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Landlording rules in the era of COVID-19 and recovering rent debt accrued during the pandemic

A white paper by Bornstein Law, a boutique law firm specializing in the advocacy of property owners and resolving complex real estate litigation throughout the Bay Area.

Rental property owners are facing threats on multiple fronts. A loss of income has placed enormous strain on landlords, and small, mom and pop landlords have been especially decimated.

Fearing a tsunami of evictions, lawmakers have asked landlords to inordinately absorb the costs of the pandemic by requiring the deferral of rent payments.

The uncertainty of collecting rent debts in a post-COVID world, coupled with downward pressures on rents and the prospect of finding new tenants to fill vacant units are all weighty factors landlords and property managers must consider.

Bornstein Law wants you to think smartly and strategically about your relationships with tenants during these most challenging times.

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All residential units, including mobile home parks, boarding houses, and even short-term rentals are covered by the COVID-19 Tenant Act of 2020 (AB 3088).

To avoid an eviction wave on the other side of the pandemic, lawmakers have reasoned that that tenants financially impacted by the novel virus should not risk displacement because of missed rent and tenants' claims of financial hardships.

Instead, COVID-related rent debt will be classified as consumer debt recoverable through civil courts.

The law contains no provisions for rent forgiveness or cancellation. That is to say, the landlord is still entitled to the rent money owed. Collecting that rent money is still a story that will unfold, however.

Diplomacy, empathy, and concessions remain the order of the day, but vacancies can still be legally effectuated with proper counsel.

When the landlord endeavors to evict a tenant for nonpayment of rent, it is important to keep a finger on the dates when rent was missed.

Rent debt accrued between March 1, 2020, through August 31, 2020:

If the tenant signs and timely returns a declaration of hardship stating their finances have been impacted by COVID-19, he or she cannot be evicted. Rent debt accrued during this period, however, is recoverable in civil courts.

Rent debt accrued between September 1, 2020, through January 31, 2021:

If the tenant signs and timely returns a declaration of hardship, he or she has until January 31, 2021, to pay at least 25% of the total rent debt. Failure to make this partial payment constitutes grounds for eviction.

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Landlords certainly are also entitled to pursue this debt in civil courts.

Declaration of COVID-19 Related Financial Distress

Code of Civil Procedure §117.02(d)

The law places limitations on the landlord's ability to evict a tenant for failure to pay rent during the pandemic. Yet, to make use of this protection, the tenant must assert a COVID-19 related hardship. When the landlord provides a 15-daynotice to pay rent or quit, tenants must declare under penalty of perjury that they experienced a financial impact as a result of the public health crisis.

What is a hardship anyway?

In the middle of the deepest recession in memory, just about everyone has been adversely impacted by the coronavirus outbreak. For the vast majority of tenants claiming a financial jolt from COVID-19, then, it takes little effort. In fact, the mere assertion of hardship will suffice.

Tenants will have 15 business days to respond to the landlord's demand to pay rent by returning a declaration signed under penalty of perjury, indicating that the tenant cannot pay the amount at issue because of "COVID-19 related financial distress" which includes:

(1)loss of income caused by the COVID-19 pandemic;
(2) increased out-of-pocket expenses directly related to performing essential work during the COVID-19 pandemic or directly related to the health impact of the COVID-19 pandemic;
(3) responsibilities to care of children, an elderly, disabled, or sick family member directly related to the COVID-19 pandemic that limit a tenant's ability to earn income; or
(4) other circumstances related to the COVID-19 pandemic that have reduced a tenant's income or increased a tenant's expenses.

The law applies a means test.

Making concessions to landlord groups, politicians agreed that tenants who are able to pay rent should do so and not "game the system."

If landlords have a hunch that the tenant can afford the rent and can substantiate it with pre-existing documentation, the tenant can be probed further as to what hardship he or she has experienced.

The majority of tenants will not be required to produce financial documents as part of claiming a hardship, except for well-to-do tenants, and then only when asked by the landlord to do so.

