



Temporary Moratorium on Commercial Evictions Regulations for Tenants and Landlords

Updated: December 9, 2021

SUSPENSION OF COMMERCIAL EVICTIONS: On March 18, 2020, the Mayor imposed a moratorium on landlords recovering possession of commercial units for non-payment of rent, if the tenant was unable to pay due to the COVID-19 crisis (the “Order,” viewable [here](#)). On November 25, 2020, the Board of Supervisors adopted an Ordinance, viewable [here](#), to address commercial evictions. The Order is no longer in effect so parties should instead refer to the Ordinance.

NEW RULES FOR MISSED RENT PAYMENTS: Under the Ordinance, if a covered commercial tenant misses a rent payment that was due during the Moratorium Period (defined below) because of financial impacts resulting from the COVID-19 crisis, then the landlord may not attempt to recover possession of the unit because of the missed payment until the end of the applicable Forbearance Period. If the Forbearance Period has ended and the tenant still has not paid back the missed rent or made alternative arrangements with the landlord, then the landlord may attempt to recover possession at that time. The Ordinance suspends the right to evict for non-payment, but does not relieve a covered commercial tenant from the obligation to pay rent owed or prevent a landlord from otherwise recovering any rent owed.

MORATORIUM PERIOD: The Moratorium Period means the time period that paragraph 2 of the Governor’s Executive Order N-28-20 remains in effect. Paragraph 2 of the Executive Order took effect starting March 16, 2020, and previously was set to expire on March 31, 2021 but on March 4, 2021, via Executive Order N-03-021, the Governor extended the effective period of paragraph 2 through June 30, 2021. On June 11, 2021 the Governor issued Executive Order N-08-21, which extended the timeframe for protections stated in the previous Executive Orders through September 30, 2021. Accordingly, the Moratorium Period began on March 16, 2020 and expired on September 30, 2021.

TENANCIES GENERALLY: For purposes of the moratorium, the term “Tenant” means a person or entity (including a subtenant) with the right to exclusive possession of commercial space, such as ordinarily exists under a lease.¹ The term “Tenant” does not include persons or entities who have made arrangements to use a “co-working” space, such as through an hourly rate or monthly membership for the usage of amenities and common areas on a non-exclusive basis.

COVERED COMMERCIAL TENANTS: To qualify for protection under the moratorium the Tenant must be a “covered commercial tenant.” A covered commercial tenant is a tenant (including a subtenant) that (1) is registered to do business in San Francisco,² and (2) has combined worldwide gross receipts for tax year 2019 equal to or below \$25 million.³ However, the moratorium does not apply to for-profit entities occupying space in property zoned or approved for use as Office Use⁴, or to entities leasing property from the City and County of San Francisco.

¹ California Department of Real Estate (2010). *Reference Book: Information Relating to Real Estate Practice, Licensing and Examinations. Chapter 9: Landlord and Tenant.* <https://www.dre.ca.gov/publications/referencebook.html>

² See Article 12 of the Business and Tax Regulations Code

³ This figure shall be pro-rated if the business did not operate for the entire 2019 tax year

⁴ As defined in Section 102 of the Planning Code

TREATMENT OF CERTAIN OFFICE TENANTS: A tenant or subtenant that occupies property that is zoned or approved for use as Office Use (as defined in Section 102 of the Planning Code) shall not qualify as a covered commercial tenant, unless such tenant or subtenant has established and maintains valid nonprofit status under Section 501(c)(3) of the United States Internal Revenue Code.

If a tenant of Office space does not have nonprofit status but otherwise meets the definition of a covered commercial tenant and is subleasing all or a majority of the space to a covered nonprofit, then the tenant is deemed a covered commercial tenant.

Example 1. Tenant is a for-profit company renting space approved for Office Use. As a for-profit entity, tenant is not covered under the moratorium.

Example 2. Same facts as above, except that tenant is subleasing 51% of the space to a non-profit. So long as Tenant and the non-profit are both registered to do business in San Francisco, and each have combined worldwide gross receipts for tax year 2019 equal to or below \$25 million, both are protected under the moratorium.

FORBEARANCE PERIOD: If a covered commercial tenant misses a rent payment that was due during the Moratorium Period because of financial impacts resulting from the COVID-19 crisis, then the landlord may not attempt to recover possession of the unit because of the missed payment until the end of the applicable Forbearance Period. The length of the Forbearance Period is determined by the number of full-time equivalent employees (“FTE”) that covered commercial tenant had as of November 1, 2020. The table below reflects that the Moratorium Period ended on September 30, 2021.

