill 939 essentially mandates a rent deferral arrangement between small business tenants who meet specified financial criteria and their landlords. It also provides those small business tenants struggling because of the shelter-in-place orders the right to, in good faith, renegotiate rent and other economic terms of their leases with their landlords. If the parties are unable to reach an agreement to modify their leases within a certain period of time, Senate Bill 939 gives those small business tenants the right to terminate their leases and any associated lease guaranties without any liability for future rent, fees or costs that would have otherwise been due thereunder. Landlords would be obligated to advise their tenants of the existence of their rights, if Senate Bill 939 becomes law.

Across the country, the State of New York has taken a more cautious approach. Governor Cuomo issued a [new executive order](#) on May 7th, which (i) extends the moratorium on residential and commercial evictions to August 20, 2020 (but, in contrast to the initial executive order, only for those facing financial hardship) and (ii) forbids the charging of late fees to residential tenants based on missed payments from March 20, 2020 through August 20, 2020. The order pointedly does not defer or waive any rental payments. Other government actors, such as the New York City Council, are trying to push the envelope further, passing several bills designed to relieve certain individual guarantors from personal liability for lease defaults occurring between March 7, 2020 and September 30, 2020 resulting from COVID-19-related restrictions imposed by the State, and to protect, among others, [residential tenants](#) and [commercial tenants](#) from harassment related to COVID-19 (all three bills are scheduled to be signed by Mayor De Blasio on May 26, 2020). They deferred action on the most controversial of the proposed interventions – a [bill](#) which would prevent city marshals and sheriffs from participating in evictions, potentially until April 2021.

While many Midwest states have enacted temporary eviction moratoriums, governmental interventions with respect to rental agreements in the region have thus far been more modest than those seen on the West Coast. Wisconsin, for example, has put in place a [limited emergency rule](#) prohibiting residential landlords from charging late fees or penalties for nonpayment of rent until the end of August; similarly, Colorado has [prohibited landlords from charging late fees](#) for rental nonpayment for amounts due in May. However, Illinois lawmakers are expected to vote this week on a [bill](#) that would provide significant rental protections, including cancelling rental payments for those residential tenants impacted by COVID-19, perhaps providing an indication of the direction the region is moving.

Landlords and tenants, and their lenders and investors, should be paying close attention to these legal developments, especially in the context of landlords' decisions to pursue default notices and other enforcement efforts and tenants' decisions to withhold rent or attempt to terminate their leases. Landlords and tenants will need to evaluate whether any moratoriums or other governmental interventions apply and if applicable, how best to comply. We would expect that some landlords may challenge the legality of new laws or orders as they weigh the cost of compliance and the expense, including reputational, of litigation, and the ultimate likelihood of prevailing in such challenge, among other factors. Moreover, these governmental interventions into the landlord-tenant relationship may put landlords into troubled waters with their lenders and investors. Government and court officials are encouraging settlement of rent disputes, in part to mitigate the flood of evictions that are anticipated when moratoriums are lifted. For example, when Governor Cooper suspended evictions, the [executive order](#) stated: "Finally, the undersigned and the Attorney General strongly encourage all property owners to work with tenants to the best of their abilities to implement payment plans and avoid evictions, in light of the State of Emergency in North Carolina, including cancelling pending evictions by notifying the relevant Sheriff's Office. Similarly, the undersigned and the Attorney General strongly encourage all lenders to work with property owners to the best of their abilities to provide loan payment flexibility that enables property owners to avoid evictions of tenants, in light of the State of Emergency in North Carolina."

The bottom line is that landlords, tenants, lenders and investors, in consultation with their counsel and other advisors, must stay current in understanding their obligations and in knowing, preserving and asserting their rights with respect to the landlord-tenant relationship as governments continue to intervene in leases to address the economic impacts of COVID-19, including the details of reopening. A continued focus on settlement and cooperation would be wise as judges, intent on moving and clearing their dockets, will likely have little patience for recalcitrant parties unable to work out risk allocations associated with the pandemic.

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