

Understanding COVID-19's Impact On California Real Property And Housing Litigation

ASIAN AMERICAN BAR
ASSOCIATION OF THE
GREATER BAY AREA

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In response to the current global crisis, authorities at the federal, state, and local levels of government have enacted emergency measures including eviction moratoriums and changes to court operations.



Statewide: Look at Gov.
Newsom's Executive Order
and California Judicial
Council's Actions



Survey of local eviction
moratoriums and court orders

San Francisco
Oakland



Practical Pointers



Theoretical Considerations
Moving Forward



Federal Eviction Moratorium

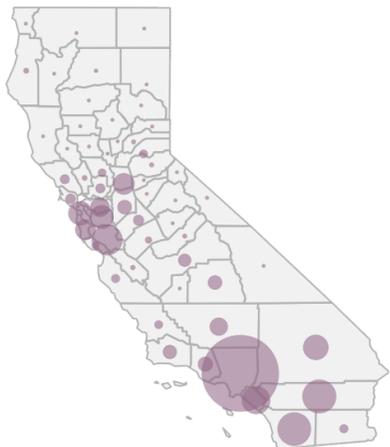
The CARES Act establishes a temporary moratorium on residential evictions for tenants living in certain properties that are federally financed (i.e. federally funded loans such as Fannie, Freddie, and HUD loans) or receiving federal assistance (such as Section 8).

Effective March 27, 2020 through at least July 25, 2020 and prohibits a landlord from filing a new UD based on nonpayment of rent.

California COVID-19 By The Numbers

April 26, 2020

Numbers as of April 25, 2020



For county-level data:
data.chhs.ca.gov

CALIFORNIA COVID-19 SPREAD

42,164

Total Cases

Ages of Confirmed Cases

- 0-17: 1,039
- 18-49: 20,379
- 50-64: 11,139
- 65+: 9,512
- Unknown/Missing: 95

Gender of Confirmed Cases

- Female: 20,908
- Male: 20,957
- Unknown/Missing: 299

Hospitalizations

Confirmed COVID-19
3,324/1,184
Hospitalized/in ICU

Suspected COVID-19
1,604/289
Hospitalized/in ICU

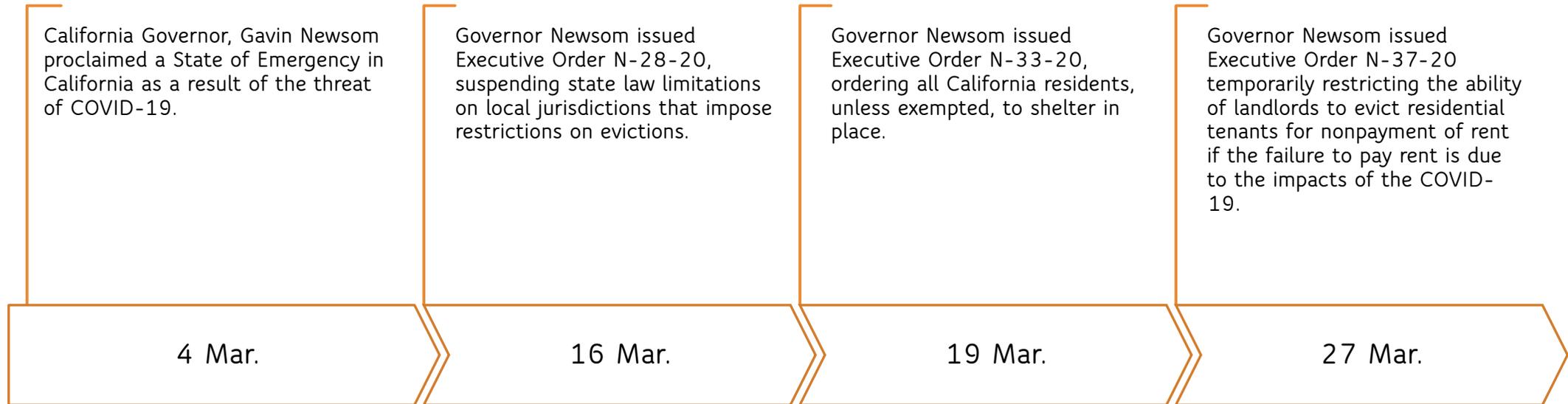
1,710
Fatalities

Stay Home. Save Lives.

covid19.ca.gov



Statewide Measures



Timeline of State Events

Executive Order N- 37-20

STATEWIDE MEASURES



What Does Executive Order N-37-20 Do?

- Delays a residential tenant's time for responding to an eviction complaint to 60 days.
- Law enforcement can't enforce any eviction order against a tenant that meets the conditions of the Order.
- The order does not stop new evictions from being filed.
- Doesn't override measures that cities or counties have enacted.

Under Executive Order N-37-20 tenants must satisfy all of the following requirements:

- Prior to March 27, 2020, the tenant paid rent due to the landlord.
- The tenant notifies the landlord in writing before rent is due or no later than 7 days after the rent was due, that the tenant needs to delay all or some payment of rent because of an inability to pay the full amount due to reasons related to COVID-19.
- The tenant must retain verifiable documentation.

What are COVID-19 related reasons for failure to pay rent Under Executive Order N-37-20?

- The tenant was unavailable to work because the tenant was sick with a suspected or confirmed case of COVID-19 or caring for a household or family member who was sick with a suspected or confirmed case of COVID-19;
- The tenant experienced a lay-off, loss of hours, or other income reduction resulting from COVID-19, the state of emergency, or related government response; or
- The tenant needed to miss work to care for a child whose school was closed in response to COVID-19.

What are Examples of Verifiable Documentation Under Executive Order N-37-20?

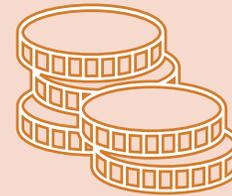
- Termination notices
- Payroll checks
- Pay stubs
- Bank statements
- Medical bills
- Signed letters or statements from an employer or supervisor explaining the tenant's changed financial circumstances supporting the tenant's assertion of an inability to pay.



Executive Order N-37-20



THE PROTECTIONS ARE IN EFFECT
THROUGH MAY 31, 2020.



NOTHING IN THE ORDER RELIEVES A
TENANT OF LIABILITY FOR UNPAID RENT.

What Did The Courts Do?

March 23, 2020:

- CA Chief Justice Tani G. Cantil-Sakauye issued a Statewide Order granting emergency powers to all superior courts pursuant to her authority under the California Constitution (Article VI, Section 6 and Government Code Section 58115).
- "All jury trials in California's Superior Courts are suspended and continued for 60 days. Courts may conduct a trial at an earlier date upon finding of good cause shown or through use of remote technology when appropriate."

March 30, 2020:

- CA Chief Justice issues a second Statewide Order granting powers to all superior courts. Order implements action approved by Judicial Council on March 28; clarifies order suspending jury trials for 60 days from the date of the original trial date

Pursuant to those orders, local courts issue general implemental orders...



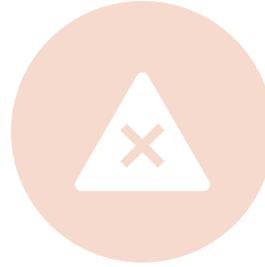
California Judicial Council Orders

STATEWIDE
MEASURES

CRC Emergency Rule 1 – Unlawful Detainers:



SUSPENDS THE ISSUANCE OF A SUMMONS IN AN UNLAWFUL DETAINER ACTION, UNLESS THE COURT FINDS THERE IS A HEALTH AND SAFETY REASON.



