

# COVID-19: COMMERCIAL LEASING - THE WEST COAST'S VARIED APPROACH TO RENT RELIEF AND EVICTION

Date: 11 June 2020

## **U.S. Real Estate Alert**

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On 13 April 2020, the governors of California, Oregon, and Washington announced the creation of a Western States Pact to facilitate a coordinated approach to reopening the states' economies in the wake of the COVID-19 pandemic.<sup>1</sup> Despite the commitment to harmonize economic relief efforts, the states have approached rent relief and eviction protections for commercial tenants impacted by widespread business closures quite differently. The varied approaches have disparate consequences for tenants and landlords alike. This alert examines the various eviction moratoriums and rent relief measures affecting commercial properties in California, Oregon, and Washington.

## **CALIFORNIA**

On 16 March 2020 by Executive Order N-28-20, Governor Newsom removed certain state law restrictions on the ability of local governments to impose limitations on commercial evictions.<sup>2</sup> As extended, Executive Order N-28-20 is set to expire on 28 July 2020.<sup>3</sup> As a result of Governor Newsom's order, numerous cities and counties throughout California have enacted so-called eviction moratoriums and temporary rent relief measures for commercial tenants. In addition, the Judicial Council of California, as the policymaking body of the California courts, enacted statewide emergency rules related to COVID-19 that, with very limited exceptions, prohibit California courts from issuing summons in unlawful detainer actions and entering certain judgments and lock out orders relating to actions of foreclosure on a mortgage or deed of trust.<sup>4</sup>

In accordance with the state guidance, the local ordinances enacted throughout California prohibit commercial evictions if the basis for eviction is the non-payment of rent due to a financial impact as a result of COVID-19. Generally, the local ordinances temporarily relieve tenants from the obligation to pay rent on a timely basis for a period of three to six months. However, importantly, the California ordinances do not relieve tenants of the obligation to pay the total rent due. Tenants must pay the total rent due in accordance with the specific time period of the applicable ordinance.

Many of the local ordinances require demonstrable financial hardship or disruption to business income due to COVID-19. Some cities offer more guidance than others on what qualifies as a disruption or financial impact due to COVID-19 and what documentation is required to demonstrate financial impact. For example, the San Francisco ordinance defines "financial impact" as a substantial decrease in business income due to illness or other disruption, reduced opening hours or reduced consumer demand, or temporary closure of the business, including temporary closure required by the local shelter in place orders.<sup>5</sup> The City of San Diego similarly defines

“financial impact” as a substantial decrease in business income due to business closure, loss of compensable hours of work or wages, layoffs, or substantial out-of-pocket medical expenses.<sup>6</sup> The City of Los Angeles provides examples of circumstances when a tenant may be unable to pay rent due to COVID-19, including loss of business income due to a COVID-19 related workplace closure, child care expenditures due to school closures, health care expenses related to being ill with COVID-19 or caring for a member of the tenant's household or family who is ill with COVID-19, or reasonable expenditures that stem from government-ordered emergency measures.<sup>7</sup> If a tenant fails to timely and sufficiently demonstrate a financial impact as a result of COVID-19, it may lose its protections under the local ordinance.

Some jurisdictions in California have placed additional qualifications on the temporary reprieve from payment of rent. In San Francisco, for example, the eviction freeze only applies to businesses that have less than \$25 million in annual gross receipts. The City of Los Angeles recently enacted a revised ordinance that applies only to tenants that are not multi-national companies, publicly traded companies, or companies that employ more than 500 employees.

