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# Commercial Tenant Issues

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# Current City Mandates



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# California and San Francisco State of Emergency

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- Storefront/  
Office  
Closure
- ▶ Businesses/non-profits must cease all non-essential business operations.
  - ▶ Essential business operations include all operations for essential businesses and Minimum Basic Operations for non-essential businesses.
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- Minimum  
Basic  
Operations
- ▶ Minimum necessary activities to maintain and protect the value of the business's inventory and facilities; ensure security, safety, and sanitation; process payroll and employee benefits; provide for the delivery of existing inventory directly to residences or businesses; or related functions.
  - ▶ Minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences.
  - ▶ Order allows businesses to continue delivery directly to customers' residences, including having employees go to stores to facilitate that function.
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# San Francisco Commercial Eviction Moratorium



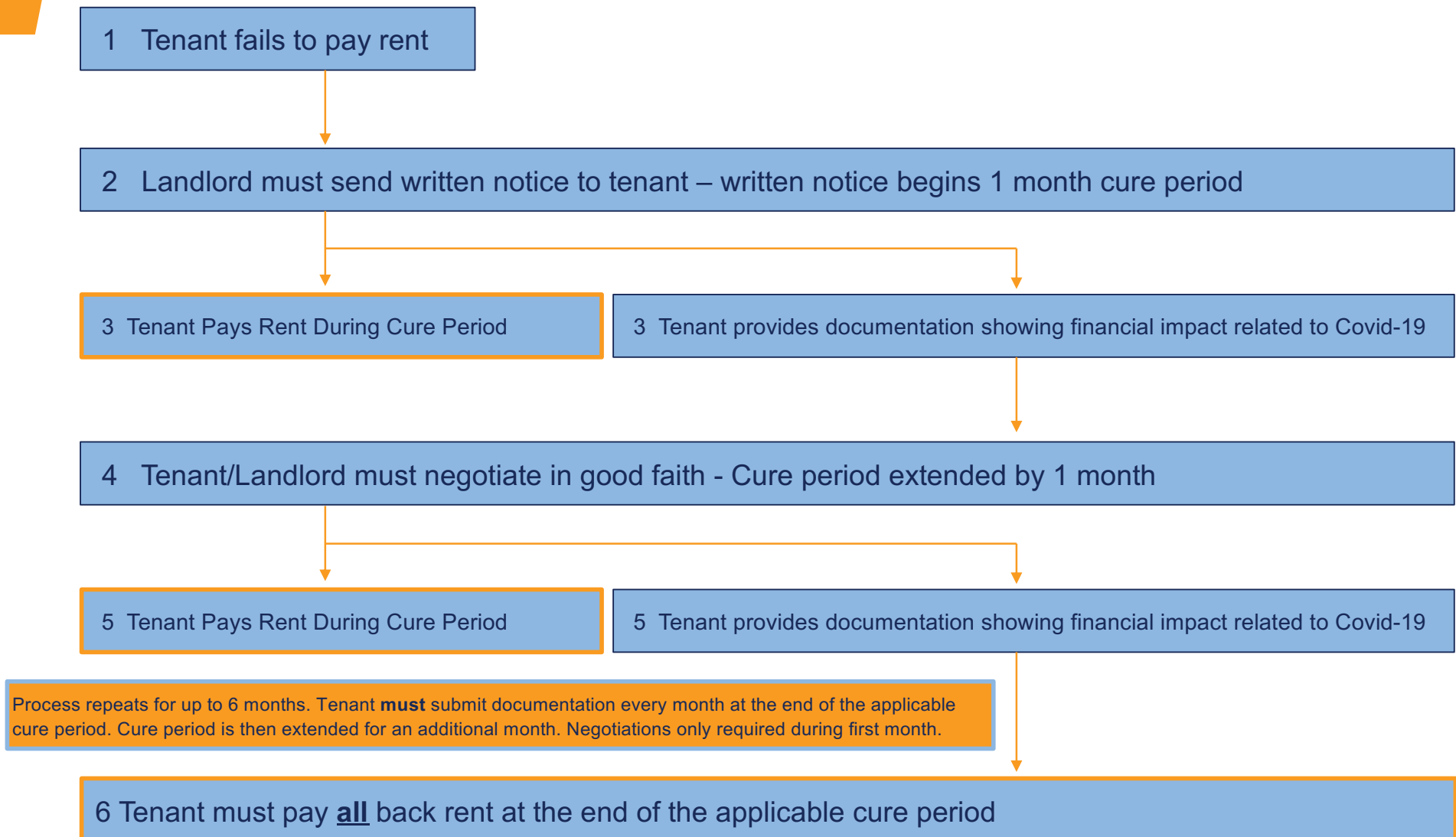
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# San Francisco Commercial Eviction Moratorium

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- ▶ San Francisco Issued a Commercial Tenant Eviction Moratorium on March 18, 2020.
- ▶ Moratorium applies to tenants who are:
  - Registered to do business in San Francisco under Article 12 of the Business and Tax Regulations Code; and
  - Have gross tax receipts for tax year 2019 equal to **\$25 million or less**.
- ▶ Moratorium applies to non-payment of rent between March 18, 2020 and April 17, 2020. Moratorium does not apply to rent missed before or after that date. Mayor has the ability to extend this period.