NO ENTRY OF DEFAULT AND/OR DEFAULT JUDGMENTS IN UNLAWFUL DETAINER CASES, UNLESS THE COURT FINDS THERE IS A HEALTH AND SAFETY REASON AND THE DEFENDANT HAS NOT APPEARED.



MANDATES THAT UNLAWFUL DETAINER TRIALS BE SET NO EARLIER THAN 60 DAYS AFTER A REQUEST FOR TRIAL, UNLESS THERE IS A HEALTH AND SAFETY REASON.



ALL TRIALS ON CALENDAR AS OF APRIL 6 WILL BE CONTINUED AT LEAST 60 DAYS.

**California Judicial Council Has Adopted 13 Emergency Rules
(First 11 Rules Effective April 6, 2020)**



Local Measures

SAN FRANCISCO

OAKLAND



San Francisco

LOCAL MEASURES

San Francisco: Eviction Moratorium

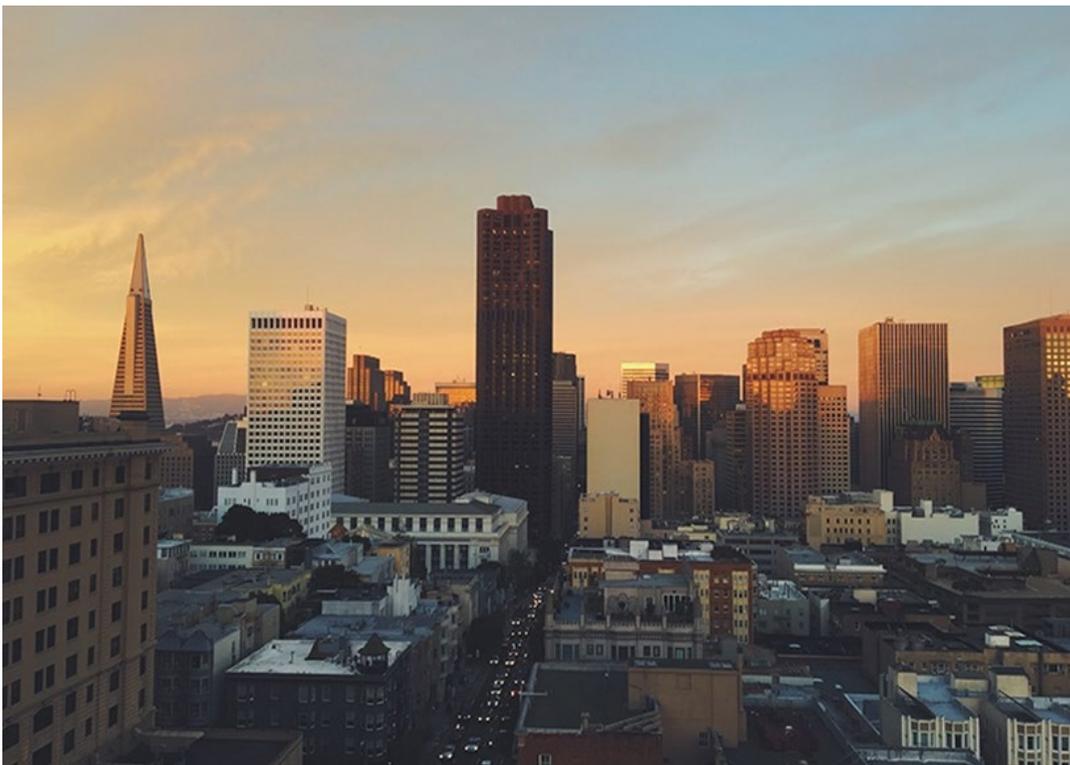
Effective March 23, 2020, all residential tenant evictions are prohibited for 60 days after the order expires through July 22, 2020, except evictions due to:

- Violence
- Threats of violence
- Health and safety issues.



San Francisco: Nonpayment of Rent

If a tenant misses a rent payment that becomes due on or after March 13, 2020, the landlord may not evict the tenant if:	1: The tenant provides notice within 30 days of the rent being due that they are unable to pay rent due "to financial impacts of COVID19"	<u>"financial impact"</u>
		<u>"related to COVID-19"</u>
	2: Within 7 days of providing notice to the landlord the tenant provides written documentation	documentation or other objectively verifiable information that due to the financial impacts of COVID-19 the tenant is unable to pay rent
Then, tenant has an additional month to pay the rent	If the tenant does not pay the rent after 1 month	The landlord must provide written notice of the breach
		Discuss in good faith to develop a plan to pay the rent
	The tenant has up to six months to pay the rent after the order expires, - November 22, 2020	



San Francisco: Commercial Eviction Moratorium

Qualifying commercial tenants who miss a rent payment due to a loss of income related to COVID 19 are given at least a month to cure.

Qualifying business include commercial tenants that earn less than \$25M per year.

In effect through May 17, 2020.

San Francisco: Local Court Orders



Period from April 16, 2020 to June 1, 2020 deemed a holiday “if the emergency conditions caused by the COVID-19 pandemic substantially interfere with the public's ability to file papers in a court facility on those dates”.

The trial dates for all cases on the civil trial calendar with trial dates from April 16, 2020, through June 1, 2020 are vacated.

April 6, 2020 through June 19, 2020 is deemed a holiday for unlawful detainers, except for cases resulting from violence, threats of violence, or health and safety issues.

San Francisco: Local Court Orders

Unlawful Detainers:

- All actions in unlawful detainers cases, including trials, motions, discovery, and ex parte apps are stayed for 90 days until June 19, 2020
 - Excludes unlawful detainer cases resulting from violence, threats of violence, or healthy and safety issues
- Through June 19, 2020 is deemed a holiday for unlawful detainers
- All new motions filed in UD cases will be assigned a hearing date on or after June 22, 2020
- Trials and Mandatory Settlement Conferences in unlawful detainer cases will **be continued for at least 90 days** on a rolling basis

San Francisco Rent Board

The Rent Board counter service is closed with administrative postponement of hearings and mediations

The Rent Board is accepting documents (including eviction notices, buyout agreements and declarations, tenant petitions, tenant hardship applications, and duplication requests.

Rent Board is providing phone counseling.

San Francisco Rent Freeze

- April 24, 2020, Mayor Breed signed emergency legislation passed temporarily prohibiting certain rent increases on rent-controlled units.
- Temporary rent freeze applies to all rent increases that are effective between April 7, 2020 and June 23, 2020 (unless extended).
- Only applies to annual allowable (and banked) rent increases, operating and maintenance expense rent increases, and “passthroughs” for rent-controlled tenancies under the San Francisco Rent Ordinance.
- The temporary rent freeze does not restrict the following types of rent increases:
 - Properties that are exempt from San Francisco’s local rent control regulations.
 - Rent increases permitted by state law, such as an increase based on the Costa-Hawkins Rental Housing Act or the Tenant Protection Act of 2019.
 - Rent increases authorized by Rent Board Rules and Regulations Section 1.21
 - If a rent increase was paid during the temporary rent freeze, landlords should immediately refund the tenant the amount of the overpayment.





City of Oakland

LOCAL MEASURES



City of Oakland: Eviction Moratorium

March 27, 2020: Oakland City Council passed an emergency order restricting landlords from evicting residential and commercial tenants during the COVID-19 pandemic, or “Local Emergency”, through May 31, 2020.

