

Legal Insights Due To COVID-19

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Presented For:



BOMA
Oakland/East Bay

HLG *Horner Law Group, PC*
ATTORNEYS AT LAW

Overview of Topics

Brief Background – Commercial Unlawful Detainers



Commercial Eviction Moratoriums in Contra Costa and Alameda Counties, And How To Navigate Those Ordinances

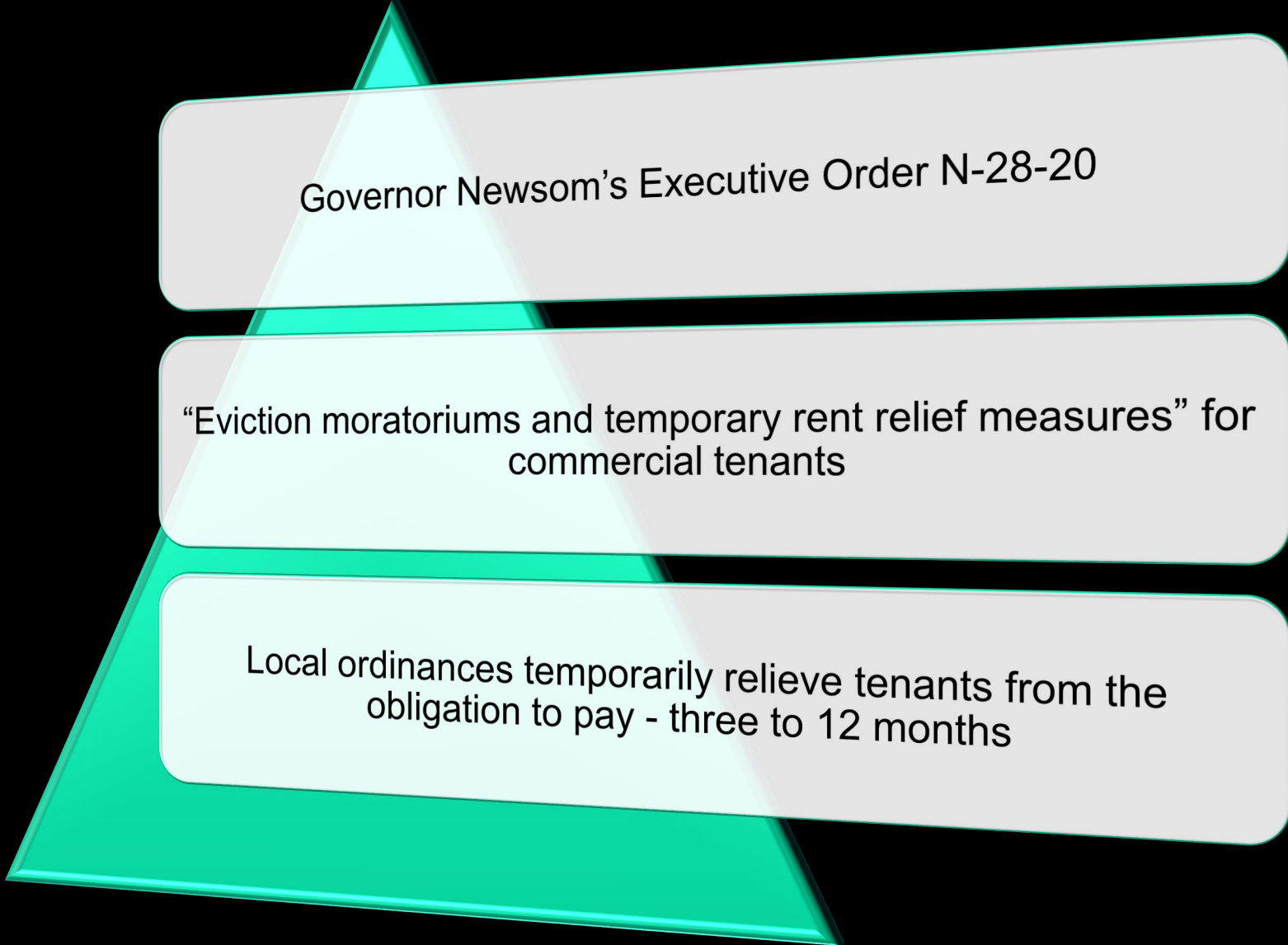


Landlord's Recourse



Specific Questions Posed By BOMA Members/Attendees

Brief Background of the Current Eviction Mortarium



Governor Newsom's Executive Order N-28-20

