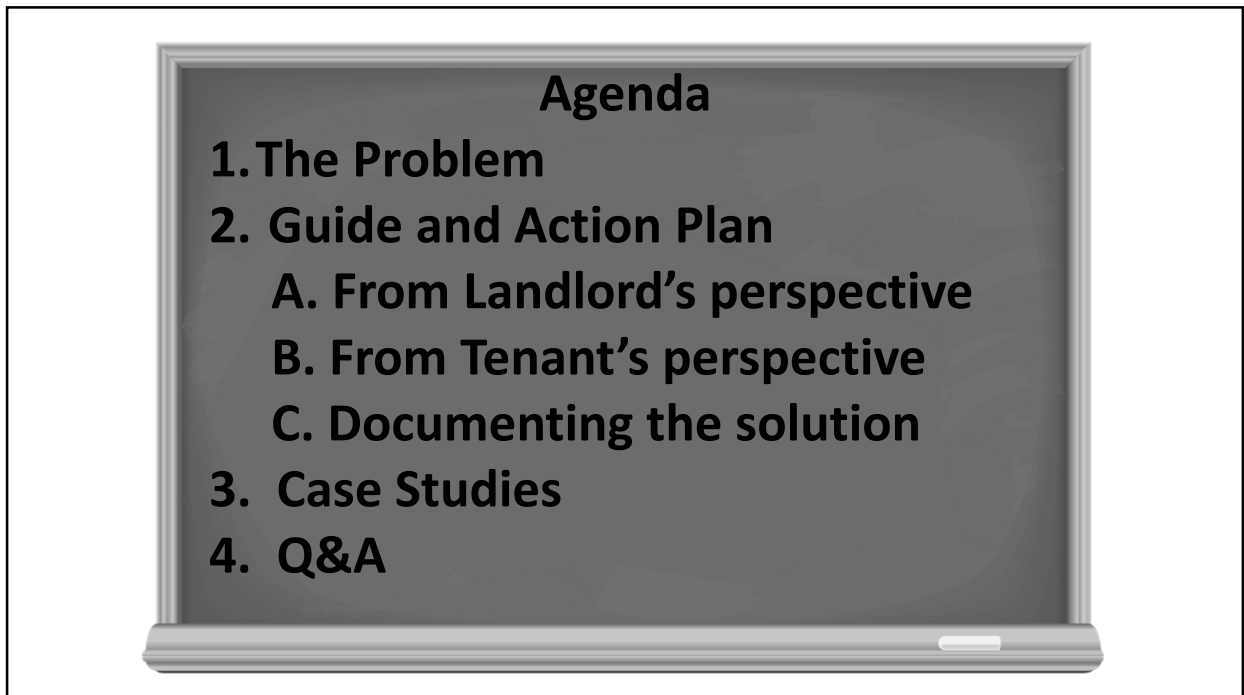




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Why This CRE Industry Challenge is Unprecedented... and Why Commercial Landlords and Tenants Should Care

“Unlike past economic challenges, COVID-19 is having an immediate and widespread impact on the CRE industry across the globe.

...

As a rule of thumb, the [CRE] industry has historically lagged the broader economy by six months in terms of experiencing the effects. But the expansiveness, depth, and unprecedented reach of this pandemic has started impacting the CRE industry much sooner.

...

Rather than the typical lag, the CRE industry was affected immediately. This was because trade activities and occupiers’ businesses were shut down.”

Deloitte.

3

New Challenges Demand New Solutions



New Challenge: Quick evictions difficult due to orders, laws, court closures

New Solution: New Mindset
SEEK BEST COMPROMISE

4

The Problem

Tenants: Are facing **unprecedented and unanticipated** economic hardship and uncertainty, yet are still obligated to pay rent and are fighting for the very existence of their business.

Landlords: Are facing **unprecedented and unanticipated** economic hardship and uncertainty, rent defaults, economic hardship and uncertainty, yet are still obligated to pay their mortgage and building expenses and are not in a position to become effectively a lender to their delinquent tenants.

5

Our Purpose: To Educate and Provide An Action Plan



- For Landlords
- For Tenants
- Pre-Negotiation
- Negotiation
- Documentation of Solution

6

What's New

- ❖ Coronavirus infections and death rate in California have risen sharply in the last month
- ❖ Many commercial tenants' PPP and other financial relief has been exhausted
- ❖ Governor Gavin Newsom's order on July 13 closing indoor operations STATEWIDE for a variety of commercial businesses
- ❖ An even more restrictive order affecting businesses in Marin County and 29 other California counties
- ❖ State to operate with a "dimmer switch" to modify restrictions as needed

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The screenshot shows the website [Covid19.ca.gov/roadmap-counties/](https://covid19.ca.gov/roadmap-counties/). The page features a dark header with the CA.GOV logo and navigation links for Home, Get help, Health information, Working and living safely, and How you can help. A search bar and language selection dropdown are also present. The main content area is titled "County variance info" and includes a sub-section for "County data monitoring".

County variance info
Last updated July 15, 2020 at 4:56 PM

County data monitoring

California is [monitoring COVID-19 closely](#) in each local community and keeping the public informed. We're teaming up with counties to fight it with every tool we have: [current local data](#), testing, contact tracing, infection control, emergency supplies, containment measures, and more.

Counties should be ready to restore limitations if outbreaks increase. The State Public Health Officer may take action if needed.

Effective July 13, 2020, ALL counties must close indoor operations in these sectors:

- Dine-in restaurants
- Wineries and tasting rooms
- Movie theaters
- Family entertainment centers (for example: bowling alleys, miniature golf, batting cages and arcades)
- Zoos and museums

At the bottom of the page, there are links for "County alerts", "Search", and "Back to top".

