

How Some States Are Slowing Commercial Property Evictions

By **Rachel Churchill, Clement Farley, Matthew Rifino and Shawn Smith** (May 8, 2020)

As the economic impact of the COVID-19 pandemic expands, several states within the Northeast and Mid-Atlantic regions have taken different approaches concerning commercial property evictions. Below, we discuss how some of these states and Washington, D.C., are handling such eviction matters or are operating concerning court matters, and offer practical considerations for parties to commercial leases.



Rachel Churchill

Connecticut

Connecticut has stayed issued executions on evictions from proceeding until June 2, but has not specifically addressed the commencement of new commercial eviction actions. In particular, on March 19, Connecticut's chief administrative judge for civil matters stayed all issued executions on evictions — whether commercial or residential — through May 1; later, on April 23, that date was extended through June 1.[1]



Clement Farley

While Connecticut has issued a moratorium on commencing residential eviction proceedings, which presently runs until July 1, there is no such bar on commencing a commercial eviction proceeding during the COVID-19 pandemic.

However, any proceeding that is initiated is unlikely to progress during the crisis as Connecticut courthouse operations have been significantly reduced until further notice, with many courthouses closed. The courthouses that remain open are addressing only Priority 1 business functions and select civil and family non-Priority 1 matters that can be addressed remotely.



Matthew Rifino

Eviction proceedings have not been deemed Priority 1 business functions and are not presently included in the non-Priority 1 matters courts are adjudicating remotely. Consequently, pending eviction proceedings are not being heard or advancing. When the courts reopen, the Superior Court housing sessions are expected to be faced with a substantial backlog that will likely cause further delay.



Shawn Smith

Delaware

Delaware has not explicitly addressed commercial lease evictions, but the state courts have postponed hearings or closed court facilities, effectively delaying eviction actions. The state court delays were outlined in two judicial orders. The Delaware Supreme Court declared a judicial emergency on March 16, closing all court facilities to the public until May 14.

Additionally, the Justice of the Peace Court, which is the court primarily responsible for landlord-tenant matters, issued on April 23, a standing order postponing all hearings scheduled from March 17 through May 14, to a date no earlier than June 1. It should be noted that Delaware Gov. John Carney did set a moratorium on residential evictions in a March 24 modification of his March 21 state of emergency declaration.

Massachusetts

While Massachusetts has set a moratorium on certain evictions at residential properties and small business premises units, the state has excluded larger commercial tenants from this moratorium.

On April 20, Gov. Charlie Baker signed the moratorium law, suspending nonessential evictions of residential and small business tenants from March 10 (the start of the state's declared COVID-19 state of emergency) until the earlier of either (1) Aug. 18 (120 days from April 20, the effective date of the moratorium law, as may be extended by the governor in increments of up to 90 days) or (2) 45 days after the state of emergency is lifted.

Nonessential evictions include those (1) for nonpayment of rent, (2) resulting from foreclosures, (3) for no fault or no cause, and (4) for cause that does not involve or include allegations of certain criminal activities or certain lease violations that may impact health or safety.

"Small business premises unit" does not include premises occupied by a tenant if the tenant — or a party that controls, is controlled by, or is in common control with the tenant — (1) has operations outside of Massachusetts, (2) is publicly traded or (3) employs 150 or more full-time-equivalent employees.

Emergency regulations adopted April 24, in furtherance of the moratorium law, clarified that a small business is one that qualifies as a small business under the size standards established by the Small Business Administration in addition to standards set forth in the moratorium law.

Although tenants are not relieved from rental payment obligations, and landlords retain their ability to recover rent, landlords cannot impose a late fee or report late rent payments to a consumer credit reporting agency if the tenant provides notice and documentation within 30 days of each missed rent payment that the nonpayment of rent was due to a financial impact of COVID-19.

"Financial impact of COVID-19" is defined in the emergency regulations as a loss of income or additional expense that (1) is caused directly or indirectly by the COVID-19 pandemic or by the local, state or federal response to the pandemic and (2) is of a magnitude that makes it impossible or impractical for a tenant to make a payment of rent on the date such payment is due.

The emergency regulations have prescribed a form notice and financial hardship spreadsheet for a small business premises unit tenant to deliver to its landlord for each missed rent payment documenting the financial impact of COVID-19. If a court determines that the information provided in such notice is fraudulent or contains a material misrepresentation by the tenant, then the landlord may impose late fees pursuant to the lease and furnish rental payment data to a consumer reporting agency.

Beyond considering the new state law's impact on evictions, including those following a commercial foreclosure, parties to leases should also look to the rules of the municipality in which the property is located, as some local governments have instituted additional rules and limitations on evictions.