Affluent tenants may be required to furnish proof that the pandemic has caused financial distress if they fall into this category:

- Households making more than $100,000 annually
  OR
- Households with more than 130 percent of the county's median income, as defined by HUD(whichever is higher)

Importantly, we need to consider the household composition when asking for supporting documentation of a COVID-related hardship. We can't just focus on the income of an individual breadwinner — we have to consider the household size, including minor children, when calculating if the rental unit is deemed to be occupied by a high-income tenant.

Can a landlord ask for supporting documents if the tenant drives a Tesla? No.

The mere suspicion that the tenant is affluent is not reason enough to request proof of financial distress. The landlord must already have independently verifiable information in hand like tax returns, W-2s, written employer statements, paystubs, and the like. This is no time to go on a fishing expedition.

As of September 2020, evictions for reasons other than nonpayment of rent like nuisance have been allowed to resume. But they have been slowed to a crawl.

When unruly, troublesome tenants interfere with the quiet enjoyment of neighboring residents, it is loosely defined as a "nuisance," and this is a theory for eviction.

With a backlog of cases, however, only the most egregious of acts that have imminent threats to public health and safety have been bumped to the front of the line. Instances of arson, violence, prostitution, drug dealing and the like have taken precedence.

Barking dogs, playing loud music at night, and other acts have been less of a priority for an inundated court system. Subletting and other lease violations have also taken a backseat.

Anticipating retaliatory evictions, lawmakers extended "just cause" protections to all residents in California through January 1, 2021.

The permissible reasons to evict can be found in the Tenant Protection Act of 2019 (AB-1482). Keep in mind, there are several jurisdictions that have enacted stronger eviction controls - if local rules are more protective, they apply. To use an example, San Francisco has temporarily banned "no fault" evictions (excluding Ellis Act evictions) through March 31, 2021.

For any rental property owners who want to tear down a building or do a substantial remodel, these types of evictions are limited only to circumstances where it's necessary to comply with health and safety laws. This qualifier to the just cause eviction protections of AB-1482 was added in response to the pandemic.

Recognizing that landlords at their wits' end might use illegal lockouts and other self-help eviction measures during the public health crisis, the new law enhances penalties for illegal evictions. The tenant can sue the landlords for six or even seven figures for improperly being displaced. This is true in every season, but the optics of heavy-handed tactics by landlords and property managers look especially bad during the pandemic.

COVID-related debt is recoverable through civil courts.

As we stated earlier, lawmakers attempted to strike a balance between cash-strapped landlords and renters staring at eviction. The goal of tenants' advocates was not to forestall rent to be repaid later, but rent forgiveness for renters who have lost their income due to the coronavirus recession. This created the popularized slogan, "no income, no rent."

Instead of erasing rent debt that accrues during COVID-19, this IOU will come due in the future. Although rent deferment is a more moderate solution than waiving the rent, it is of little consolation for many struggling landlords who have their own bills to pay, with little guarantee of collecting back rent when it becomes due. We feel your pain, and we can only say that the capability to recover COVID-related debt through civil courts is better than nothing, and we can offer a good strategy forcapturing all of the debt.

You can elect to commence a lawsuit through either small claims court or through the Superior Court.

Two options, explained.

Small claims court

New legislation has removed limitations on the type and number of cases that can be heard. Small claims actions can now air out disputes over $10,000, and plaintiffs can file an unlimited number of cases, whereas, before AB 3088, landlords could file no more than two actions in a calendar year. One drawback is that the plaintiff landlord cannot be represented by an attorney unless the defendant appeals the decision. This is a simple process that can be commenced with a one-page document.

Superior court

Nothing prohibits landlords from seeking recovery of rent debt through the Superior Court, where, unlike a small claims action, the plaintiff can be represented by an attorney. Landlords can use a bit of leverage because attorneys' fees can be recovered if the defendant tenant loses the case. This can be a powerful motivator for tenants to pay the outstanding debt because if the landlord prevails, it will be of greater expense to a conscientious tenant who does not want a judgment appearing on his or her credit report.