"Eviction moratoriums and temporary rent relief measures" for commercial tenants

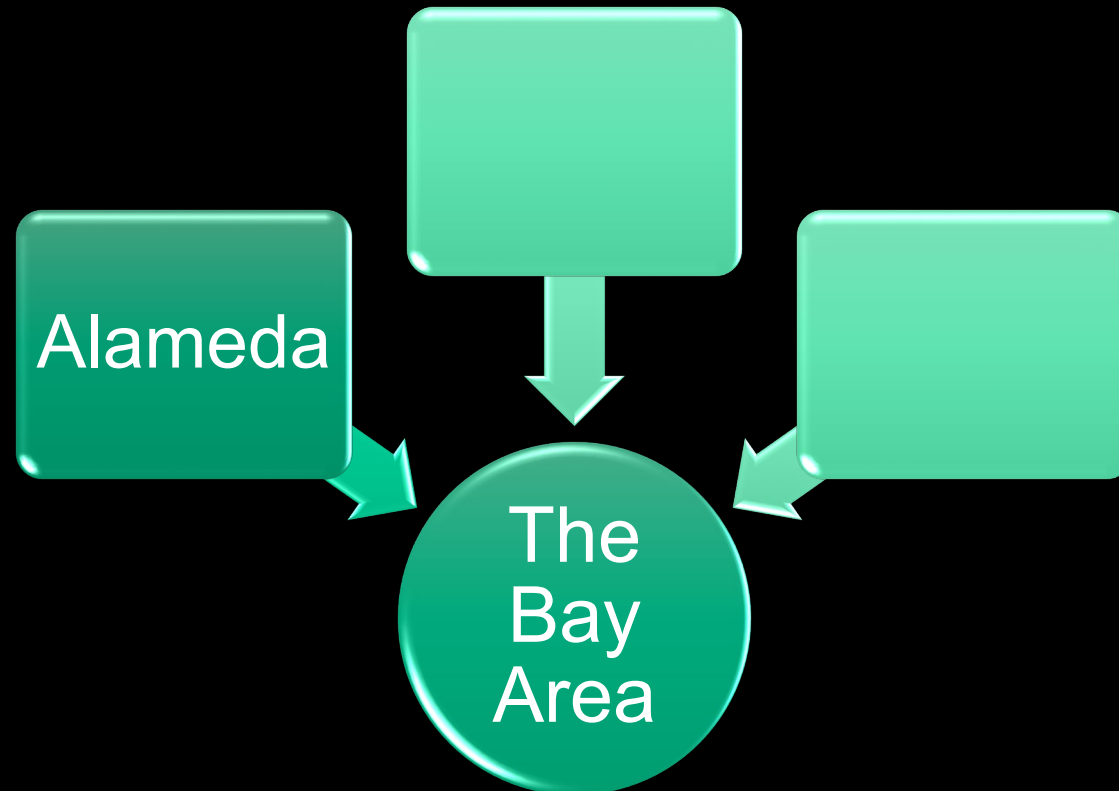
Local ordinances temporarily relieve tenants from the obligation to pay - three to 12 months

Alameda County

“Residential only” eviction ban at County level

The following cities in Alameda County have enacted commercial rent ordinances (Ordinance No. O-2020-40) related to COVID-19:

Alameda
Albany
Berkeley
Emeryville
Hayward
Newark
Oakland
San Leandro
Union City



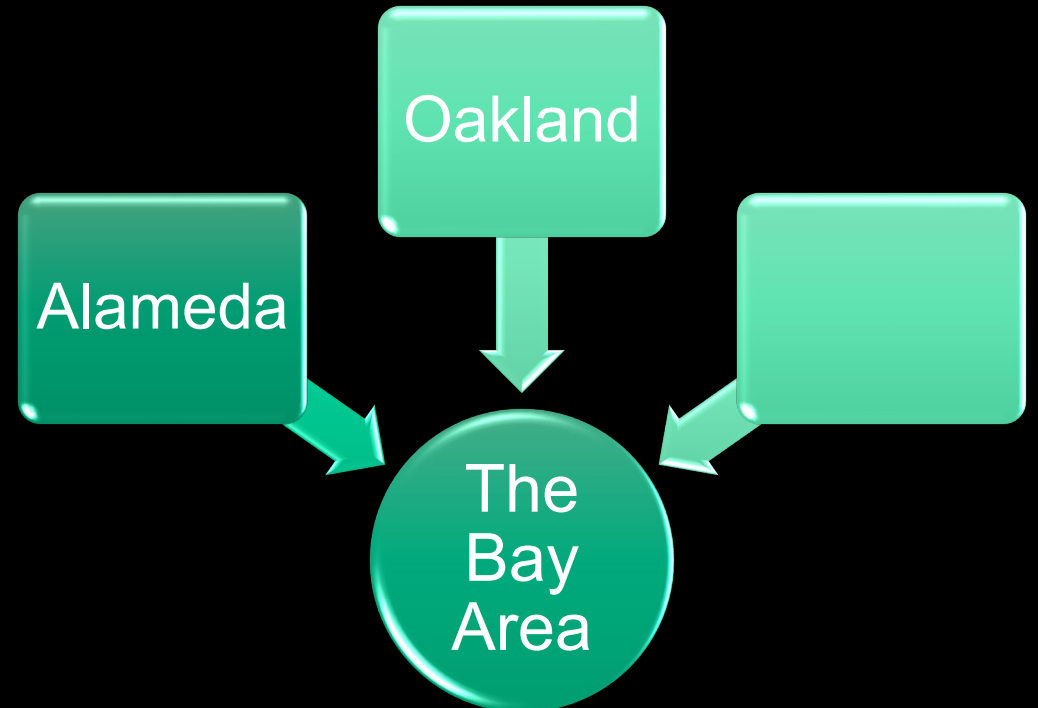
Alameda County moratorium is residential specific only.

