



Stoel Rives<sub>LLP</sub>

# Commercial Tenancies

*in the Era of COVID-19*

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Stoel Rives LLP

Commercial Brokers Association Webinar

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Focus on real estate transactions and dispute resolution for real estate brokerages, multiple listing services, homeowners' associations, developers and principals.

Assist with the representation of the Commercial Brokers Association, several residential and commercial brokerage firms, and the Northwest Multiple Listing Service.

Previously at Foster Pepper PLLC (2017–2018) and Mills Meyers Swartling P.S. (2014–2017).

- State of Washington
  - Limitations on residential managers and owners
  - One limitation on commercial owners and managers
- City of Seattle
  - Additional limitations on commercial owners and managers

- Very fluid situation
- Evolving daily
- Government orders can change or be modified on a moment's notice
- We have general guidance; anything beyond that is speculative (e.g. no precedent for this)
- Expect to hear more from the Governor any day
- **Not legal advice**



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State of Washington

# Statewide Timeline

- **Feb 29** – State of Emergency declared in WA
- **Mar 18** – Statewide moratorium on residential evictions
- **Mar 23** – “Stay Home, Stay Healthy” order
- **Apr 2** – “Stay Home, Stay Healthy” extended
- **Apr 16** – Residential eviction moratorium extended
- **May 4** – *Expiration of “Stay Home, Stay Health”?*

## Statewide Moratorium on Residential Evictions (March 18)

- Residential landlords prohibited from serving a notice of unlawful detainer for failure to pay rent
- Residential landlords prohibited issuing notices of unlawful detainer actions
  - Unless the landlord attaches an affidavit attesting that it is necessary to ensure the health and safety of the tenant or other individuals.
- Residential landlords prohibited from initiating judicial action for failure to pay rent
- Local law enforcement prohibited from acting on residential eviction orders

# Moratorium on Residential Evictions Extended (April 16)

- Amends and extends Moratorium on Residential Evictions
- Likely applies only to residential landlords (with one exception)
- Residential landlords cannot serve, enforce, or threaten notices requiring residents to vacate a dwelling (for failure to pay rent *or otherwise*)
  - Unless the owner or property manager attaches an affidavit attesting that the action is necessary to respond to a significant and immediate risk to the health or safety of others created by the resident.
- Residential landlords cannot seek, enforce or threaten judicial eviction
  - Unless necessary to respond to a significant and immediate risk to the health or safety of others created by the resident

# Moratorium on Residential Evictions Extended (April 16)

- Local law enforcement prohibited from acting on eviction orders (unless risk to health and safety of others)
- Residential landlords cannot assess or threaten late fees or other charges for non-payment or late payment of rent that occurred on or after February 29, 2020
- Residential landlords cannot assess or threaten rent or other charges when a resident's access or occupancy was prevented as a result of COVID-19
- Residential landlords cannot treat unpaid rent or any other amounts due on or after February 29, 2020, as enforceable debts or obligations that are owing and collectable
  - Unless tenant refused to comply with reasonable re-payment plan

## Moratorium on Residential Evictions Extended (April 16)

- Residential landlords cannot increase or threaten to increase rent or the amount of any deposit
- Commercial landlords are prohibited from increasing or threatening to increase rent or the amount of any deposit for commercial tenants materially impacted by COVID-19, whether because the tenant is personally impacted and unable to work or because the tenant was not deemed essential pursuant to Governor Inslee's previous proclamations

## Enforcement

- Violation = gross misdemeanor
- April 20 - Washington Attorney General Bob Ferguson sued a property-management company for allegedly violating the eviction moratorium
- Company issued Notices to Pay or Vacate to at least 14 residents in Tacoma
- A cover letter acknowledged the eviction moratorium
- More than 650 complaints have been filed with the AG since April 1. The AG has contacted 469 tenants and 284 landlords in response to the complaints
- Class action?

## Takeaways

- Proclamations focused on residential tenants
- Residential landlords cannot increase rent, charge late fees, or threaten eviction
- Commercial landlords cannot increase rent for businesses closed due to COVID-19
- Attorney General is acting on complaints from tenants

## Questions

- Do not provide client with legal advice
- Advising clients about what they are allowed to do under the moratoriums IS legal advice
- Advise your client to consult with a lawyer

## Questions

- What is residential and what is commercial?
  - Residential properties = used as a home, residence, or sleeping place by one person or by two or more persons maintaining a common household, including but not limited to single-family residences and units of multiplexes, apartment buildings, mobile homes, AirBnBs, etc.
  - Commercial = everything else

- Does the Governor's proclamation, which bans rent increases, apply to a scheduled rent increases per a rent rider of a fully executed lease? A scheduled rent increase is to occur April 2020 for a commercial tenant.
  - The Governor's order is unclear on this
  - We are looking for guidance
  - To me, rent increases pursuant to a lease already in effect should not be a violation of the Governor's proclamation (See Seattle ordinance)
  - BUT there is a clear argument that this is a rent increase in violation of the Governor's proclamation
  - Talk to a lawyer