Commercial Tenant	Number of Full-Time Equivalent Employees (FTE)	Forbearance Period	Forbearance Start Date	Forbearance End Date
Tier 1	Fewer than 10 FTE	24 Months	October 1, 2021	September 30, 2023
Tier 2	Between 10 and 24	18 Months	October 1, 2021	March 30, 2023
Tier 3	Between 25 and 49	12 Months	October 1, 2021	September 30, 2022
Tier 4	50 or more FTE	None	October 24, 2021	September 30, 2021
Tier 4 (NEW)	Between 50-99	6 Months	October 24, 2021	March 30, 2022
Tier 5 (NEW)	100 or more	None	None	September 30, 2021

CALCULATING FULL-TIME EQUIVALENT (FTE) EMPLOYEES: The term “employee” means any person providing labor or services for remuneration who is an employee under California Labor Code Section 2775, as may be amended from time to time, including a part-time or temporary employee, who performs work as an employee within the geographic boundaries of the City. A sole proprietor is not considered an employee.

Each full-time employee shall count as 1 FTE regardless of actual hours worked. Part-time employees shall be accounted for by calculating the total hours that each employee worked (no more than 40 hours per employee per week) in the 4 weeks preceding November 1, 2020; dividing the total hours by 4 to derive a weekly average; and then dividing that result by 40. The employer shall perform this calculation for all part-time employees, add up the total, and then round to the nearest whole number.

Example 1. Tenant employs an administrative assistant. It is understood that the assistant will work from approximately 9-to-5, Monday through Friday. The assistant is a full-time employee who counts as 1 FTE.

Example 2. Tenant employs one part-time worker who averages 30 hours per week. The employee counts as 0.75 FTE, which rounds up to 1 FTE.

Example 3. Tenant employs two part-time workers, each working an average of 30 hours a week. Each employee counts as 0.75 FTE, so together they count as 1.5 FTE, which rounds up to 2 FTE.

Example 4. Tenant employs Worker A who averages 10 hours per week, and Worker B who averages 60 hours per week. Worker A counts as 0.25 FTE. Only 40 hours of Worker B's time can count towards the FTE, so Worker B counts as 1 FTE. The total FTE count is 1.25 FTE, which rounds down to 1 FTE.

Example 5. Tenant normally has 11 FTE, but furloughed two (2) FTE on March 31, 2020. On November 1, 2020, tenant has still furloughed two (2) FTE. Tenant has nine (9) FTE.

Example 6. Tenant has nine (9) FTE as of November 1, 2020. On December 1, 2020 tenant hires two (2) FTE. Upon the termination of the moratorium period of September 30, 2021, the tenant is considered to have nine (9) FTE.

Example 7. Tenant has nine (9) FTE in San Francisco and nine (9) FTE at its location outside of San Francisco. On November 1, 2020, tenant should only count the (9) FTE within San Francisco.

FINANCIAL IMPACT RELATED TO COVID-19: A financial impact related to COVID-19, which must be documented by the covered commercial tenant, is an event caused by the COVID-19 pandemic or by a response from any local, state or federal government that has led to a substantial decrease in the covered commercial tenant's business income or a substantial increase in business expenses. Examples include financial impacts due to illness or other disruption, reduced open hours, or reduced consumer demand, or temporary closure of the business, including temporary closure required to comply with restrictions or in response to restrictions under the shelter in place or other orders of the Health Officer.

LANDLORD AND TENANT AGREEMENTS: Negotiated agreements for repayment plans between landlords and covered commercial tenants must be in writing. If mutually agreement exists between both parties, the agreement may provide for a longer or shorter forbearance period than what is allowed by the City. This agreement will then provide the timing of the covered commercial tenant's obligation to pay the deferred rent.

DEFERRED PAYMENT ORDER: A covered commercial tenant may pay deferred rent in either installments or in a lump sum before the applicable Forbearance Period ends. In situations where a payment is made before the Forbearance Period, the landlord should first apply these payments to rent that comes due during the Forbearance Period, and then to unpaid rent that originally came due during the Moratorium Period.