In addition, some jurisdictions have enacted measures to curtail the imposition of late fees and other charges, and some have provided guidance on the use of security deposits by landlords. The City of Los Angeles and the City of San Diego have prohibited landlords from imposing interest or late fees under certain circumstances. With respect to security deposits, San Francisco “highly discourages” deduction from security deposits based on rent that is not paid and prohibits landlords from requiring replenishment of security deposits.<sup>8</sup>

Although the state of California has only effectively opened the door for local governments to enact protective measures for commercial tenants, there has been some uniformity in the local California ordinances. The larger urban centers in California tend to have carve outs from protective measures for larger corporate tenants in addition to more detailed requirements to take advantage of the tenant protections. In the last month or so, the California legislature has introduced Senate Bill 939, which at a statewide level may extend and, in some instances, expand commercial tenant protection measures. Practically speaking, the emergency rules enacted by the Judicial Council of California make it difficult for a landlord to take action against a tenant that fails to pay rent, regardless of whether a city or county has adopted protections for commercial tenants.

## **OREGON**

On 1 April 2020 by Executive Order 20-13, Governor Kate Brown issued a 90-day moratorium on both residential and commercial lease evictions in Oregon, which will expire on 30 June 2020.<sup>9</sup> Governor Brown previously issued a moratorium solely on residential lease evictions on 22 March 2020 by Executive Order 20-11.<sup>10</sup> Executive Order 20-13 broadened the moratorium on residential lease evictions and added a similar moratorium to commercial lease evictions as well.

Governor Brown's executive orders were likely prompted by requests for a moratorium from several jurisdictions in Oregon (including Washington, Clackamas, and Multnomah Counties and the City of Portland).<sup>11</sup> Prior to Governor Brown's moratorium, Multnomah County and the City of Portland jointly issued emergency rules providing for a moratorium on residential evictions in their respective jurisdictions, and Clackamas County issued a moratorium on residential and commercial lease evictions (it being the only jurisdiction in Oregon to include commercial lease evictions in its moratorium prior to Executive Order 20-13).<sup>12</sup>

During the moratorium, landlords are prohibited from terminating a lease or pursuing an eviction of a tenant if the termination or eviction is the result of non-payment of rent. For commercial leases, the moratorium applies if the tenant provides the landlord with “documentation or other evidence” that such nonpayment was caused, “in whole or in part, directly or indirectly,” by the COVID-19 pandemic. Such documentation could include “proof of loss of income due to any governmental restrictions imposed to mitigate the spread of COVID-19.”

Executive Order 20-13 does not relieve a tenant's obligation to pay the total rent due, but does waive late charges or other penalties arising from the nonpayment of rent that is subject to the moratorium. In addition to the requirement that tenants provide documentation or other reasonable evidence of nonpayment, tenants are to notify a landlord “as soon as reasonably possible” of an inability to pay rent and “shall make partial rent payments to the extent the tenant is financially able to do so.” Any person violating the provisions of Executive Order 20-13 is subject to penalties, including conviction of a Class C misdemeanor under Oregon law.<sup>13</sup>

Unlike the residential eviction moratoriums in Multnomah County and the City of Portland, Executive Order 20-13 does not specify the process or timetable for repayment of any unpaid rent during the moratorium. It is not clear if Oregon will provide further regulation or guidance regarding repayments.

## **WASHINGTON STATE**

On 16 April 2020, Governor Jay Inslee modified an earlier statewide proclamation prohibiting residential evictions to include additional measures affecting some commercial rental properties.<sup>14</sup> Effective through 1 August 2020, landlords, property owners, and property managers are prohibited from increasing, or threatening to increase, rent rates or the deposit amounts for commercial rental properties if the commercial tenant has been “materially impacted” by COVID-19 (e.g., non-essential businesses forced to close due to governmental orders, businesses that have lost staff or customers, or tenants who have been personally impacted by COVID-19 and unable to work). This prohibition on rent increases does not apply to commercial rental property where the rent increases were provided for in an existing lease agreement executed prior to February 29, 2020.<sup>15</sup> Commercial landlords and property owners and managers who willfully violate this order may face gross misdemeanor charges.<sup>16</sup>