# Moratorium Process



## Further Moratorium Considerations

- ▶ The City's order does not outline what documentation the tenant is required to submit to the landlord.
- ▶ Financial impact requires two part showing.
  - (1) Business must have a substantial decrease in business income 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 City's Health Officer.
  - (2) Must be caused by the Covid-19 pandemic, or by any local, state, or federal government response to Covid-19.
- ▶ Important to remember moratorium does not excuse rent. All back rent must be paid at end of the applicable cure period.
- ▶ If the tenant agrees to a pay plan, it is likely the landlord can evict the tenant if the tenant does not follow that plan.
- ▶ The Office of Economic and Workforce Development can grant waivers to landlords who can demonstrate that being unable to evict would cause them significant financial hardship.

# Survey of Select Bay Area Jurisdictions

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- ▶ California Judicial Council's 4/6/20 Ruling: Unless necessary to protect public health and safety, no eviction case (residential or commercial, whether related to COVID-19 or not) can proceed during Governor Newsom's state of emergency or 90 days after the emergency ends
  - ▶ No statewide moratorium protecting commercial tenants, and local moratoriums vary widely by city and county. A sampling of local moratoriums described below for reference
  - ▶ Berkeley: Effective 3/17/20 for duration of emergency, moratorium on no-fault evictions, including commercial tenants who demonstrate COVID-related inability to pay. Must notify landlords in writing before rent is due and provide documentation. Must repay back rents after emergency, but landlords can't charge collection fees or interest.
  - ▶ Fremont: Effective until 30 days after emergency, moratorium on all small-scale commercial evictions for tenants who demonstrate COVID-related inability to pay. Must notify landlord in writing and provide documentation within 5 days of notice to quit. Non-moratorium protections, including restrictions on landlord fees, in effect for 6 months after emergency
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## Survey of Select Bay Area Jurisdictions

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- ▶ Marin County: Effective 3/24 through 5/31/20, moratorium on all evictions, including just cause evictions, for commercial tenants who demonstrate COVID-related inability to pay. Must notify landlords in writing within 30 days of due date and provide documentation. Must repay back rents after emergency, but landlords can't charge late fees.
  - ▶ Oakland: Effective 3/27 through 5/31/20 unless extended, moratorium on all evictions including commercial tenants who demonstrate COVID-related inability to pay, both now and after moratorium is lifted. Excludes businesses with 100 or more employees. Must repay back rent after emergency, but landlords can't charge late fees.
  - ▶ San Mateo County: Effective 4/7 through 5/31/20, moratorium on evictions of commercial tenants with annual revenues under \$2.5 million who demonstrate COVID-related inability to pay. Must repay back rent within 180 days of end of emergency
  - ▶ Santa Clara County: Effective 3/24 through 5/31/20 unless extended, moratorium on all evictions, including commercial tenants who demonstrate COVID-related inability to pay. Must provide documentation and repay back rent within 120 days of end of emergency, but landlords can't charge late fees or collection fees.
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# Basic Commercial Lease Law



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## Lease Terms - Overview

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- ▶ A commercial lease is a written, detailed agreement between a property owner and a person (or commercial entity). The lease will describe the property, usually referred to as the premise, this written description controls over any other understanding between the tenant and the landlord.
  - ▶ Lease is a contract. Unless terminated pursuant to the lease terms, each party remains liable for the term of the lease.
    - If tenant ends the lease in accordance with its terms, the lease is considered terminated.
    - If tenant ends the lease not in accordance with its terms, but with landlord approval, the lease is considered surrendered.
    - If tenant ends the lease not in accordance with its terms, and without landlord's approval, the lease is considered abandoned.
  - ▶ If lease is terminated or surrendered, the tenant is no longer liable. If lease is abandoned the tenant remains liable for the rent. Landlord has an obligation to mitigate (re-rent the property), but this may be difficult in the current environment.
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## Lease Terms – Personal Liability

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- ▶ The law considers a person (the small business owner) personally liable when that person, rather than the person's business entity, is responsible for the lease obligations.
- ▶ Whether a business owner is personally liable depends on two factors.
  - (1) Whether the tenant under the lease is the business owner in its individual capacity or whether tenant is a limited liability entity (LLC, corporation, LP, etc.). This can be determined by who signed the lease.
  - (2) Whether the business owner signed a personal guaranty in connection with the lease.
- ▶ Note, the moratoriums do not excuse personal guarantees.