City of Oakland

Complete defense to a UD for nonpayment of rent if the failure to pay rent during the local emergency was the result of a substantial decrease in income caused by COVID-19.

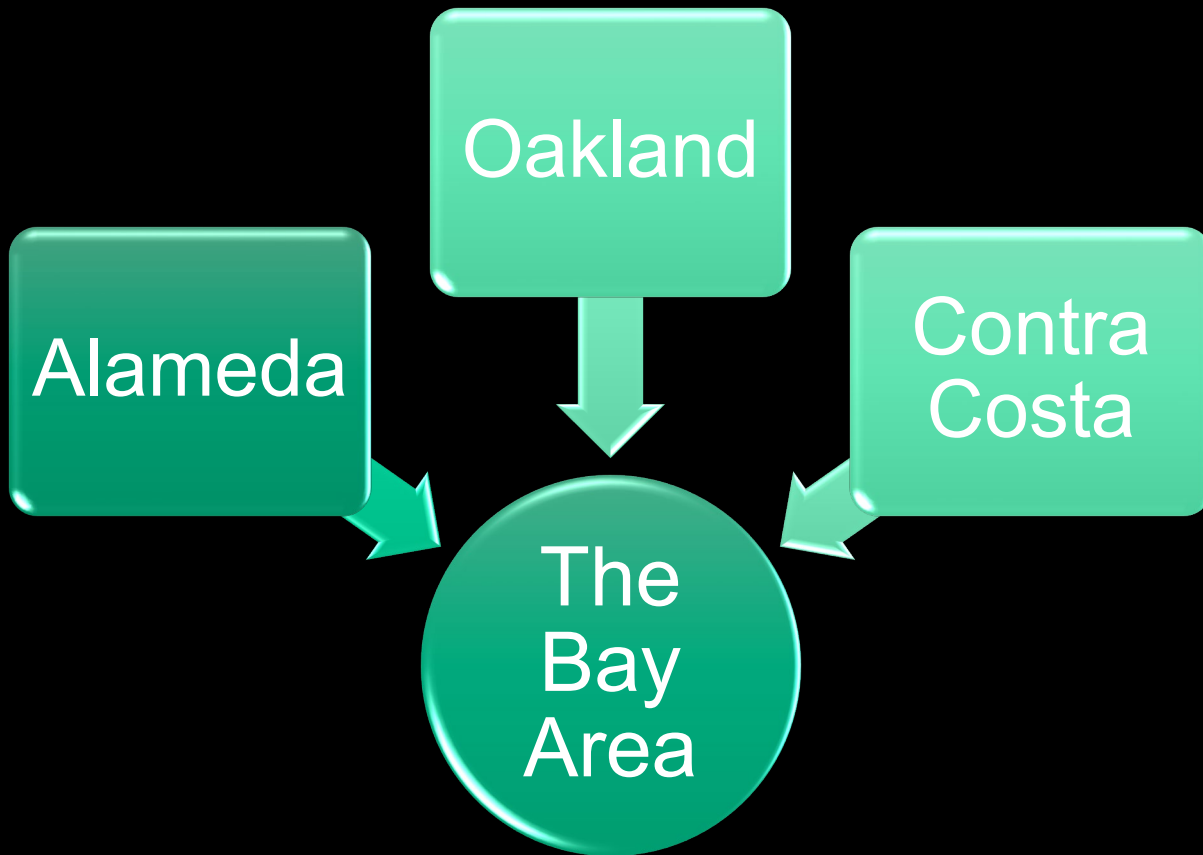
Applies to small businesses having 100 or fewer employees, and average annual gross receipts of 15 million dollars or less and to nonprofit organizations