MONTH TO MONTH PERIODIC TENANCY, HOLDOVER, OR OTHER SIMILAR ARRANGEMENT: This moratorium applies to all attempts to recover possession of a unit due to non-payment, including situations where the tenant is occupying the unit on a month-to month periodic tenancy, holdover basis, or similar arrangement, and including where the landlord has the right to terminate or not renew the agreement at the landlord's discretion. In such situations, if a tenant misses a payment due to COVID-19, the moratorium against recovering possession due to non-payment shall apply, unless the landlord can demonstrate an alternative, non-pretextual reason for recovering possession of the unit (e.g., turning the unit over to a new tenant under a previously executed agreement, planned renovations, or previous agreement to turn over the unit vacant to a new owner).

TIER 1 COVERED COMMERCIAL TENANT LEASE TERMINATION: A Tier 1 covered commercial tenant that is unable to pay rent due to a financial impact related to COVID-19 shall also have the option, despite any terms in the lease to the contrary, to terminate its lease upon thirty (30) days' written notice to the landlord if it fails to reach a mutually satisfactory agreement for repayment.

Additionally, if the Tier 1 covered commercial tenant had provided notice of termination during the Moratorium Period, the tenant is not liable for any further rent following the effective date of the termination (30 days after the date of the notice)⁵, nor is the tenant liable for any penalties that may arise from this termination, despite any terms in the lease to the contrary.

⁵ Section 37C.3(c) further by [Ordinance #78-21](#)

Example 1. Tier 1 Tenant has a lease that expires in December 31, 2021, which requires tenant to pay a penalty if the tenant terminates early. Tenant provides notice of termination to landlord on March 19, 2021. The lease will terminate 30 days later (April 17), and landlord will be entitled to payment of April rent, but landlord may not collect rent from May or later and may not impose the termination penalty contained in the lease.

Example 2. Same facts as above, except tenant provides its 30-day notice on October 1, 2021. The tenant will owe the October rent, and because notice was given after September 30, the landlord may seek to impose the termination penalty contained in the lease. But the landlord will not be entitled to the November rent because the lease will have been terminated as of October 31.

INTEREST AND OTHER CHARGES: A landlord cannot assess interest or other charges on a covered commercial tenant based on unpaid rents that fell due during the Moratorium Period. If unpaid rent remains after the applicable Forbearance Period ends, a landlord may apply interest and penalties prospectively, to the extent allowed under the lease.

PRESERVATION OF AFFIRMATIVE DEFENSE FOR TENANT: A covered commercial tenant may claim protections of this moratorium as an affirmative defense in the event the landlord sues to recover possession, even if the covered commercial tenant fails to provide the landlord notice and/or documentation of its inability to pay at the time of the missed rental payment.

EXCEPTION FOR LANDLORDS FACING SIGNIFICANT FINANCIAL HARDSHIP: If a landlord owns less than 25,000 square feet of Gross Floor Area⁶ in the City and County of San Francisco, and can demonstrate that being unable to evict for non-payment would cause the landlord to experience a significant financial hardship, it may proceed to evict a covered commercial tenant before the applicable Forbearance Period ends.

Whether a landlord has experienced or will experience a significant financial hardship shall depend on factors such as default on debt or similar enforceable obligations and other such other factors as a court may deem relevant. For example, a significant financial hardship may exist if the landlord is unable to meet payment obligations for basic goods, services and other charges necessary for the maintenance and ownership of the property. A reduction in rental income itself is not a significant financial hardship, unless the landlord lacks other resources to meet its obligations.

Landlords claiming hardship must demonstrate with documentation that there is a hardship and that it is necessary to evict the tenant in order to mitigate the hardship. Documentation may include, without limitation:

- Mortgage and lender statements
- Bank and credit card statements
- Investor payments or obligations
- Court ordered payments, judgments or liens
- Utility fees/payments
- Current retirement and investment statements
- Property list with values
- Current credit report
- Complaint for foreclosure
- Notice of default
- Property appraisal
- Debt payment schedule

⁶ See link [here](#) for definition of "Floor Area, Gross" in Section 102 of the Planning Code

REBUTTABLE PRESUMPTION: Section 37C.4 of San Francisco’s Administrative Code establishes a rebuttable presumption, when a public health order has prohibited a commercial tenant from operating on the leased premises, that the purpose of the commercial lease has been frustrated. A landlord overcomes the rebuttable presumption when the landlord presents sufficient evidence to support a finding in the landlord’s favor. State law governs the remedies available to a tenant who establishes that a public health order frustrated the purposes of its lease.

