

Commercial Lease Negotiation Tactics for Small Business Owners

Presented by:

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Welcome!

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

Disclaimer

- No legal advice – just information.
- Commercial lease consultations are available. 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 Oakland.
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?

Oakland

- Moratorium on commercial evictions extends through the end of the “local emergency” declared by the City – tied to Governor’s Executive Order, which is currently set to expire on September 30, 2021.
- For “small businesses” that:
 - have fewer than 100 employees,
 - average annual gross receipts of \$15 million or less, and
 - have their principal office located in California.
- Also applies to nonprofit organizations.

Claiming protection under the moratorium

- Must be able to demonstrate that the non-payment of rent was due to “a substantial decrease in income.”
 - *E.g.*, fewer hours of operation, reduction in consumer demand.
- Provides a defense to a landlord’s attempt to evict you due to non-payment of rent due to COVID-19.

Claiming protection under the moratorium

- Rent missed through the last date of the local emergency would be due in full the following day (subject to any agreement with your landlord).
- Protections may extend after the local emergency ends for rent missed during the emergency period.

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.

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://www.oaklandca.gov/resources/coronavirus-2019-covid-19-business-and-worker-resources>

Financial Resources

- **Targeted EIDL Advance and Supplemental Targeted Advance** (up to \$15,000 in funding, no repayment requirement)
- **EIDL** (long-term, low-interest loan of up to \$500,000; community resources to help you apply)
- **California Rebuilding Fund** (loans of up to \$100,000 with repayment terms of 36 months or 60 months at 4.25% fixed annual interest rate; interest-only payments for the first year)

Financial Resources

- **California Small Business COVID-19 Relief Grant Program**
(reopened for waitlisted applicants from previous rounds through September 16, 2021; new applicants will be accepted in Round 9, which runs through September 30) (grants of \$5,000 to \$25,000)
- **Renaissance Entrepreneurship Center and the Alameda County-Oakland Community Action Partnership relief grants** (\$1,500; first-come, first-served)

Financial Resources

- **Foundation Directory Online** (connects nonprofits with funding opportunities)
- **Other private options** (TMC Community Capital a KIVA)

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
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