Notice requirement for any rent demanded



Contra Costa County

Residential and commercial small business and nonprofit moratorium “through March 31, 2021



Notice to Landlord: Tenant must notify the owner in writing before the rent is due, or within a reasonable period of time afterwards not to exceed 14 days

Notice of Termination of Tenancy: Owner's failure to comply shall render any notice of termination of tenancy in violation of the ordinance void

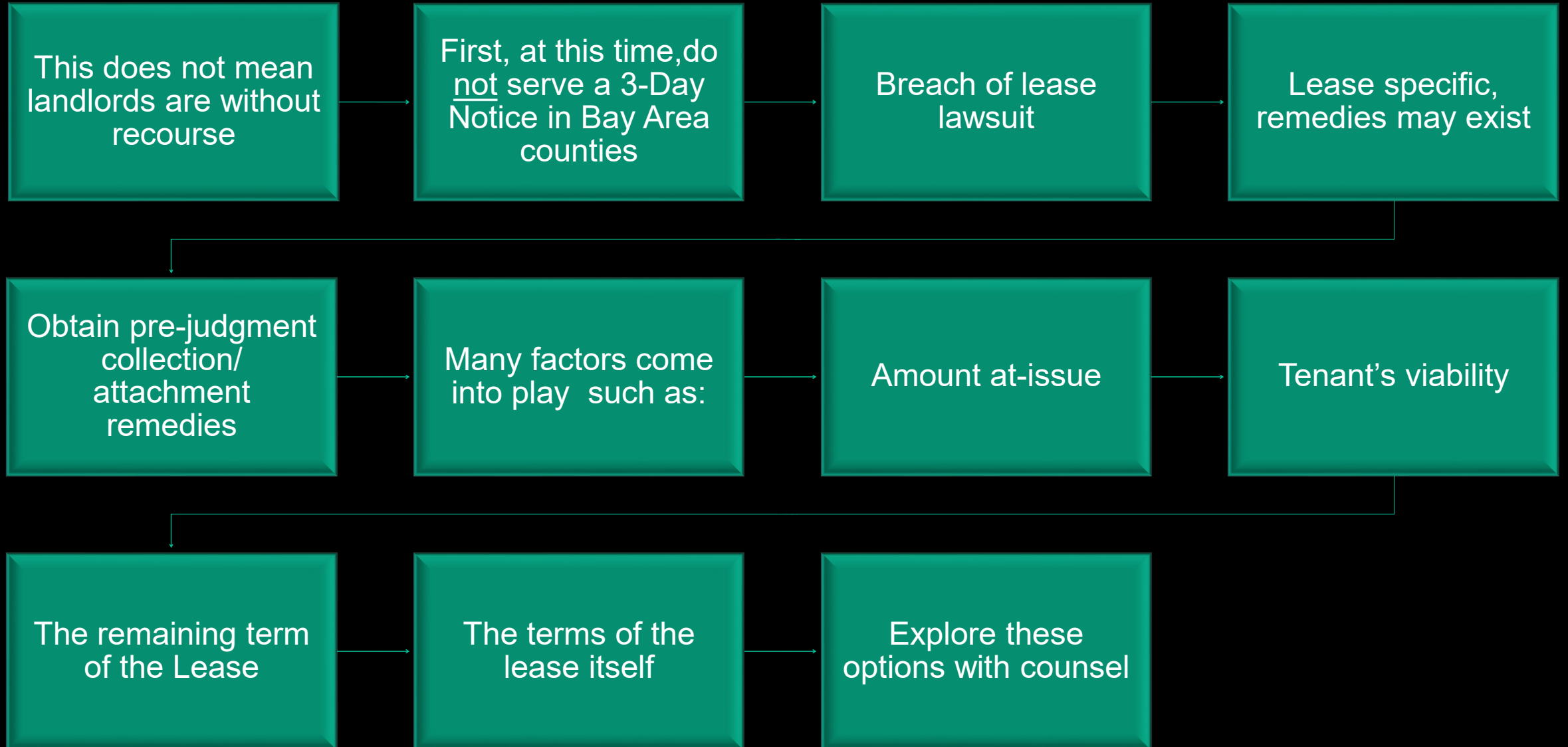
Late Fees: Through March 31, 2021, an owner may not charge or collect a late fee from a tenant who demonstrated loss of income

Grace Period: All past due rent due no later than November 15, 2020

Carve Out: Ordinance does not relieve tenants of the obligation to pay rent due, and shall not prevent a tenant who is able to pay all or some of the rent due from paying that rent in a timely manner.