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Some important dates to keep in mind

Small claims courts will begin hearing cases involving COVID-related rent debt beginning March 1, 2021. If rent payments are missed (in whole or in part) between March 1, 2020 and January 31, 2021, landlords can commence a small claims action against the tenant.

Increase your chances of prevailing in court

Document, document, document! Meticulous bookkeeping has always been critically important in landlording and property management and are all the more vital now. You want to be very clear with a tenant paying partial rent that the payment is deferred, not waived.

For example, if the rent is $1,000 and the tenant is paying $750, we don't want you to lower the base rent. Instead, take the $750 and in no uncertain terms inform the tenant that you are carrying a debt that will be pursued later on if it goes unpaid. Put this in writing.

What to expect when filing in small claims court

Many landlords and property managers are already familiar with small claims court from disputes over security deposits, and it's not all that cumbersome of a process - a simple document (SC-100) starts the action. Come springtime, we predict that these courts will be inundated with cases and we can only hope that personnel and processes can accommodate the demand. As a time-saving tip, we recommend that if there are multiple defendants with an outstanding rent balance, file all of the actions on the same day and get one court date, rather than running back and forth to the courthouse multiple times.

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Our two-pronged, hybrid approach to recovering rent debt accrued during and after the pandemic:

1. For COVID-related rent debt, file a small claims action come March 21, 2021.
2. For post-COVID rent debt, issue a three-day notice to pay rent or quit at the same time.

Assuming Sacramento politicians do not extend the state of emergency by March, we will revert back to the standard three-day notice and the unlawful detainer process will return to normal.

If the tenant fails to pay rent in a post-COVID world, our offices can simultaneously file both a small claims lawsuit and a three-day notice to pay rent or quit and properly serve the tenant with both. By serving both at the same time, landlords have the most leverage and the best opportunity to capture all of the rent debt.

This whole process can be avoided through a tenant surrender of possession agreement, also known as a tenant buyout agreement, a vehicle we cover next.

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Tenant buyout agreements are one of the few vehicles landlords can use to transition tenants out a rental unit during the pandemic.

Under an ethical, legal and enforceable tenant buyout agreement, the tenant agrees to voluntarily vacate the unit in exchange for compensation, a rent waiver, or both.

Not merely "cash for keys," a tenant buyout agreement cauterizes risk because the tenant agrees not to sue the landlord. All legal claims that could arise out of the tenancy are removed.

There is no edict from state or local governments that prohibit landlords and tenants from entering into discussions about leaving the premises at the tenant's own volition.

It may be emotionally painful for property owners to pay tenants who are not paying rent, but this may be a wise investment.

We know that, traditionally, rents can be raised when there is a voluntary vacancy. We also know that when properly staged, a vacant building will sell for more than a tenant-occupied building. As a general of thumb, for each $1,000 in additional rent that can be commanded for a unit, the seller can expect an added $100,000 in equity.

Some locales like San Francisco, Oakland and Berkeley require disclosures before discussions begin. Bornstein Law can properly prepare these disclosures and coach landlords on how to have a structured, leveraged conversation with tenants who are engaged in a negotiation.

Having brokered hundreds of tenant buyout agreements, we know of no other firm in the Bay Area so well-versed in the local nuances and successful strategies to employ to arrive at a mutual understanding.

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Items we will need to draft a surrender of possession agreement within 48 hours of receipt of the following information:

- Names of Owner(s)
- Names of Tenants and/or Occupants
- Address of Rental Unit
- When are the tenants vacating the unit?
- How much are you paying them?
- When are you going to pay them (upon signing settlement agreement or upon giving the keys to you)?
- Are the tenants going to continue to pay rent for the duration of their time in the rental unit or is the rent waived?
- Are you returning the security deposit according to law or are the tenants forfeiting the security deposit?

We have to have all of the I's dotted and the T's crossed. If there is improper documentation, it will be invalid. The contract itself isn't rocket science. Our main concern is how to arrive at an agreement, and you will find our tutelage to be most helpful. Whenever possible, we prefer to oversee the negotiations "behind the scenes," so as to not spook a tenant and prompt them to call a tenant attorney who will assuredly make unreasonable demands. If clients cannot have a productive conversation with the tenant because of acrimony and the landlord is a "bull in a china shop," we can gladly interact with the tenant, although this will be on an hourly basis and not a flat fee.