- For commercial leases, what do landlords do if a new lease that had a half month of rent due for the month before the order was issued, or a free month of rent, and now the lease rate is supposed to be a full month of base rent plus NNN? Do we abide by the lease, or is it free-rent until June or July?
  - The Governor's order is unclear
  - To me, rent increases pursuant to a lease already in effect should not be a violation of the Governor's proclamation
  - BUT clearly an argument that this is a rent increase in violation of the Governor's proclamation
  - Talk to a lawyer

## Questions

- If a commercial Tenant has a rent increase for April, May, or June which is spelled out in the lease document – can we make that increase? In the event that we cannot incorporate the increase, which is spelled out in the lease document, can we retroactively bill for the increase in July? Or does the increase only go into effect after June 4th?
  - The Governor’s order is unclear To me, rent increases pursuant to a lease already in effect should not be a violation of the Governor’s proclamation
  - BUT clearly an argument that this is a rent increase in violation of the Governor’s proclamation
  - Talk to a lawyer

- Suppose there is a utility bill back, can we charge that?
  - Yes, but if utilities exceed last month, same answer
  - To me, rent increases pursuant to a lease already in effect should not be a violation of the Governor's proclamation
  - BUT clearly an argument that this is a rent increase in violation of the Governor's proclamation
  - Talk to a lawyer

- Once the restrictions are lifted, how do we calculate late fees on past due rent? From what date do we calculate them – the month in which they were originally due or is there a new due date set based on the date the restrictions are lifted?
- The state moratorium is effective until June 4, 2020, so late fees on residential tenants cannot start to accrue until after that date. (Seattle is different.)
- It may be extended

## Questions

- If a commercial tenant has not paid rent this month (because their business is not considered essential, therefore they are forced to close) and they don't have the money to pay rent next month, what steps can the landlord take against the tenant?
- If outside of Seattle, a Landlord should be able to proceed as normal by issuing a Notice to Pay
- Keep in mind: courts will be sympathetic to tenants

- If a commercial tenant wants to get out of a legally signed contract, what is the usual penalty for the tenant and what is the best way for the landlord to deal with this situation?
  - Usual damages: look at the lease. Landlord allowed to collect rent until a new tenant takes over the premises, unless the delay in finding a tenant is unreasonable
  - Advice to Landlord: talk to a lawyer. Must use reasonable efforts to find a replacement tenant and mitigate damages

- Will CBA attorneys draft language that can be used in a lease agreement extension (current lease is expiring soon), to allow for a rent increase once they are allowed?
- We are continuing to evaluate which new forms are appropriate
- We do not think it is the right time for parties to be contracting for rent increases
- Once the moratorium is lifted, a traditional extension should be appropriate

- If a tenant does not pay rent or a lower amount, and the lease ends before the end of the emergency, does the tenant automatically go onto a month to month and then can landlord raise the rent?
  - This is also unclear
  - Lease likely provides that tenancy converts to month-to-month with holdover rent of 150% or 200%
  - Is this an increase in rent in violation of the order? Or is it okay because it was agreed to by the parties?

- If a tenant does not pay rent, can the landlord refuse to extend on that basis? If the landlord puts off the extension decision until after the civil emergency based on the fact that they cannot raise the rent, can the landlord then refuse to extend on the basis of non-payment?
  - Residential or commercial?
  - Residential landlords cannot likely refuse to extend, because they cannot evict tenants
  - Commercial landlords outside of Seattle can, but King County Sheriff is not enforcing evictions
  - Once the emergency is over, Tenants have to pay, so Landlords likely can refuse to extend lease based on nonpayment (In Seattle, small business and nonprofit tenants have one year to pay)

## Questions

- If a lease is expiring, can an addendum be used to extend for two years without requiring a notary? Or does a new lease need to be created?
  - Either way, need a notary
  - Cannot increase rent if business is materially impacted by COVID-19

# Questions?

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City of Seattle

# City of Seattle Timeline

- **Mar 3** – Seattle Mayor proclaims civil emergency
- **Mar 14** – Seattle moratorium on residential evictions
- **Mar 17** – Seattle moratorium on small business evictions
- **Mar 17** – King County Sheriff temporarily suspended enforcement of evictions
- **Apr 17** – Seattle enacts limitations on commercial tenancies

# Overall Timeline

- Feb 29 – State of Emergency declared in WA
- **Mar 3** – Seattle Mayor proclaims civil emergency
- **Mar 14** – Seattle moratorium on residential evictions
- **Mar 17** – Seattle moratorium on small business evictions
- **Mar 17** – King County Sheriff temporarily suspended enforcement of evictions
- **Mar 18** – Statewide moratorium on residential evictions

# Overall Timeline

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# Moratorium on Residential Evictions (March 14)

- Residential tenants cannot be evicted
  - Unless the tenant's conduct poses an imminent threat to the health and safety of other tenants
- Residential landlords cannot post notices or take other actions threatening lease termination or eviction
- Residential landlords cannot charge fees for late or partial payments