New Jersey

New Jersey has placed commercial lease evictions on hold until after May 31. The New Jersey Supreme Court delayed those actions by issuing a March 27 order^[2] suspending all state court landlord-tenant trials through April 26, and by subsequently issuing an April 24 order^[3] suspending these trials through May 31. Both orders also acknowledge that residential-tenant evictions cannot be enforced pursuant to Executive Order 106 issued on March 19.^[4]

The practical result of the orders: Commercial landlords may file an eviction action against a commercial tenant, but those matters will not be addressed before May 31. The orders do not affect rent-due schedules or the remedies available to commercial landlords if tenants fail to pay rent under the terms of a lease. This includes the possible remedy of self-help (e.g., commercial-tenant lockouts that present their own risks).

New York

New York issued a moratorium on commercial lease evictions until June 18. New York Gov. Andrew M. Cuomo issued Executive Order 202.8 on March 20,^[5] setting forth this moratorium. The order provided for suspending enforcement of evictions of residential and commercial tenants for 90 days. Thus, commercial landlords may not enforce eviction actions until after this time.

The New York courts also issued orders that impact prosecution of commercial landlord-tenant litigation. The Chief Administrative Judge of the New York State Courts ordered on March 22 that "no papers shall be accepted for filing by a county clerk or a court in any matter of a type not included on the list of essential matters attached as Exh. A. This directive applies to both paper and electronic filings."^[6]

Exhibit A to this order did not list a commercial eviction as an essential matter, but noted that a court is empowered to deem a matter essential. Unless a court were to grant permission to do so, commercial-eviction-related papers would not be permitted to be filed, whether in a new or pending matter; consequently, by virtue of Order AO-78-2020, the courts were effectively not permitting prosecution of a new or existing commercial landlord-tenant dispute.

Reflecting that responses to the COVID-19 pandemic can change quickly, even daily, the New York state courts issued a press release^[7] on April 13 revising its position.

The court said that although "the existing ban on the filing of new 'non-essential' matters will remain in effect," pending (not new) nonessential matters "will be heard virtually, with all interactions taking place by video or telephone" with "administrative and court staff assisting Judges in the use of Skype and other technology platforms to conduct conferences, access records and perform other essential tasks." The court went on to say that "further steps to increase justice in non-essential matters will be announced in the coming weeks."

Pennsylvania

Pennsylvania has not explicitly addressed commercial lease evictions. The Supreme Court of Pennsylvania, however, has issued a number of orders concerning the administration of eviction proceedings during the COVID-19 pandemic.

In an April 1 order, extended by an April 28 order,^[8] the court barred any person employed by the Pennsylvania judiciary from effectuating an eviction, ejection or displacement from

a residence through May 11. While this order makes no reference to commercial properties, the order closed all magisterial district courts, which are the courts primarily responsible for eviction proceedings.

If the commercial lease in question possesses a confession of judgment clause, the landlord may be able to bypass the Magisterial District Court and confess judgment for possession in the Court of Common Pleas. However, the landlord will still experience varying levels of delay, as most courts are either closed or limited to performing judicial functions related to essential matters, which does not include commercial evictions. The present statewide ban on nonessential matters will remain in effect through June 1.

Washington, D.C.

Washington, D.C., has delayed eviction actions from proceeding until May 2, and issued a rent freeze to all commercial tenants until 30 days after the lifting of the COVID-19 public health emergency. On March 13, the Chief Judge of the District of Columbia Superior Court stayed all eviction proceedings started on or before May 1 against tenants and foreclosed homeowners.

On April 10, the D.C. Council enacted the COVID-19 Response Supplemental Emergency Amendment Act of 2020, which provides, among other things, some rent relief to commercial tenants. Section 202(g) of the act mandates that any landlord receiving a mortgage deferral due to the public health emergency must reduce the rent charged to any qualified tenant in an amount proportional to the reduced mortgage amount paid by the landlord.

A qualified tenant includes a tenant of a property owned or controlled by a person or entity receiving a mortgage deferral who has notified the landlord of an inability to pay some or all of the rent due to the public health emergency. The act permits landlords to require repayment of the rent balance, without interest or fees, within 18 months of the reduction or by the end of the lease term, whichever is earlier.

On April 21, the D.C. Council amended the act to bar increases to commercial tenants' rent for the duration of the public health emergency plus an additional 30 days.

Summary

While the states may differ in how they have responded to landlord-tenant disputes and eviction issues, fundamental to any consideration of commercial landlord and tenant rights and remedies are the terms of a written lease.

If the lease does not provide an acceptable remedy, the parties can agree to negotiate a lease amendment or make other arrangements to address the situation short of commencing litigation or eviction proceedings, provided that such amended lease will remain subject to the relevant moratorium laws.

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[1] Court-issued COVID-19-related orders are listed here.

[2] <https://njcourts.gov/notices/2020/n200327a.pdf?c=Nnu>.

[3] <https://njcourts.gov/notices/2020/n200424a.pdf?c=Uzr>.

[4] <https://nj.gov/infobank/eo/056murphy/pdf/EO-106.pdf>.

[5] https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.8.pdf.

[6] <https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>.

[7] https://www.nycourts.gov/LegacyPDFS/press/PDFs/PR20_15virtualcourtstortsetc.pdf.

[8] <http://www.pacourts.us/assets/files/page-1305/file-9158.pdf>.