Applies to all evictions except Ellis Act evictions and evictions where the tenant poses imminent threat to the health and safety of others

City of Oakland: Nonpayment of Rent Evictions

A tenant cannot be evicted for missed rent due during the local emergency *if*

- the rent was unpaid because of a substantial reduction in household income or substantial increase in expenses resulting from the pandemic.

Requires landlords to accept rent from 3rd parties.

Prohibits late fees during the local emergency.

Also prohibits rent increases above 3.5%.



City of Oakland: Commercial Evictions



A commercial tenant cannot be evicted for nonpayment of rent if:

- They are a qualifying small business; *and*
 - Small businesses as defined by Government Code Section 14837(d)(1)(A) and to nonprofit organizations
- The failure to pay rent during the local emergency was a result of a substantial decrease in income; *and*
- The decrease in income was caused by the COVID 19 pandemic; *and*
- The decrease is documented.

Alameda County: Local Court Orders

- Continued the Court closure through May 1, 2020. March 17 through May 1, 2020 will be considered a Court holiday
- As a result, all civil jury trials have been extended through May 3, 2020. All civil trials have been continued for 60 days.
- Stayed all UD proceedings, including evictions, through the extended closure period including May 3, 2020.
- Enacted emergency rules, including local rule 3.29 effective April 6, 2020 requiring mandatory eservice.

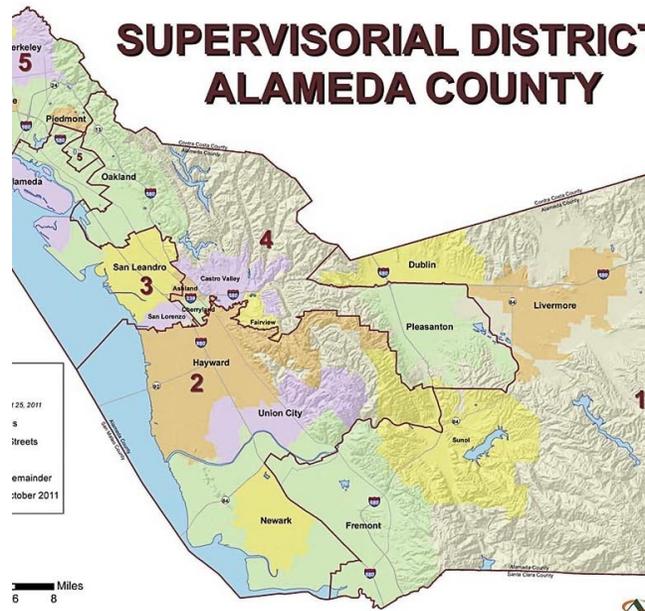


Alameda County: Local Court Orders continued

- Emergency Local Rule 1.8a, the Superior Court of Alameda County announces the resumption of the Court's fax filing service—which the Court temporarily suspended due to the COVID-19 crisis—for certain enumerated emergency-related Civil, Family, and Probate documents, effective April 13. Rule 1.8a also expands the types of documents that can be filed at the Court's drop box locations.
- On April 29, 2020 ASC further expanded its services stating:
 - Allowing fax filing for motions with hearings or trials originally set between March 17 and May 4, 2020. All of these hearings will be conducted entirely remotely.
- The court has also asked for authority through May 31, 2020 and anticipates continuing the closure through that same period.



Alameda County: Eviction Moratorium



- On April 21, 2020 the Alameda County Board of Supervisors amended their existing temporary eviction moratorium and instituted widespread protections for individuals impacted by the global Coronavirus pandemic.
- The supplemental moratorium now prohibits landlords from evicting tenants for any reason, except for evictions when the tenant poses an imminent threat or health and safety risk or Ellis Act evictions through May 31, 2020 but, as we have seen, may be extended.
- If a tenant cannot pay rent due during the moratorium because they suffered a substantial loss of income (including due to children being out of school or other childcare needs) or substantial out of pocket medical expenses, they must give the landlord notice of the hardship before the rent is due. Then, the tenant must provide documentation of their substantial hardship within 45 days of the initial notice or within 30 days after the County's shelter in place order is lifted, whichever is later.

Alameda County: Eviction Moratorium continued



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- Tenants will then have twelve (12) months to repay any back rent that was missed as a result of a COVID-19 related hardship. However, all past due rent because a consumer debt that cannot be recovered through the unlawful detainer process—meaning a tenant cannot ever be evicted for the rent they missed during the Covid-19 pandemic. Further, Alameda landlords are prohibited from imposing late fees, fines or interest for unpaid rent.
- The moratorium applies to all cities within the county and any City that wishes to apply their own local moratorium must affirmatively opt out of the County moratorium.

Legislation to Watch: City of Oakland

The City of Oakland has proposed over 60 potential amendments to their eviction and rent ordinances as part of the Covid-19 emergency response. Although initially set to be heard on April 21, 2020 the amendments are tabled until May 12, 2020.



Other Nearby Counties with Eviction

- Hayward
- Alameda City
- Alameda County
- City of Berkeley
- San Jose
- Marin
- San Mateo
- Napa County
- Sonoma County
- Monterey County
- Santa Cruz County
- Solano County
- Contra Costa
 - The April 21, 2020 Contra Costa moratoriums does not exempt newer units as required by the Costa Hawkins Act

Practical Pointers

Representing Landlords:

- What to do when the tenants don't pay?
 - Can you serve notices while Shelter in Place or Stay at Home Orders are active;
 - Can you file new UD complaints;
- Work out repayment agreements
- Managing Properties
- San Francisco specifics
- Anti price gouging under Penal Code section 396 (in effect through Sept. 2020).

Representing Tenants:

- When Tenants Can't Pay Rent
- Drafting Rent Repayment Agreements
- Tenant Harassment and Retaliation
 - Self Help
 - Privacy Issues
 - Preparing Affirmative Cases
- Insurance Issues

Theoretical Considerations

Ejectment

- May be filed against either residential or commercial tenants if the tenancy has been validly terminated by proper written notice or otherwise.
- Not as quick as an unlawful detainer.

Nuisance, Waste or Harassment

For potential tenant misconduct.

Other effective and fairly speedy legal pre-trial remedies may exist, including seeking a restraining order, an injunction, or a receivership.

Theoretical Considerations: Commercial NPR

Landlords may be able to seek a pre-trial writ of attachment, which will serve to freeze cash or other assets.

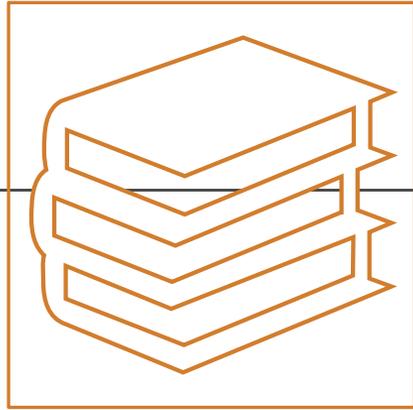
May put financial pressure on the tenant to settle.

Increase the odds that assets will be readily available to execute upon if the landlord ultimately obtains a judgment against the tenant.

