

Commercial Lease Negotiation Tactics for Small Business Owners

Presented by:

Jake Christensen, *Associate*, Arent Fox

Welcome!

- Partnership between the Lawyers' Committee for Civil Rights and Arent Fox.
- This workshop is specific to San Francisco.

Disclaimer

- No legal advice – just information
- Commercial lease consultations available, and we'll talk about how to sign up before the end of the presentation

Agenda

1. First steps before negotiating with your landlord.
2. Understand relevant protections in San Francisco.
3. Tips for negotiating with your landlord.
4. Questions.

First Steps – Review your lease

- Don't forget the exhibits / appendices.
- If you sublet from someone, review the master lease and your sublease.
- Leased your space for multiple lease terms? Review the original lease and all extension documents.
- What if I don't have a lease?

First Steps – Review your lease

Keep an eye out for:

- common-area and other shared expenses. (CAM fees, denoted as additional rent)
- abatement and other rights.
 - Rent may be reduced if you can't access the building, or
 - if the landlord cuts off services (*e.g.*, utilities, sanitation, janitorial, etc.)

First Steps – Review your lease

Keep an eye out for:

- *Force majeure* clauses that don't require you, the tenant, to keep paying rent.
- Rulings about frustration of purpose as an affirmative defense.
- Provisions that guarantee the tenant's right to access or use the premises.

First Steps – Review your lease

- Condemnation/casualty provisions if drafted to cover a loss of access or use due to governmental action.
- For buildings with multiple commercial spaces, like a food court or shopping mall, there may be lease clauses that require the landlord to maintain a certain level of occupancy or certain stores in operation.
- Failure to meet these occupancy/operation requirements can trigger termination and other rights in favor of tenants.

First Steps – Review your lease

- Quiet enjoyment rights.
- Security deposits (if drawn on, does it need to be replenished / by when?).
- Grounds outside of the four corners of the lease, such as a supervening illegality, and lack of habitability or possession.

First Steps – Notify your landlord

- Try to keep an open dialog.
- Continue to meet the minimum requirements of any local eviction moratorium, even if the landlord isn't responding.

First Steps – Save everything

- Make and keep copies of all written and other correspondence:
 - Hard-copy notices, letters
 - E-mails
 - Text messages
 - Voicemails
- Review your business interruption insurance policy.

Questions so far?

San Francisco

Protection extends through September 30, 2021

- For businesses that are:
 - Financially impacted by the COVID-19 crisis and missed rent between March 17, 2020 and Sept. 30, 2021,
 - Registered to do business in San Francisco, and
 - Have gross receipts at or below \$25 million.

Protection extends through September 30, 2021

- Applies to qualified commercial tenants, subtenants, and month-to-month or holdover tenants.
- “Rent” includes monthly rent, additional rent, security deposits, late fees, and interest. If outstanding rent is still owed at the end of the moratorium or forbearance period, interest can then accrue.

Protection extends through September 30, 2021

- Claiming protection under the moratorium:
 - Provide written documentation to your landlord that the coronavirus outbreak has had a financial impact on your business.
 - Extends cure period by another 30 days.
 - Discuss payment terms with your landlord monthly.
- You must do this each month to qualify!

Protection currently extends through **September 30, 2021**

- You are not required to pay any rent during the moratorium, but are encouraged to pay what you can.
- Your landlord can agree to additional extensions beyond the moratorium period, in his/her discretion.

Protection currently extends through **September 30, 2021**

- Does not include rent relief – you still owe the missed rent.
- Prohibits the landlord from modifying existing leases after March 17, 2020.

Protection extends through September 30, 2021

Your landlord cannot evict you without:

- Providing written notice, and
- Giving you an opportunity to pay back the missed rent (and at least 30 days to do so)

Protection extends through September 30, 2021

- Your landlord cannot evict you for missing payments while you are working with him/her! Try to work with your landlord to come up with payment plan.
- If you still have not paid all outstanding rent after the agreed-upon repayment period or after the moratorium protections expire, your landlord can then commence proceedings to evict you for non-payment.