Although Governor Inslee's proclamations do not prohibit commercial landlords from pursuing unlawful detainer actions or issuing related notices, commercial evictions may be practically hindered by judicial orders and other orders by local-level officials. The Washington Supreme Court has suspended all civil jury trials until 6 July 2020, which could delay resolution of any unlawful detainer proceeding.<sup>17</sup> Certain superior courts, including those in Pierce and Spokane Counties, have indicated that they will not hear any unlawful detainer matters unless necessary to address the health and safety of others, without identifying an exception for commercial unlawful detainer actions.<sup>18</sup> Other jurisdictions, including King and Snohomish Counties, are proceeding with commercial unlawful detainer actions, but have implemented measures affecting court access (such as requiring masks, providing for telephonic/video appearances, and limiting the number of people allowed in the courtroom).<sup>19</sup> Additionally, several local county sheriff offices have indicated that they will not execute residential or commercial evictions unless the basis for the eviction is waste, nuisance, or the commission of a crime.<sup>20</sup>

Some municipalities have enacted additional protections for certain commercial tenants. In the City of Seattle, Mayor Jenny Durkan issued a civil emergency order implementing a moratorium on the evictions of small businesses and nonprofit tenants.<sup>21</sup> Under Mayor Durkan's order, commercial landlords are prohibited from terminating the tenant's lease or right to possession of the premises due to nonpayment of rent or the expiration

of the lease term. The order adopts the definition of “small business” under RCW 19.85.020(3), which includes businesses “owned and operated independently from all other businesses, and that has fifty or fewer employees” per establishment or premises. A “nonprofit” tenant refers to entities designated as “nonprofit” or “public benefit” corporations under Washington law, or holding 26 U.S.C. § 501(c)(3) tax-exempt status. This order was later extended through 4 June 2020.<sup>22</sup>

Additionally, the Seattle City Council has enacted legislation affecting residential and certain commercial tenants. Ordinance 126066 gives small business and nonprofit tenants who fail to pay rent during or within six months after the termination of the civil emergency the option to pay overdue rent in installment payments.<sup>23</sup> Such payment plans, to be negotiated between the landlord and tenant, require tenants to pay all arrears in full no later than one year after the end of the civil emergency, and landlords may not impose late fees, interest or other fees or charges due to the delinquencies during the same period. Landlords are also prohibited from increasing rent for such commercial tenants (including routine rent increases pursuant to lease renewals). Ordinance 126066's definition of a “small business” tenant is narrower than in the Mayor's order: it excludes general sales and service businesses with 10 or more establishments and entertainment use businesses with five or more establishments and requires the small business to have either been forced to close due to the Mayor's emergency order or has experienced in the previous month gross receipts that are less than 70 percent than for the same calendar month in 2019. Because the timetable for repayment of delinquent rent is tied to the end of the civil emergency order, it is not yet known when tenants will be expected to commence installment payments or when landlords can expect to rent arrearages to be fully satisfied.

## CONCLUSION

Notwithstanding the pledge by California, Oregon, and Washington to coordinate their responses to the financial hardships imposed by the COVID-19 pandemic, these states have differed in their efforts to address the economic uncertainty for commercial tenants and landlords. Although Oregon has taken a more centralized approach by issuing a statewide moratorium on all commercial evictions, California and Washington have largely left it up to county and municipal governments to impose their own eviction restrictions and rent relief measures. Even in the absence of outright eviction prohibitions, emergency judicial orders or other local-level orders may make it difficult in certain areas for landlords to evict or seek relief from defaulting tenants in most situations. As the West Coast continues to grapple with COVID-19, efforts to address the impact on commercial leases will continue to evolve. Commercial landlords and tenants alike should be aware of how these measures may affect their rights and obligations under their leases.

## FOOTNOTES

<sup>1</sup> [\*California, Oregon & Washington Announce Western States Pact\*](#), OFF. OF GOVERNOR GAVIN NEWSOM (Apr. 13, 2020). Colorado and Nevada later joined the Western States Pact. [\*Inslee Announces Colorado & Nevada will join Washington, Oregon & California in Western States Pact\*](#), WASH. GOVERNOR JAY INSLEE (Apr. 27, 2020).

<sup>2</sup> [\*Executive Order N-28-20\*](#) (March 16, 2020).