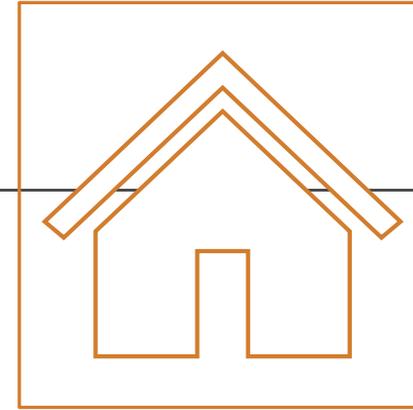
Theoretical Considerations: Force Majeure Clause

Generally, force majeure clauses are contractual provisions which excuse one or both parties' performance obligations when circumstances arise which are beyond the parties' control and make performance of the contract impossible.





Birkenfeld v. City of Berkeley
(1976) 17 Cal.3d 129



Channing Properties v. City of Berkeley
(1992) 14 Cal.Rptr.2d 32

Case Law Conflict?

What happens when the Moratorium ends?

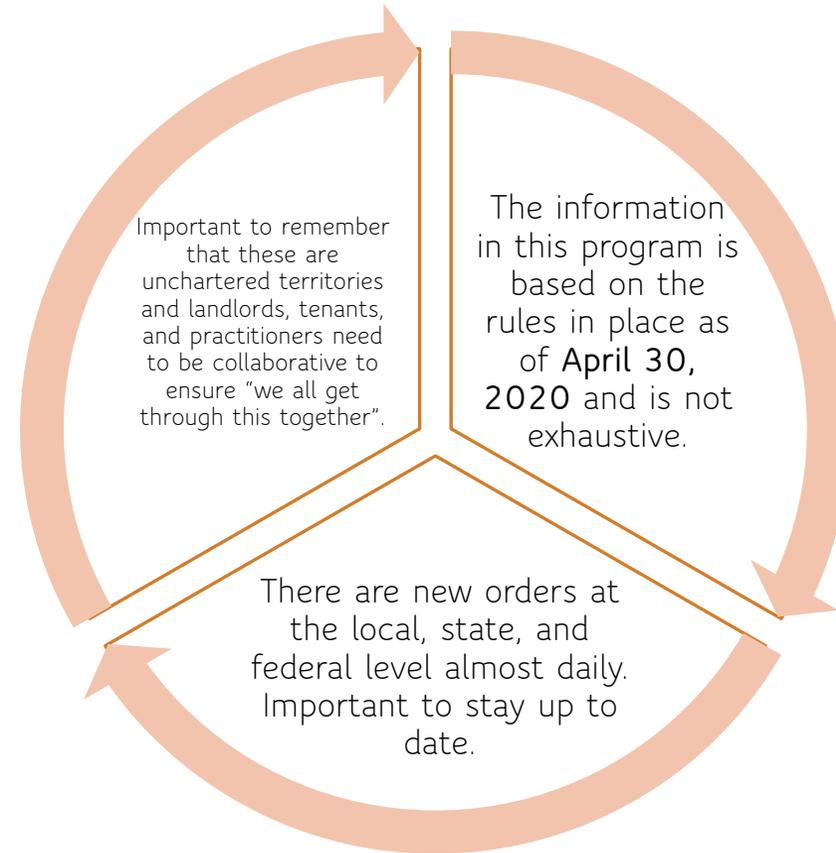
Realities of practicing:

- Back Log
- E hearings
- Wide spread economic impact

Proposed Legislation

- AB 828

Parting Thoughts



Thank You!

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UNDERSTANDING COVID-19'S
IMPACT ON CALIFORNIA REAL
PROPERTY AND HOUSING
LITIGATION

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ASSOCIATION
OF THE GREATER BAY AREA

May 7, 2020

I. Summary

In response to the current global crisis, authorities at the federal, state, and local levels of government have enacted emergency measures including eviction moratoriums and changes to court operations. This program will discuss current state court orders, the statewide executive order on evictions, and survey local eviction moratoriums including San Francisco and Oakland. Practical pointers and theoretical considerations will also be covered.

II. Federal Eviction Moratorium

a. CARES ACT Section 4024(b):

- i. Prohibits landlords of certain covered dwellings rental from initiating eviction proceedings or charging late fees or other penalties against a tenant for nonpayment of rent.
- ii. These protections extend for 120 days from enactment. It began on March 27, 2020 and will end on July 25, 2020, unless extended.
- iii. The CARES Act's eviction protections only apply to covered dwellings, which are rental units in properties:
 1. that participate in federal assistance programs,
 2. are subject to a "federally backed mortgage loan," or
 3. are subject to a "federally backed multifamily mortgage loan."
- iv. Covered federal assistance programs include public housing, Housing Choice Vouchers, Section 8 Project-Based Rental Assistance, rural housing programs, and the Low Income Housing Tax Credit program.
- v. Tenants are still required to pay the rent owed after the grace period.

III. Statewide Measures

a. California Executive Orders

- i. **Timeline:** California Governor Gavin Newsom signed a series of executive orders in response to the COVID-19 pandemic. This course will focus on several housing related executive orders.
 1. March 4, 2020: California Governor Gavin Newsom proclaimed a State of Emergency in California as a result of the threat of COVID-19.
 2. March 16, 2020: Executive Order N-28-20, issued by Gov. Newsom, suspends state law limitations on local jurisdictions that impose restrictions on residential or commercial evictions.
 3. March 19, 2020: Executive Order N-33-20, issued by Gov. Newsom orders all California residents, unless exempted, to shelter in place.
 4. March 27, 2020: Executive Order N-37-20, issued by Gov. Newsom temporarily restricts the ability of landlords to evict residential tenants for nonpayment of rent if the failure to pay rent is due to the impacts of the COVID-19.
- ii. **What Does Executive Order N-37-20 Order Do?**
 1. This is a residential eviction moratorium. In short, it delays evictions in California and gives any tenant who is served, while the Order is in effect, with an eviction complaint based on non-

payment of rent from a residential dwelling unit, sixty (60) days to respond to the complaint. Defendants typically have five (5) days under Code of Civil Procedure Section 1167 to respond to an eviction complaint if personally served.

2. Restricts the ability of law enforcement to enforce any eviction order against a tenant that meets the conditions of the Order. In other words, sheriffs cannot remove tenants from their homes.
 3. The order does not stop new evictions from being filed.
 4. Does not override measures that cities or counties have enacted.
 5. The tenant must satisfy all of the following requirements:
 - a. Prior to March 27, 2020, the tenant paid rent due to the landlord.
 - b. The tenant notifies the landlord in writing before rent is due or no later than 7 days after the rent was due, that the tenant needs to delay all or some payment of rent because of an inability to pay the full amount due to reasons related to COVID-19.
 - c. The tenant must retain verifiable documentation.
 6. What are COVID-19 related reasons for failure to pay rent under Executive Order N-37-20? Include but are not limited to:
 - a. The tenant was unavailable to work because the tenant was sick with a suspected or confirmed case of COVID-19 or caring for a household or family member who was sick with a suspected or confirmed case of COVID-19;
 - b. The tenant experienced a lay-off, loss of hours, or other income reduction resulting from COVID-19, the state of emergency, or related government response; or
 - c. The tenant needed to miss work to care for a child whose school was closed in response to COVID-19.
 7. What are examples of verifiable documentation that the tenant must retain to prove their inability to pay rent?
 - a. Termination notices, payroll checks, pay stubs, bank statements, medical bills, or signed letters or statements from an employer or supervisor explaining the tenant's changed financial circumstances supporting the tenant's assertion of an inability to pay.
 8. The protections are in effect through **May 31, 2020**.
 9. Nothing in the order relieves a tenant of liability for unpaid rent.
- b. **State Court Action**
- i. March 16, 2020: CA Chief Justice Tani G. Cantil-Sakauye issued guidance to trial courts seeking emergency orders to adjust or suspend court operations.
 - ii. March 18, 2020: Supreme Court of CA expanded mandatory electronic filing of all documents, including briefs.