Remedies For Violation: Tenant may institute a civil proceeding for injunctive relief, money damages of not more than three times actual damages

What Can A Landlord Do?



Specific Questions Posed By BOMA Members/Attendees



Specific Questions Posed By BOMA Members/Attendees

Question #1



We have a tenant in Oakland that has stopped paying rent but refuses to provide any financials or documentation, documenting that their income has been impacted by COVID. They are an industrial warehouse tenant and they are currently occupying at full capacity and we do not believe their business has been impacted significantly by COVID. We do not want to evict them but what legal remedies can we pursue to get them to pay rent?

Specific Questions Posed By BOMA Members/Attendees

Answer to Question #1



- A. Is the Tenant a “small business” under the Oakland CTEM?
- B. “Small business” means an independently owned and operated business that is not dominant in its field of operation, 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) or “nonprofit”.
- C. If you believe the Tenant is a Small Business, I would still demand that the Tenant provide financials to determine it qualifies under the CTEM and that it is complying.
- D. Unfortunately, the language of the CTEM doesn’t have a timeframe for which the financials or proof of being an affected business must be provided as is the case in other municipalities.
- E. Nonetheless, as discussed, since you do not want to evict, I would begin a breach of lease lawsuit and the first step being issuing a notice of default/breach.

Specific Questions Posed By BOMA Members/Attendees

Question #2



We have a retail tenant in Oakland that has stopped paying rent and is currently closed due to the SIP. They are a bar and are currently not able to open under the SIP. They have provided financials and sales that document that they currently have no income. They have said that they do not have to pay rent and that they are protected by the eviction moratorium. We are trying to get them to agree to a rent deferment agreement but they insist they are protected from having to pay rent. What legal remedies can we pursue?

Specific Questions Posed By BOMA Members/Attendees

Answer to Question #2



- A. First, it seems that you confirmed that the tenant qualifies as a small business under the CTEM and as such, do not want to evict.
- B. I would make clear to the Tenant that the Rent is not waived under the CTEM and the Rent is a debt which it owes to Landlord and while Landlord cannot dispossess Tenant at this time for nonpayment of Rent, Landlord will still pursue same to the extent a deferral agreement is not reached, and can do so via a breach of lease lawsuit.

Specific Questions Posed By BOMA Members/Attendees

Question #3



We have an industrial warehouse tenant in Livermore that has not paid rent for the last six months and has provided financials documenting that their business has been impacted by the pandemic. However they have a guarantor on their lease whose financials are publicly available and is a high net worth individual. Can we pursue the guarantor for the default?

Specific Questions Posed By BOMA Members/Attendees

Answer to Question #3



- A. Livermore's CTEM is in effect through at least March 31, 2021.
- B. Without reviewing the Lease itself, the Tenant and Guarantor have a strong defense to a breach of lease lawsuit under the specific language of the Livermore CTEM.
- C. Note the ordinance at 9 provides, "nothing in this Order relieves the tenant of liability for the unpaid rent, which the landlord may seek after the expiration of this Order or subsequently enacted Ordinance." Here, the language can provide a strong defense against a breach of lease during the Order period – note, many municipalities do not include such language.
- D. Nonetheless, the CTEM also states "To remain eligible for protections afforded by the moratorium, any tenant that cannot pay some or all of the rent temporarily for the reasons set forth above must endeavor to pay partial rent commensurate with their substantial decrease in business income and shall work with their landlord to determine a repayment schedule for the balance of their lease obligations."
- E. Here, the Landlord can argue Tenant is required to pay a certain amount of Rent commensurate with their decrease in business income – and can further argue that the Guarantor should pay the difference.

Specific Questions Posed By BOMA Members/Attendees

Question #4



Can we serve a tenant a three day notice after we have requested financials and documentation their business has been impacted by COVID?

Specific Questions Posed By BOMA Members/Attendees

Answer to Question #4



This would depend on whether a CTEM is in place and if documentation is required under the CTEM and/or when it is required.

Specific Questions Posed By BOMA Members/Attendees

Question #5



If we do not get a response from the three day notice and or default letter can we file a complaint for rent or a breach of lease?

Specific Questions Posed By BOMA Members/Attendees

Answer to Question #5



More than likely, yes – however, if a very specific CTEM ordinance states the Rent is not due until a time in the future the Tenant can argue that as a defense and other arguments which we encounter as defenses are *force majeure*, frustration of purpose, impracticability and again, these are lease specific so I would consult counsel, of course, prior to initiating such lawsuits.

The End

Thank you for your time today!

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