# Moratorium on Small Business Evictions (March 17)

- “Small business” means any business entity, including a sole proprietorship, corporation, partnership, or other legal entity, that is owned and operated independently from all other businesses, and has fifty or fewer employees
- Cannot evict “small businesses” for non-payment of rent or because the tenant’s lease expired
- Landlords “shall endeavor” to enter into a payment plan with tenants
- Landlords cannot accrue or charge late fees or interest due to late payment of rent during moratorium
- Pending evictions continued during moratorium

# Commercial Tenancies Ordinance (April 17)

- Applies only to “small businesses” and “nonprofits”
- A “nonprofit” is any “not for profit corporation” or “nonprofit corporation” under RCW 24.03.005(16) or “public benefit not for profit corporation” or “public benefit nonprofit corporation” under RCW 24.03.490 that holds tax-exempt status under 26 U.S.C. § 501(c)(3).
- New definition of “small business”

# Commercial Tenancies Ordinance (April 17)

- “Small business” must meet all of the following conditions:
  - Owned and operated independently from all other businesses (e.g. a franchisee with five or fewer franchise units); and
  - 50 or fewer employees per establishment or premises; and
  - Has either: been forced to close due to an emergency order issued by the Governor or Mayor; or has gross receipts from the previous calendar month of 2020 that are less than 70 percent of its gross receipts for the same month in 2019; and
  - Is neither: a general sales and service business with ten or more establishments in operation located anywhere in the world; nor an entertainment use business with five or more establishments in operation located anywhere in the world.

# Commercial Tenancies Ordinance (April 17)

- Cannot increase rent during the lease term, unless the increase was authorized in a written lease in effect before the ordinance
- In addition, Landlords cannot renew a lease or enter into a new lease if rent due under the new lease exceeds rent due under the expired lease
- These restrictions do not apply to month-to-month tenancies

# Commercial Tenancies Ordinance (April 17)

- Nonprofits and small businesses may pay rent in installments on a payment schedule until 6 months after civil emergency declared over
- Tenants must pay past-due rent within one year of the Mayor declaring the civil emergency over, and Landlords cannot accrue or impose late fees, interest, or any other charges for deferred rent during that time
- Unless the Tenant agrees otherwise, Tenants are not required to pay more than 1/3 of the late rent “within any month or period following the month or period for which full rent was not paid”

## Questions

- Do not provide client with legal advice
- Advising clients about what they are allowed to do under the moratoriums IS legal advice
- Advise your client to consult with a lawyer

- What if my tenant is covered by the Seattle ordinance and does not pay the rent?
  - The landlord may issue a billing statement or letter to the tenant documenting the rent due.
  - The statement or letter must not threaten eviction (do not use pay or vacate language).
  - At the end of the moratorium, the landlord may issue a 14-day notice for any rent balance that remains unpaid but may not charge fees for late or partial payments made during the moratorium.

## Questions

- What can I do if my tenant's rental agreement expires during the moratorium?
  - The landlord cannot start an eviction to remove the tenant until after the moratorium has expired.

## Questions

- For triple-net (NNN) leases, can tenants pay operating expenses in installments?
- Probably. The ordinance allows a tenant to pay “rent” in installments, and most commercial triple-net leases (including the CBA triple-net leases) define rent to include operating costs.

## Questions?

- If NNNs increase due to property taxes, can landlords bill that or do they have to wait? Same question for NNN reconciliations, when the tenant owes funds after the reconciliation.
  - Yes, if authorized by a Lease already in effect
  - Remember, only applies to “small businesses” and “nonprofits” as defined by the ordinance

## Questions?

- If a subtenant gives notice for a 5 year extension prior to the emergency but the sublessor was obligated to respond with a new rate and has not, are the parties bound by the current rent?
  - Need to look at the lease and talk to a lawyer
  - Validity of the extension is still in question (e.g. rent has not been determined)
  - Holdover rent apply?
  - Current rent apply?
  - Will need to be negotiated

## Questions?

- Our current sublease term expires Oct.15, 2020. Can the subtenant request that the sublessor renew the sublease at the same sublease rate for 5 years except for the annual 3.5% increase and since the rate cannot change under the ordinance? Or can they simply not execute the extension until the emergency is over?
  - Something to negotiate
  - Landlord cannot agree to increase rent due during the moratorium, so Landlord may want to wait until after it is lifted
  - Landlord can agree to such an extension if it wants, not required

## Questions?

- Can the government remove the State of Emergency but still maintain restrictions on occupancy or other sanctions for bars and/or restaurants?
- Yes, the Seattle ordinance already provides protections for one year after the emergency is over

## Questions?

- If the City maintains restrictions or other sanctions for bars and restaurants, will the City's ordinance still apply?
- Yes, it is intended to help those bars and restaurants. May be extended

## Questions?

- Once the restrictions are lifted, how do we calculate late fees on past due rent? From what date do we calculate them – the month in which they were originally due or is there a new due date set based on the date the restrictions are lifted?
  - For residential tenants, late fees cannot accrue until after the moratorium is lifted.
  - For small businesses and nonprofits, late fees cannot accrue until one year after the Mayor declares the civil emergency over

## Questions?

- What are my rights in requesting commercial mortgage payment deferrals or interest only payments to my bank/credit union?
  - I don't know
  - Likely depends on your loan
  - Need to talk with an expert

# Questions?