- iii. March 20, 2020: CA Chief Justice issued a second advisory order with new guidance to the state's superior courts to mitigate some of the health risks to judicial officers, court staff, and court users.
 - iv. March 23, 2020: CA Chief Justice Tani G. Cantil-Sakauye issued a Statewide Order granting emergency powers to all superior courts pursuant to her authority under the California Constitution (Article VI, Section 6 and Government Code Section 58115). The order continued all trial dates by 60 days and allowed courts to immediately adopt new rules to address the impact of the COVID-19 pandemic.
 - v. March 28, 2020: CA Judicial Council adopts temporary emergency measures.
 - vi. March 30, 2020: CA Chief Justice issues a second Statewide Order granting powers to all superior courts. The Order implements action approved by Judicial Council on March 28; clarifies order suspending jury trials for 60 days from the date of the original trial date. Pursuant to those orders, local courts issue general implemental orders.
- c. **California Judicial Council Rules of Court - Emergency Rules**
- i. On April 6, 2020, the CA Judicial Council adopted 11 emergency rules. Rule #1 applies to all evictions, regardless of cause, and will remain in effect until 90 days after Gov. Newsom declares an end to the current state of emergency. The only exceptions are evictions that are found to be necessary for the public health or safety.
 - ii. **CRC Emergency rule 1. Unlawful detainers:**
 - (a) Application
Notwithstanding any other law, including Code of Civil Procedure sections 1166, 1167, 1169, and 1170.5, this rule applies to all actions for unlawful detainer.
 - (b) Issuance of summons
A court may not issue a summons on a complaint for unlawful detainer unless the court finds, in its discretion and on the record, that the action is necessary to protect public health and safety.
 - (c) Entry of default
A court may not enter a default or a default judgment for restitution in an unlawful detainer action for failure of defendant to appear unless the court finds both of the following:
 - (1) The action is necessary to protect public health and safety; and
 - (2) The defendant has not appeared in the action within the time provided by law, including by any applicable executive order.
 - (d) Time for trial
If a defendant has appeared in the action, the court may not set a trial date earlier than 60 days after a request for trial is made unless the court finds

that an earlier trial date is necessary to protect public health and safety. Any trial set in an unlawful detainer proceeding as of April 6, 2020 must be continued at least 60 days from the initial date of trial.

(e) Sunset of rule

This rule will remain in effect until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted, or until amended or repealed by the Judicial Council.

On April 17, 2020: The CA Judicial Council adds Emergency Rule #12, requiring attorneys to electronically serve and receive notices and documents in all general civil actions and family and probate proceedings if requested to do so by the other party. Small claims proceedings; unlawful detainers; and petitions to prevent civil harassment, elder abuse, and workplace violence are not subject to Rule #12.

The rule will stay in effect through 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted, or when amended or repealed by the council.

IV. **Local Eviction Moratoriums**

a. **City And County Of San Francisco**

i. **Eviction Moratorium**

1. Initially, on March 13, 2020 San Francisco Mayor London Breed ordered a temporary 30 day suspension of a landlord's ability to evict tenants who were unable to pay rent due to financial impacts caused by COVID-19.
 - a. Mayor Breed stated the focus of the moratorium was to "help people stay stable if they lose income because they get sick, a family member gets sick, or their job is impacted by the economic damage the coronavirus is causing. This all part of our larger plan to provide support and resources to everyone in our city who is suffering under the spread of COVID-19."
2. This order was then supplemented on March 23, 2020 to (1) clarify the prior moratorium and (2) expand the moratorium.
 - a. Prohibit all residential evictions *except* evictions due to violence, threats of violence, or health and safety issues or the state Ellis Act), for 60 days after the Mayor's order expires on May 22 – or until July 22, 2020

ii. **Nonpayment of Rent Evictions**

1. If a tenant misses a rent payment that becomes was due on or after March 13, 2020, the landlord may not evict the tenant if:

- a. The tenant provides **notice** within thirty days of the rent being due that they are unable to pay rent due “to financial impacts of COVID19”,
 - i. Under the Mayor’s order, “financial impact” means a substantial loss of household income due to business closure, loss of compensable hours of work or wages, layoffs, or extraordinary out-of-pocket medical expenses.
 - ii. A financial impact is “related to COVID-19” if it was caused by the COVID-19 pandemic, the Mayor’s Proclamation, the Health Officer’s Declaration of Local Health Emergency, or public health orders related to COVID-19 from local, state, or federal authorities.
- b. Within one week of providing notice to the landlord the tenant provides written **documentation** that the rent payment was missed due to a financial impact of COVID 19, and
 - i. Satisfied with documentation or other objectively verifiable information that due to the financial impacts of COVID-19 the tenant is unable to pay rent
 - ii. A tenant may satisfy this requirement with a letter, email, or other communication written by the tenant that explains the financial impact they are experiencing. 3rd party documentation is not necessary to satisfy but advised.
2. If the tenant provides the documentation, they have an additional month after the date of providing the documentation to pay the rent
3. If the tenant does **not** pay the rent after one month, the landlord must provide the tenant written notice of the breach AND must discuss with the tenant in good faith to develop a payment plan for the tenant.
4. A tenant who **does** properly provide notice and documentation to the landlord then has up to six months to pay the rent owed to the landlord before the landlord can recover possession for nonpayment of rent.
 - a. Practically this means that a landlord cannot bring a NPR eviction against a tenant for six months after the Mayor’s order expires, so November 22, 2020.
 - i. The landlord can provide additional time if they choose

- ii. The landlord may request documentation of the tenants ongoing inability to pay, and the tenant shall pay when they can, but a failure to timely respond to a follow if request for documentation invalidate the 6 month extension period.

iii. **Commercial Leases**

1. Qualifying commercial tenants that fail to pay their rent cannot be evicted if the missed payment was due to a loss of income related to COVID 19, unless the landlord first provides written notice to the tenant of the violation and provides an opportunity of at least a month to cure OR provide documentation to the landlord stating its inability to pay rent due to the “financial impacts” of COVID-19.
 - a. Qualifying small business are those who are registered to do business in San Francisco making less than \$25 million in the 2019 tax year
 - b. A tenant may satisfy the documentation requirement with a letter, email, or other written communication to the landlord (or its agent) that explains the financial impact the tenant is experiencing. The explanation should be objectively verifiable. Third party documentation (such as a letter from an accountant) is not necessary to satisfy this step but may be helpful.
 - c. The commercial eviction moratorium has been extended for another 30 days so it now covers all rent payments that become due through May 17, 2020.
 - d. Again, both residential and commercial tenants are not relieved of their obligation to pay rent during the Order.
 - e. If a landlord proceeds with serving any notice during this time, they must include a new form with their notices available from the SF Rent Board.