## Lease Terms

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- ▶ **Rent** - Rent is the money, or consideration, that the tenant pays the landlord. Rent can be set as a base or by a formula. Many commercial leases contain late charges and interest penalty clauses that apply when a tenant fails to make a rent payment on time. There may also be a non-payment cure period.
  - ▶ **Term** - Term provisions contain the date the tenant can take possession of the property, the date the tenant begins paying rent, and the date the tenant must surrender. The lease can also include one or more options to extend the term of the lease by the tenant providing notice to landlord of its exercise of the option by a certain date.
  - ▶ **Early Termination Rights** - Some leases have provisions that allow the tenant to terminate its lease before the end of the lease term. Often these provisions will require the tenant to pay some pre-negotiated amount to exercise this right. For example, the lease may state that if the tenant does not achieve a certain amount of gross sales in the first few months of the lease, the tenant can terminate the lease early for a certain fee.
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# Renegotiating Lease Provisions



# Initial Considerations

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- ▶ Even in times of crisis, it's important to think through a tenancy holistically, including whether the situation is working for you. This analysis should include a general review of the role of the premise in your business.
  - ▶ Next, the tenant should think through and take stock of its current relationship with the landlord.
  - ▶ The tenant should conduct a thorough analysis of its financial situation and the terms of the lease.
  - ▶ Consideration of the financial situation should include whether the business expects to return to profitability at the end of the COVID-19 emergency and whether the business will need amended lease terms to suit the business after the crisis abates. At this point it is important to think through what your future plans will be.
  - ▶ If the tenant determines it will need accommodations in addition to a rent reprieve during the crisis, the tenant should thoroughly consider every term of the lease it is seeking to amend.
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# Termination Provisions

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- ▶ **Exercising Early Termination Rights Under the Lease.** The lease may include provisions that allow the tenant to terminate its lease early. Early termination rights can come in a variety of forms and may include the organization paying a certain amount in order to exercise the right.
  - ▶ **Invoking a Force Majeure Clause.** Many commercial leases include force majeure clauses, which are included to provide a mechanism to postpone or suspend the performance of a duty under the lease due to unforeseeable circumstances that are beyond the control of the party. A specific force majeure clause will usually describe the parties, a list of events that qualify, the obligations of the party impacted, and the remedies. Typically these clauses do not apply to monetary obligations or give the parties a right to terminate. Tenant should carefully review this clause to consider if it is beneficial.
  - ▶ **Common Law Defenses.** Certain common law legal defenses (impossibility, impracticability, and frustration of purpose) may apply. Such defenses are extremely difficult to prove—a party must show that an intervening situation was unforeseeable and resulted in difficulties that are more than just economic hardship.
  - ▶ **Buying Out the Lease.** The landlord may be open to allowing the tenant to pay the landlord a certain amount of money in order to terminate the lease before the end of the lease term.
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# Communication Best Practices

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- ▶ Important to remember the landlord is required to negotiate in good faith with the tenant as part of the moratorium. Even so, the tenant may want to approach the landlord earlier in the process.
  - ▶ When approaching the landlord, it's considered best practice to be cheerful, kind, and professional in all communications. Ensure proper modes of communication in context.
  - ▶ Beware of text messages. Think through all calls and emails.
  - ▶ The lease and moratorium govern. The tenant should follow each to the letter, including any notice provisions. The moratoriums typically require written notices.
  - ▶ Importantly, other than the notices and documentation required under the moratorium **the tenant does not need a written agreement with the landlord to utilize.**
  - ▶ But if the landlord agrees to advantageous terms, such as rent abatement, it may be in the tenant's interest, and legally required, to get such agreement in writing.
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# Sample First Contact Letter

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Dear [Landlord],

How are you? I hope you and your family are staying safe and healthy as we face this crisis as a community.

As you know, our [store front/office] closed on March 16 to comply with the City's health emergency order. We have been attempting to do everything we can to continue as an ongoing concern.

Without any cashflow, we are unable to pay our employees or our rent until business resumes. This development concerns us deeply, and we understand that you also have ongoing obligations.

When would you be available to discuss steps to maintain our relationship during the crisis, and to develop a rent relief plan that works for us both?

This situation is beyond difficult for everyone. I pledge to work with you to get to the other side of the crisis. Thank you for your understanding....

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# Negotiation Tips & Resources

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- ▶ After conducting research on your financial condition and lease, think up your negotiation plan. This should include identifying your most favored, but justifiable, expectations. Try writing this down before the negotiations to have in your mind.
  - ▶ While thinking up your plan, try to think of the negotiation from the landlord's perspective. What are the landlord's most favored, but justifiable, expectations. Can you marry the landlord's goals with yours? Try thinking creatively on different pieces you can negotiate around.
  - ▶ During negotiations, try not to overreach.
  - ▶ Lead with your vision of the future.
  - ▶ Think about rent abatement vs. deferment.
  - ▶ For the special case of retailers, remember that sales = value.
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## Further Resources

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- ▶ The Bar Association of San Francisco's Conflict Intervention Service ([sfbar.org/cis](https://sfbar.org/cis))
- ▶ Lower Polk CDB Tenant-Landlord Clinic ([lptlc.org/covid](https://lptlc.org/covid)). Offers tenant counseling and mediation services.
- ▶ Lawyers' Committee for Civil Rights (<https://www.lccr.com/get-help/economic-justice-legal-services-for-entrepreneurs-lse/>). Offers pro bono attorney referral service to assist with commercial lease negotiations.
- ▶ And please remember: self-care is important!