<sup>3</sup> [\*Executive Order N-66-20\*](#) (May 29, 2020).

<sup>4</sup> Appendix I of Cal. Rules of Ct., Emergency Rules 1 and 2.

<sup>5</sup> [Fourth Supplement to Mayoral Proclamation of February 25, 2020](#) (Mar. 18, 2020), as the same was extended. This proclamation is presently extended through 16 June 2020, by Executive Order of 14 May 2020.

<sup>6</sup> [San Diego City Council Ordinance No. O-21177](#) (Mar. 25, 2020), as the same was extended through 30 June 2020 by [San Diego City Council Ordinance No. O-313043](#) (May 21, 2020).

<sup>7</sup> [City of Los Angeles Ordinance No. 186606](#) (May 12, 2020).

<sup>8</sup> [Temporary Moratorium on Commercial Evictions Regulations for Tenants and Landlords](#) (May 14, 2020).

<sup>9</sup> [Executive Order 20-13](#) (Apr. 1, 2020).

<sup>10</sup> [Executive Order 20-13](#) (Mar. 22, 2020).

<sup>11</sup> [Letter dated March 18, 2020](#).

<sup>12</sup> [Multnomah County, Oregon Executive Rule No. 388 Addendum](#) (Mar. 17, 2020); [Ordinance No. 189890](#), City of Portland (Mar. 18, 2020); [Addendum No. 1 to Resolution No. 2020-14](#) (Mar. 24, 2020).

<sup>13</sup> ORS 401.990 (West 2019).

<sup>14</sup> [Proclamation 20-19.1: Evictions](#) (Apr. 16, 2020); see also [Proclamation 20-19: Evictions](#) (Mar. 18, 2020). Governor Inslee later extended the applicability of the residential eviction moratorium and lease protections through 1 August 2020. [Proclamation 20-19.2: Evictions and Related Housing Practices](#) (Jun. 2, 2020).

<sup>15</sup> [Proclamation 20-19.2: Evictions and Related Housing Practices](#) (Jun. 2, 2020).

<sup>16</sup> RCW 43.06.220(5) (West 2019).

<sup>17</sup> See *Amended Third Revised and Extended Order Re: Court Operations* at 3, In the Matter of Statewide Response by Wash. State Courts to the COVID-19 Pub. Health Emergency, No. 25700-B-626 (Wash. Sup. Ct. May 29, 2020) (“All civil jury trials remain suspended until at least July 6, 2020.”).

<sup>18</sup> See, e.g., [COVID-19 Response: Pierce County Superior Court Remains Open](#), Pierce Cty. Sup. Ct.; Amended Emergency Order #9: Unlawful Detainer Actions, In the Matter of the Response by Spokane County Superior Court to the Public Health Emergency in Washington State, No. 94.2-06940-8 (Spokane Cty. Sup. Ct. Apr. 29, 2020), [available here](#).

<sup>19</sup> Emergency Order #8 RE: Court Operations, In Re the Matter of the Response by Snohomish County Superior Court to the Public Health Emergency in Snohomish County and the State of Washington, No. 2020-7010-31A (May 14, 2020), [available here](#).

<sup>20</sup> See, e.g., [Civil Process Unit](#), PIERCE CTY. SHERIFF; [Evictions \(Writs of Restitution\)](#), KING CTY. SHERIFF'S OFFICE (Mar. 20, 2020); [Eviction/Writ of Restitution](#), SPOKANE CTY. SHERIFF.

<sup>21</sup> [City of Seattle Civil Emergency Order: Moratorium on Small Business Tenant Evictions](#) (Mar. 17, 2020).

<sup>22</sup> [Executive Order 2020-05: COVID-19 Civil Emergency Further Extension of City Closures and Relief Measures](#) (May 2, 2020). As of the date of last revision, Mayor Durkan had not further extended this order.

<sup>23</sup> [Seattle, Wash., Ordinance 126066](#) (Apr. 13, 2020).

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