iv. **San Francisco Superior Court Orders**

1. The San Francisco Superior Court (SFSC) has reduced operations and is only providing necessary and essential services through the time period of March 17 through May 1, 2020, as advised by public health officials.
2. The period from March 18, through April 15, 2020 are deemed a holiday for purposes of computing time under Code of Civil Procedure § 1167, with the exception of unlawful detainer cases resulting from violence, threats of violence, or health and safety issues.
3. April 16, 2020 to June 1, 2020 are deemed a holiday “if the emergency conditions caused by the COVID-19 pandemic

substantially interfere with the public's ability to file papers in a court facility on those dates”

4. The trial dates for all cases on the civil trial calendar with trial dates from through June 1, 2020 are vacated.
5. **Unlawful Detainers:**
 - a. All actions in unlawful detainer cases, including trials, motions, discovery, and ex parte applications, with the exception of unlawful detainer cases resulting from violence, threats of violence, or health and safety issues, are **stayed for 90 days, until June 19, 2020**.
 - b. The period from April 6, 2020 through June 19, 2020 is deemed a holiday for unlawful detainers, except for cases resulting from violence, threats of violence, or health and safety issues.
 - c. All new motions filed in unlawful detainer cases will be assigned a hearing date on or after June 22, 2020.
 - d. Trials and Mandatory Settlement Conferences in unlawful detainer cases will **be continued for at least 90 days** on a rolling basis, with the exception of unlawful detainer cases resulting from violence, threats of violence, or health and safety issues. Jury trials in unlawful detainer cases resulting from violence, threats of violence, or health and safety issues may be continued for a week on a rolling basis based on availability of jurors.

v. **San Francisco Rent Board**

1. The Rent Board counter service is closed with administrative postponement of some hearings and mediations through April 17 and are sending rescheduled dates via mail.
2. The Rent Board is accepting documents (including eviction notices, buyout agreements and declarations, tenant petitions, tenant hardship applications, and duplication requests) via email and mail.
3. Rent Board is also offering phone counseling.
4. San Francisco requires new Rent Board form for notices for any eviction notices served during the state of emergency.

vi. **San Francisco Rent Freeze**

1. On April 24, 2020, the Mayor signed emergency legislation passed by the San Francisco Board of Supervisors temporarily prohibiting certain rent increases on rent-controlled units.
2. The temporary rent freeze applies to all rent increases that are effective between April 7, 2020 and June 23, 2020 (unless extended), even if the rent increase notice itself was served before

April 7, 2020. However, rent increases or passthroughs that went into effect prior to April 7, 2020 are not affected.

3. The temporary rent freeze only applies to annual allowable (and banked) rent increases, operating and maintenance expense rent increases, and “passthroughs” for rent-controlled tenancies under the San Francisco Rent Ordinance (i.e. - increases permitted by Rent Ordinance Section 37.3(a)).
4. The temporary rent freeze does not restrict the following types of rent increases:
 - a. Rent increases for properties that are exempt from San Francisco’s local rent control regulations.
 - b. Rent increases that are permitted by state law, such as an increase based on the Costa-Hawkins Rental Housing Act or the Tenant Protection Act of 2019.
 - c. Rent increases authorized by Rent Board Rules and Regulations Section 1.21, where the Rent Board has determined that there is no “tenant in occupancy” of the rental unit.
5. If the landlord does serve a notice of rent increase that is effective during the temporary rent freeze, the tenant need not pay the increase until the landlord serves a new rent increase notice pursuant to Civil Code Section 827 that is effective after the temporary rent freeze expires.
6. If a rent increase was paid during the temporary rent freeze, landlords should immediately refund the tenant the amount of the overpayment.

b. **City of Oakland**

i. **Eviction Moratorium**

1. On March 27, 2020 Oakland City Council passed an emergency order restricting landlords from evicting residential and commercial tenants during the COVID-19 pandemic through May 31, 2020.
 - a. “The most important thing we can do as a city, to keep people safe in their homes during the epidemic, is to make sure tenants can stay in their homes,” said Oakland City Councilwoman Nikki Fortunato Bas.
2. The order makes it an absolute defense to any eviction if the notice was served or expired, or that the complaint was filed or served, during the local emergency.
3. Including evictions for cause, without cause, breach of lease, owner move in, or requests for repairs.
4. Excludes Ellis Act or evictions when the tenant poses an imminent threat to the health and safety of other occupants of the property

and such threat is stated in the notice as the grounds for the eviction

- ii. **Residential Tenants**, a tenant cannot be evicted for missed rent due during the local emergency if:
 1. The rent was unpaid because of a substantial reduction in household income or substantial increase in expenses resulting from the pandemic.
 2. This includes, but is not limited to, where, as a result of the Coronavirus pandemic, the tenant
 - a. suffered a loss of employment or a reduction in hours,
 - b. was unable to work because their children were out of school,
 - c. was unable to work because they were sick with COVID-19 or caring for a household or family member who was sick with COVID-19,
 - d. they were complying with a recommendation from a government agency to self-quarantine,
 - e. they incurred substantial out of pocket medical expenses due to COVID-19.
 3. The Order also:
 - a. Requires Landlords to accept rent from 3rd party
 - b. No capital improvements during this time
 - c. No late fees during this period
 - d. Prohibits rent increases above 3.5% until June 30, 2020.
- iii. **Commercial Tenants** cannot be evicted for nonpayment of rent if:
 1. They are a qualifying small business *and*
 - a. Small businesses as defined by Government Code Section 14837(d)(1)(A) and to nonprofit organizations.
 - i. “Small business” means an independently owned and operated, the principal office of which is located in California, the officers of which are domiciled in California, and which, together with affiliates, has 100 or fewer employees, and average annual gross receipts of ten million dollars (\$10,000,000) or less over the previous three years, or is a manufacturer, as defined in subdivision (c), with 100 or fewer employees. Commencing January 1, 2019, the average annual gross receipts threshold shall be fifteen million dollars (\$15,000,000).
 - b. The failure to pay rent during the local emergency was a result of a substantial decrease in income *and*

- c. The decrease in income was caused by the COVID-19 pandemic or by any local, state, or federal government response to COVID-19, *and*
- d. Decrease in income is documented.

iv. **Alameda County Superior Court Orders**

- 1. Continued the Court closure through May 1, 2020. March 17 through May 1, 2020 have been deemed a Court holiday and no new filings will be accepted
- 2. As a result, all civil jury trials have been extended through May 3, 2020. All civil trials have been continued for 60 days and the deadline for trials to be heard is extended 60 days through May 22, 2020.
- 3. Stay all UD proceedings, including evictions, through the extended closure period including May 3, 2020.
- 4. Enacted emergency local rule 3.29 effective April 6, 2020 requiring mandatory eservice and rule 1.8 which allowed the resumption of the Court's fax filing service—which the Court temporarily suspended due to the COVID-19 crisis—for certain enumerated emergency-related Civil, Family, and Probate documents, effective April 13. Rule 1.8a also expands the types of documents that can be filed at the Court's drop box locations.
- 5. Starting April 20, 2020 the Court began hearing limited civil, criminal and family matters via e hearings.
- 6. On April 29, 2020 ASC further expanded its services stating:
 - a. Allowing fax filing for motions with hearings or trials originally set between March 17 and May 4, 2020. All of these hearings will be conducted entirely remotely.
 - b. The court has also asked for authority through May 31, 2020 and anticipates continuing the closure through that same period.