Administrative Code Section 37C.4(b) states: “Excusing performance. Absent an agreement to the contrary between a Covered Commercial Tenant and the landlord, if the Covered Commercial Tenant fell under a category of businesses that was legally prohibited from operating in the unit due to a state or local health order concerning COVID-19, then there shall be a rebuttable presumption that the shutdown frustrated the purpose of the lease and that payment of rent covering the period of the shutdown is excused. The Covered Commercial Tenant need not seek to terminate the lease to invoke the protections of this ordinance. This presumption shall apply unless and until evidence is introduced that would support a finding that, notwithstanding the shutdown order(s), the purpose of the lease was not frustrated, and performance remained possible.”

Section 37C.4(b)’s rebuttable presumption applies only when three required conditions have been met:

- The tenant must be a Covered Commercial Tenant, as defined in Section 37C.2 of the Administrative Code.
- Section 37C.4 applies only where a state or local COVID-19 health order required the tenant to fully shut down its operations at the leased premises. It does not apply where a tenant was able to continue some business operations at the leased premises, such as take-out restaurant service or curbside retail sales. It also does not apply where a tenant belongs to a category of businesses that was allowed to continue operations, but closed because of a COVID-19 outbreak on the premises, or because of the economic impacts of COVID-19.
- Section 37C.4(b) does not override an agreement between the tenant and landlord that governs the impact of a shutdown on the tenant’s rent obligation. A tenant may not invoke Section 37C.4 to justify its inability to comply with a payment plan executed in response to COVID-19.

The tenant bears the burden of production and the burden of proof to establish that these three required conditions have been met.

Section 37C.4 affects only the burden of production. It does not alter the burden of proof under state law whether the purposes of a commercial lease have been frustrated. Section 37C.4 assigns to the landlord the burden of production that notwithstanding the shutdown order(s), the purpose of the lease was not frustrated and performance remained possible. If the landlord introduces sufficient evidence to support a finding that the shutdown order(s) did not frustrate the purposes of the lease, then the landlord has satisfied its burden of production, and the Court will determine the question according to the applicable burden of proof under state law.

Example 1. Tenant is a tattoo parlor that qualified as a Covered Commercial Tenant under Section 37C.2 and had not negotiated an agreement with its landlord regarding rent obligations incurred during COVID-19. Tenant was prohibited from operating both indoors and outdoors under a COVID-19 health order and could not use any part of the leased premises for its business operations. In the absence of contrary evidence, a court would find that the purpose of the lease was frustrated during that time period. If Landlord introduced evidence sufficient to support a finding that the purposes of the lease were not frustrated, then the Court would weigh the evidence and apply the burden of proof under state law to determine whether the purposes of the lease had been frustrated.

Example 2. A COVID-19 health order prohibited a café from operating its indoor dining room but allowed Tenant to operate outdoors (e.g., Tenant had the option to operate a take-out window or provide curbside service). Since Tenant could lawfully use a portion of the leased premises to

operate a portion of its business, even though in limited form, Tenant is not entitled to invoke Section 37C.4.

Example 3. Same as above, except the café did not operate a take-out window because it did not receive a Shared Spaces permit. The COVID-19 health order allowed Tenant to continue operating, and the restriction resulted from the Shared Spaces program which is not a health order. Therefore, Tenant is not entitled to invoke Section 37C.4.

INFORMATION AND RESOURCES:

For additional assistance to small business tenants who cannot afford to pay for an attorney on their own, please contact Lawyers Committee for Civil Rights of the San Francisco Bay Area - Legal Services for Entrepreneurs helpline at 415-543-9444 x217, or send an email to lse@lccrsf.org. To apply for assistance from Legal Services for Entrepreneurs, please submit an application at lccr.com/get-help/economic-justice-legal-services-for-entrepreneurs-lse.

For free and low-cost consultations please contact the Bar Association of San Francisco's Conflict Intervention Service (CIS) helpline at 415-782-8940, send an email to cis@sfbar.org or visit their website www.sfbar.org/adr-services/cis

For more information on this guidance as it relates to non-payment of commercial rent, please contact the Office of Economic and Workforce Development at sfosb@sfgov.org.

In order to provide additional clarity, the Office of Economic and Workforce Development ("OEWD") may publish additional guidelines for this moratorium on its website. Please visit the following link [here](#) for any additional guidance.