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In a nutshell, let's summarize the new landlording rules codified under the new law, beginning with evictions.

➤ Tenants have 15 days (excluding weekends or holidays) to pay rent demanded or return a declaration of hardship in response to a landlord's notice to pay rent or quit.
➤ For rent debt accrued between March 1, 2020 - August 31, 2020, tenants cannot be evicted for nonpayment of rent if a declaration of hardship is returned to the landlord within the 15-day notice period.
➤ For rent debt accrued between September 1, 2020 - January 31, 2021, tenants cannot be evicted for nonpayment of rent if the tenant timely returns a declaration of hardship **AND** pays 25% of missed rent payments for that time period by January 31, 2021.
➤ "High-income" tenants earning over $100K household income or over 130% of median household income must produce documentation of financial distress.
➤ Beginning October 5, 2020, tenants can be evicted if they fail to return a COVID-19 related hardship declaration to the landlord. Eviction for nuisance and other just causes other than nonpayment of rent can commence September 2, 2020 (subject to local "eviction moratorium" constraints – contact an attorney for an evaluation).
➤ Extends just cause protections under AB-1482 to all tenants until February 1, 2021.

In like fashion, let's provide some bulleted points about recovering COVID-related debt.

➤ Provided that the tenant returns the declaration of hardship within 15 days, rent debt accrued between March 1, 2020 - January 31, 2021 is not a ground for eviction, but will be converted into consumer debt recoverable through civil courts.
➤ The jurisdiction of small claims courts is expanded to allow landlords to bring actions when rent debt exceeds $10,000 and removes restrictions on the number of small claims actions a landlord can file.
➤ This debt can be pursued in small claims court beginning March 1, 2021. Debt can also be pursued in civil limited/unlimited jurisdiction courts, as well, with the added advantage of recouping attorneys' fees.

Reading the fine print, there are additional protections for tenants.

➤ Landlords must provide hardship declaration forms in the tenant's native tongue if a rental agreement was negotiated in the tenant's preferred language.
➤ Tenants may claim in an eviction hearing that they have a good reason for failing to return the hardship declaration to the landlord in the prescribed 15-day period.
➤ Landlords must provide a notice that details the rights of the tenant under the Act.
➤ Eviction judgements in nonpayment of rent cases filed between March 4, 2020 - January 31, 2021, may be concealed and not publicly available, irrespective of the outcome.
➤ The law imposes new penalties of between $1,000 and $2,500 against landlords who resort to "self-help" eviction measures without following the required court process. Sunsets February 1, 2021.

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Reconciling state law with a patchwork of local rules can be tricky, but we can help you bridge the gap.

➤ Existing local ordinances have full effect until they expire, but local actions that occur after August 19, 2020 cannot take effect before February 1, 2021.
➤ Clarifies that nothing in the Act interferes with a city or county's ability to adopt an ordinance that requires just cause for eviction, consistent with state law, provided it does not affect payments due between March 1, 2020 and January 31, 2021.

Parting thoughts

2020 has marked the most complicated era in landlord-tenant law, and it has been difficult to make sense of all the new, ever-changing rules for sophisticated investors, much less mom and pop landlords. Even as landlord attorneys, we have at times reached fatigue digesting it all.

At over 20,000 words long, new legislation has left a lot of question marks and grey areas that are best journeyed with a law firm that practices landlord-tenant law on a daily basis. We don't profess to have all the answers, but we are best equipped to take on these perplexities as a continuation of 26+ years of representing landlords in a time when laws and political rhetoric often falls squarely on the sides of tenants.

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Offices in San Francisco and the East Bay to best serve our clients.

507 Polk St.
Suite 310
San Francisco, CA 94102

482 W MacArthur Blvd.
Oakland, CA 94609

Facebook.com/BornsteinLaw

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