v. **Legislation to Watch:**

- 1. The City of Oakland has proposed over 60 potential amendments to their eviction and rent ordinances as part of the Covid-19 emergency response. Although initially set to be heard on April 21, 2020 the amendments are tabled until May 12, 2020. The proposed amendments include:
 - a. Changing the Rent Ordinance to limit the maximum rent increase allowed in any one year to conform to state law (AB1482);
 - b. Changing the Just Cause for Eviction Ordinance to prohibit landlords from evicting tenants based on additional occupants if the landlord unreasonably refuses the tenants written request to add occupants or fails to reply to the

request within 14 days, even if the request comes after receiving a notice of violation from the landlord;

- c. Changing the Just Cause for Eviction Ordinance to override occupancy limits set in the rental agreement to a uniform 2 persons in a studio; 3 persons in a one bedroom; 4 persons in a two bedroom and 8 persons in a four bedroom unit;
- d. Changing the Just Cause for Eviction Ordinance to make it an affirmative defense to an eviction if the landlord fails to pay required relocation benefits;
- e. Changing the Tenant Protection Ordinance to prohibit late fees over 1% of the rent and prohibits unilateral changes to the terms of the tenancy;
- f. Changing the Tenant Protection Ordinance to remove the 15 year exemption for new construction;
- g. Changing the Tenant Protection Ordinance to expand the definition of a tenant; and
- h. Changing the Tenant Protection Ordinance to expand the definition of harassment and privacy rights.

c. Alameda County Eviction Moratorium

- i. On April 21, 2020 the Alameda County Board of Supervisors amended their existing temporary eviction moratorium and instituted widespread protections for individuals impacted by the global Coronavirus pandemic.
 - 1. The supplemental moratorium now prohibits landlords from evicting tenants for any reason, except for evictions when the tenant poses an imminent threat or health and safety risk or Ellis Act evictions through May 31, 2020 but, as we have seen, may be extended.
 - a. If a tenant cannot pay rent due during the moratorium because they suffered a substantial loss of income (including due to children being out of school or other childcare needs) or substantial out of pocket medical expenses, they must give the landlord notice of the hardship before the rent is due. Then, the tenant must provide documentation of their substantial hardship within 45 days of the initial notice or within 30 days after the County's shelter in place order is lifted, whichever is later.
 - i. Tenants will then have twelve (12) months to repay any back rent that was missed as a result of a COVID-19 related hardship. However, all past due rent because a consumer debt that cannot be recovered through the unlawful detainer process-meaning a tenant cannot ever be evicted for the rent

they missed during the Covid-19 pandemic.
Further, Alameda landlords are prohibited from imposing late fees, fines or interest for unpaid rent.

2. The moratorium applies to all cities within the county and any City that wishes to apply their own local moratorium must affirmatively opt out of the County moratorium.

d. Other Nearby Counties with Eviction Moratoriums

- i. Hayward
- ii. Alameda City
- iii. Alameda County
- iv. City of Berkeley
- v. San Jose
- vi. Marin
- vii. San Mateo
- viii. Napa County
- ix. Sonoma County
- x. Monterey County
- xi. Santa Cruz County
- xii. Solano County
- xiii. Contra Costa

1. The April 21, 2020 Contra Costa moratoriums does not exempt newer units as required by the Costa Hawkins Act

V. Practical Points for Practicing During the Pandemic

a. Representing Landlords

- i. Non-payment of Rent: Communicate with tenants. Work out agreements, rent repayment agreements, accepting partial rent with notices that the partial rent is not a waiver are the best way to recapture rent payments.
- ii. Price gouging during a declared state of emergency. A property owner cannot increase rent by more than 10%. California Penal Code Section 396. All prohibitions against price gouging shall be in effect through September 4, 2020."
- iii. Owner Move-In – school year exemption. Households with minor children or educators in San Francisco cannot be evicted during the school year. An Owner Move-In notice must be served before June 18, 2020. The San Francisco school year begins on August 17, 2020, so the OMI notice must expire before that date, otherwise the eviction will need to wait until 2021 for qualifying households.
- iv. San Francisco: Evictions due to violence, threats of violence, or health and safety issues or the state Ellis Act can still go forward.
- v. San Francisco Notices requiring new Rent Board Form 1010. "Notice to Tenant Regarding the Existence of a Temporary Eviction Moratorium due to COVID-19) at www.sfrb.org.

- vi. Take into consideration the “Court of Popular Opinion”: how will a judge or jury view your client’s efforts to regain a unit in the midst of a global pandemic?
 - vii. What to do when Tenant’s don’t pay?
 - 1. Issues serving notices during shelter in place. For example, SFCC Shelter in Place does not allow process servers and serving a notice would be a misdemeanor violation of the Shelter in Place Order. Oakland has the absolute defense for any notice served during the local emergency
 - 2. Filings: Courts not issuing stays in UDs and not issuing new summons through June; Tenants have 60 days to respond
 - viii. Take into consideration the “Court of Popular Opinion”: how will a judge or jury view your client’s efforts to regain a unit in the midst of a global pandemic?
 - ix. Landlord responsibility during Shelter in Place
 - 1. Consider providing e-methods or alternative methods to pay rent;
 - 2. Cease non-essential repair work but continue necessary emergency repairs that would amount to a health and safety issue or a substantial decrease in housing services.
 - a. e.g., continue to fix overflowing toilets and broken heaters, but do not move forward with plans to repaint walls for cosmetic purposes and upgrade appliances
 - b. Communicate with tenants about these repairs.
 - 3. Moving is generally an essential service so continue move out inspections as requested while practicing safe social distancing.
- b. Representing Tenants**
- i. If Tenants can’t pay rent:**
 - 1. Understand the reporting and documentation procedure for your local city and county
 - a. Time frame to provide notice
 - b. What documentation you need
 - c. Local definitions of financial impacts related to Covid-19
 - ii. Drafting rent repayment agreements**
 - 1. Understand this is NOT a rent waiver and the tenant will have to pay back the rent. Consider:
 - a. The amount of time the tenant has under local ordinance to pay back rent,
 - b. A real amount the tenant can pay back each month on top of rent
 - i. Assign rent payments for each upcoming month:
One issue is that once the eviction moratoriums end, the tenants will have no protection for nonpayment of rent. So it is essential that tenants who are

behind in rent adequately assign any rental payments they are making.

1. For example. San Mateo current eviction moratorium ends May 31, 2020. On June 1, 2020 tenants are required to pay full rent with none of the moratorium protections.
2. Tenants should write on the check that the rent is for June 2020. Otherwise, the tenant could tender rent, the landlord could apply it to the May past due rent, serve the tenant with a 3DN for June rent, and the tenant will not have any protection.
2. Ensure that the agreement does not waive any of the tenant rights under the moratoriums or local ordinances;
3. Ensure that the agreement does not give the landlord immediate right of possession of the tenant violates the repayment plan.

iii. Expect a rise in tenant harassment and/or retaliation

1. No Self Help

- a. California Civ Code 789.3
- b. Under no circumstances should a landlord ever attempt to making living conditions uninhabitable in order to get a tenant to leave. They also may not change the locks or in any way attempt to keep the tenant out of the rental unit. The only entity with the authority to lock out a tenant is the sheriff's office after they have received a directive from the court.
- c. Landlords who use self-help evictions may have their case thrown out or and be sued for damages by the tenant. Self-help actions include:
 - i. Shutting off or interrupting any of the following utilities or services: water, heat, light, electricity, gas, telephone, elevator, or refrigeration
 - ii. Removing doors or windows
 - iii. Changing the locks
 - iv. Removing any of the tenant's personal property from the unit

2. Privacy Issues for Tenants Who Test Positive for Covid 19

- a. Tenants have a constitutional right to privacy including medical information such as their status regarding Covid 19.
- b. Landlords do not have a duty to inform other tenants regarding Covid-19 tenants and doing so, even generally, could open landlords up to liability.