Protection currently extends through **September 30, 2021**

Dec. 2020 Board of Supervisors Commercial Eviction Protections Ordinance (“Dec. 2020 Board Ordinance”)

- Creates four tiers of tenants
 - Tier 1: 10 or fewer full time employees (FTE), two years to repay deferred rent, option to terminate by giving landlord 30 days’ notice and pay all rent due through termination date.
 - Tier 2: 10–24 FTEs, up to 18 months to repay deferred rent.
 - Tier 3: 25–49 FTEs, up to 12 months to repay deferred rent.
 - Tier 4: 50+ FTEs, must pay deferred rent when moratorium period expires.

Protection extends through September 30, 2021

Dec. 2020 Board Ordinance

- Landlords can't assess interest or late fees for rent due during the moratorium period, or penalties/fees in connection with the termination of the Tier 1 tenant's lease prior to Sept. 30, 2021.
- Landlords and tenants can negotiate / enter into agreements on terms different from those provided by the Ordinance. If parties can't agree, the Ordinance controls.

Questions so far?

Negotiating with your landlord

Negotiating with your landlord

First step – get your landlord to come to the table and negotiate.

Negotiating with your landlord

Make an ask that is realistic for you

- Avoid setting yourself up for failure.
- Avoid repeated re-negotiations.

Negotiating with your landlord

Don't be afraid to ask for the moon

- Abatement for duration of pandemic.
- Extended deferrals beyond the moratoria / rent reductions.
- Extended repayment period for missed rent during shutdowns.

Negotiating with your landlord

Don't be afraid to ask for the moon

- Convert back rent into a loan, payable over a fixed term.
- Credit deposit toward back rent + delay in requirement to repay.
- Forgiveness of back rent owed (possibly with promise to pay full rent moving forward).

Negotiating with your landlord

Don't be afraid to ask for the moon

- If your lease term is about to end, consider leveraging a lease extension for a reduction or forgiveness of back rent.
- Ask if your landlord is receiving any mortgage assistance or is aware of it.

Negotiating with your landlord

Don't over commit

- Repayment tied to percentage of monthly revenue vs. set monthly amount.
- Ask to convert base rent to percentage rent.

Negotiating with your landlord

Don't compromise your sanity

- If your landlord is threatening you or being verbally abusive, communicate only much as needed to meet moratorium requirements.

Negotiating with your landlord

Don't compromise your sanity

- The moratorium protects tenants from eviction for nonpayment of rent.
- Some landlords are nevertheless trying to sidestep the moratorium by claiming breach of contract and other alleged violations.

What's Comes Next?

- Unclear whether we will see further extensions to Gov. Newsom's June 11, 2021 Executive Order.
- Viability of defenses to nonpayment of rent remains to be seen.
- Keep the September 30 moratorium deadline in mind.

What's Comes Next?

- Continue to research community financial resources and keep an eye out for new ones.
- Programs that are currently closed may receive additional funding and reopen.
- Visit <https://oewd.org/businesses-impacted-covid-19>

	<u>SF SMALL BUSINESS RECOVERY LOAN FUND</u>	<u>CA REBUILDING FUND</u>	<u>EIDL</u>
Maximum amount	\$100,000	\$100,000	\$2M
Interest Rate	0%	Fixed (4.25% as of 12/15/20)	3.75% for businesses 2.75% for nonprofits
Collateral required?	No	No	No for loans under \$200k
First Payment Due	Deferred 1 year	After 1st month	Deferred 1 year
Forgivable?	No	No	No, except for up to \$10k loan advance
Approved Uses	Flexible but uses must be detailed to CDFI	Working capital, inventory, marketing, operating expenses, rent, utilities, property taxes, supplies, etc.	Payroll, fixed debts, accounts payable, and other bills
Apply	<u>PRE-APPLICATION</u>	<u>PRE-APPLICATION</u>	<u>APPLY</u>
Nonprofits eligible?	No	No	Yes

Legal Resources

- Other grant and loan programs: <https://oewd.org/grant-and-loan-programs>
- PPP application now closed.

Legal Resources

- Additional assistance through the Lawyer's Committee for Civil Rights of the SF Bay Area (<https://lccrsf.org/>).
- Apply to LCCRSF's Legal Services for Entrepreneurs Program for a one-hour remote consultation or longer-term negotiation assistance related to your lease situation:
 - <https://tinyurl.com/LSEApplication>

Questions?



LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
OF THE SAN FRANCISCO BAY AREA