3. Harassment and Retaliation

- a. News articles of landlords harassing for rent, cutting of utilities and housing services, these are all actionable offenses under local and state law.
 - i. Document your experiences
 - ii. Gather your evidence – video, recordings, etc.

iv. Insurance issues

1. This has been a drain on all resources.
2. Reports of insurance carriers not making settlement offers, refusing to fund settlements, staggering settlement payments.
3. Prepare to get creative with formation of settlement funding.
4. Consider the practicality of zoom/e mediations for your ongoing cases.

VI. Theoretical Considerations

- a. **Alternative Types of Proceedings**
- b. As to claims by landlords, although there are some indications that shelter in place will end - or at least ease - before too much longer, the existing state and local restrictions on unlawful detainers may well remain in existence for several month after the shelter in place orders are lifted. However, the legal system provides a number of remedies to address misconduct by residential or commercial tenants.
- c. **Ejectment:** Alternative type of eviction proceeding, which may be filed against either residential or commercial tenants if the tenancy has been validly terminated by proper written notice or otherwise. Ejectments do not go through the court system as quickly as an unlawful detainer. However, the filing of the lawsuit, and the use of pre-trial discovery, etc. may suffice to bring the tenant to the bargaining table fairly quickly - especially if the tenant has no viable defense to the lawsuit, and doesn't want to be exposed to ever-mounting claims for damages and (if provided by the lease) attorney fees.
- d. **Nuisance or Waste:** If the tenant misconduct consists of something like nuisance, waste, or harassment, other effective and fairly speedy legal pre-trial remedies may exist, including seeking a restraining order, an injunction, or a receivership.
- e. **Pre-trial Writ of Attachment:** In commercial non-payment of rent situations, landlords may be able to seek a pre-trial writ of attachment, which will serve to freeze cash or other assets. This will not only put more financial pressure on the tenant to settle but will also increase the odds that assets will be readily available to execute upon if the landlord ultimately obtains a judgment against the tenant.
- f. **Force Majeure Clause:** Another hot topic we have seen asked or brought up a lot following the pandemic is the viability of Force Majeure Clauses
 - i. Generally, force majeure clauses are contractual provisions which excuse one or both parties' performance obligations when circumstances arise which are beyond the parties' control and make performance of the contract impossible.

1. In California, force majeure is not limited to the equivalent of an act of “god” but the test is whether under the particular circumstances there was such an insuperable interference occurring without the party’s intervention as could have been prevented by the exercise of prudence, diligence, and care. *Mathes v. City of Long Beach*, 121 Cal. App. 2d 473, 477, 263 P.2d 472, 474 (1953). Even in the case of a force majeure provision in a contract, mere increase in expense does not excuse the performance unless there exists extreme and unreasonable difficulty, expense, injury, or loss involved. *Butler v. Nepple*, 54 Cal. 2d 589, 598, 354 P.2d 239 (1960)
- ii. Determining whether a force majeure clause can be invoked is very fact specific and looks at the specific language of the contract.
 1. Generally, the clauses are interpreted extremely narrowly and to the substance of the contract.
 2. Typically applied to contracts for services and goods and not payment of money, such as rent.

g. **Case law conflict**

- i. **Birkenfeld v City of Berkeley was the first case where the CA Supreme Court reviewed the validity of rent control legislation. The case from 1976 established that CA cities may enact rent control measures as valid exercises of police power.**
- ii. Limitations on the ability of localities to pass good cause requirements for evictions. These cases have discussions that localities can’t alter aspects of unlawful detainers including lengthening notice requirements.
 1. The preemption doctrine arises from the limiting language in Article XI section 7: “A county or city may make and enforce within its limits all local police, sanitary and other ordinances and regulations not in conflict with general laws.”
 2. Conflict arises when the state law duplicates, contradicts or enters a field which has been fully occupied by state law whether expressly or by implications. (*Cal. Fed. Sav. & Loan Ass’n v. City of Los Angeles* (1991) 54 Cal.3d 1) A local law contradicts state law, for example, when it prohibits what the legislature intends to authorize (*Northern California Psychiatric Soc’y v. City of Berkeley* (1986) 176 Cal.App. 3d 90, 105)
 3. *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129
 - a. Rental property affected by city rent control charter amendment commenced class action which developed into action for declaratory relief to determine constitutionality of the rent control measure. The Superior Court, Alameda County, Robert L. Bostick, J., found the charter provision unconstitutional and void, and the city and intervenors appealed. The Supreme Court, Wright, C.J., held that the existence of an emergency is not necessary for rent control

when such regulation is reasonably related to the furtherance of a legitimate governmental purpose; that facts established at trial did not preclude the city from legislating on the subject of residential rent control; that state law did not preempt the field of placing maximum limits on residential rents; that an enactment for that purpose could properly take the form of an initiative amendment to the city charter; but that the amendment in question transgressed the constitutional limits of the police power not because of its objectives but because its provisions prohibiting any adjustments in maximum rents except under a unit-by-unit procedure which entailed inevitable unreasonable delays were not reasonably related to the accomplishment of its objectives and would deprive landlords of due process of law if permitted to take effect.

- i. “Under State Constitution, city’s police power can be applied only within its own territory and is subject to displacement by general state law, but otherwise is as broad as police power exercisable by legislature itself.”
- ii. “City charter amendment, which was adopted by initiative, and which instituted local rent control measures for purpose of alleviating hardships caused by “serious public emergency” resulting from growing housing shortage, could not be given effect to extent that it conflicted with general laws either directly or by entering field which general laws were intended to occupy to exclusion of municipal regulation”

4. See also *Channing Properties v. City of Berkeley* (1992) 14 Cal.Rptr.2d 32

VII. **WHAT HAPPENS WHEN THE MORATORIUMS END?**

- a. Courts will be backlogged, rent will still be owed, but there will be delays.
- b. Work out rent agreements between landlords and tenants.
- c. Proposed Legislation: Assemblyman Phil Ting introduces AB828:
 - i. This bill would prohibit a state court, county sheriff, or party to a residential unlawful detainer case from accepting for filing, or taking any further action including executing a writ of possession or otherwise proceeding with an unlawful detainer action during the timeframe in which a state of emergency related to the COVID-19 virus is in effect and 15 days thereafter, except as specified.
 - ii. The bill would require the court, if it determines that the tenant’s inability to stay current on the rent is the result of increased costs in household necessities or decreased household earnings attributable to the COVID-19 virus, to make an order for the tenant to remain in possession, to reduce

the rent for the property by 25% for the next year, and to require the tenant to make monthly payments to the landlord beginning in the next calendar month in accordance with certain terms. The bill would require declarations under these procedures to be filed under penalty of perjury.

- iii. The bill would make these provisions effective in a jurisdiction in which a state or locally declared state of emergency is in effect until 15 days after the state of emergency ends and would repeal these provisions on January 1, 2022.

VIII. **Parting Thoughts:** The information in this program is based on the rules in place as of April 30, 2020 and is not exhaustive.

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Stephanie has been recognized as a “Rising Star” by Super Lawyers, an honor awarded to only 2.5% of attorneys under the age of 40.