8

Covid19.ca.gov/industry-guidance/#top

COVID19.CA.GOV

Home Get help Health information Working and living safely How you can help

Industry guidance to reduce risk

Last updated July 15, 2020 at 4:54 PM

On June 18, 2020, CDPH issued Guidance on the Use of Face Coverings, which broadly requires the use of face coverings in California when in public or common spaces. Complete details, including all requirements and exceptions to these rules, can be found in the guidance.

As California reopens, every business will need to create a safer, low-risk environment. If you own or manage a business, follow the guidance below to protect your workers and customers.

The industry-specific guidance below applies to businesses statewide. Review the guidance that is relevant to your workplace, make a plan, and put it into action. Post your completed checklist so everyone can know the steps you've taken. Feel free to add more safety measures to the ones listed here.

Some counties have received state approval to move further into the reopening roadmap. To see guidance for industry sectors allowed to reopen in counties with state approval, see the list of [guidance for counties with attestations](#).

Before reopening, all facilities **must**:

1. Perform a detailed risk assessment and create a site-specific protection plan

9



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COVID-19: BEST PRACTICES FOR COMMERCIAL LANDLORDS

Marin County Bar Association
Real Estate Section
July 16, 2020

Philip R. Diamond, Esq.

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1

COVID-19: BEST PRACTICES FOR COMMERCIAL LANDLORDS

INTRODUCTION

- *What if tenant stops paying rent (or says it's about to)?*
- *Commercial lease disputes and mediation*
- *Is there insurance available for lost rental income?*
- *Can I lease my commercial property during the COVID-19 crisis?*



2

COVID-19: BEST PRACTICES FOR COMMERCIAL LANDLORDS

INTRODUCTION

- *Non-residential only*
- *Many areas of uncertainty*
- *These are judgment calls*
- *We are not giving legal advice*



3

COVID-19: BEST PRACTICES FOR COMMERCIAL LANDLORDS

WHAT IF TENANT STOPS PAYING RENT?

Preliminary Considerations

- *Get lawyer involved early on*
- *Gather all documents (lease, loan, vendor contracts, financials, etc.)*
- *Evaluate contractual obligations (monetary, non-monetary)*
- *Develop best/worst case, mid-ground projections*
- *Get Pre-negotiation Agreement with tenant*



4

COVID-19: BEST PRACTICES FOR COMMERCIAL LANDLORDS

WHAT IF TENANT STOPS PAYING RENT?

Analysis

- *What does the lease provide?*
 - What are tenant's rights?
 - Force majeure?
 - Impossibility/impracticability of performance (Civil Code Sec.s 1441, 1511)?
 - What are your rights?
 - Terminate and sue?
 - Collect rent when due?
- *What are your legal rights under State and local Coronavirus Orders?*
 - Local ban on commercial evictions?
 - Are the courts open for you?
 - No unlawful detainer summonses may be issued



5

COVID-19: BEST PRACTICES FOR COMMERCIAL LANDLORDS

WHAT IF TENANT STOPS PAYING RENT?

Analysis (cont'd)

- *Practical difficulties of getting another tenant in place?*
- *Do you want to preserve the relationship? If yes:*
 - Work with tenant toward creative solution
 - Get tenant's financials
 - Full or partial abatement/deferral
 - Multiple options for duration
 - Multiple options for repayment
 - Get it properly documented
- *Coordinate with your lender*
 - Consider covenant waivers/modifications
 - Loan modification options



6

COVID-19: BEST PRACTICES FOR COMMERCIAL LANDLORDS

COMMERCIAL LEASE DISPUTES AND MEDIATION

- *Why discuss mediation in context of resolving commercial lease disputes?*
 - Need a new mindset
 - Mediation principles can be applied to resolution of commercial lease disputes
 - Risk analysis
 - “Positions vs. “Interests”
- *Why use mediator?*
 - May be required by lease
 - Can assist with understanding of risks & interests, and exchange of information
 - Quicker and cheaper solution than litigation
 - May need some “cat-herding”
 - Confidential process

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7

COVID-19: BEST PRACTICES FOR COMMERCIAL LANDLORDS

IS THERE INSURANCE AVAILABLE FOR LOST RENTAL INCOME?

- *Business Interruption insurance covers lost income resulting from:*
 - Damage to own property (Business Interruption)
 - Damage to property of customer/supplier (Contingent Business Interruption)
 - Government action/evacuation orders (Order of Civil Authority)
- *Can be stand-alone policy, but usually part of commercial property insurance*
- *Read your policy*
- *Insurance company’s probable response (depending upon policy):*
 - Property damage required
 - “Period of restoration” limitation on amount payable
 - Exclusions may apply



8

COVID-19: BEST PRACTICES FOR COMMERCIAL LANDLORDS

CAN I LEASE MY COMMERCIAL PROPERTY DURING THE CRISIS?

- *Yes, but consider:*
 - Timing
 - Potential tenant pool
 - Availability of contractors for TI's
 - Availability of movers
 - Restrictions on marketing
 - Can you use an agent?
 - Yes, with restrictions (depending on local jurisdiction)
 - Are real estate services "essential"?
 - Can you show the property?
 - May be prohibited or restricted by local jurisdiction
 - Use "best practices" per CDC Guidelines



9

COVID-19: BEST PRACTICES FOR COMMERCIAL LANDLORDS

ACTION PLAN

- *Put yourself in best position to negotiate and resolve ("knowledge is power")*
 - Get lawyer involved early
 - Consult lawyer to:
 - review your lease, loan, and other relevant documents and understand your strengths/weaknesses and limitations
 - understand existing and proposed orders and laws that may impact what you can/cannot do
 - understand if your insurance may provide relief, and to make claim
 - get Pre-negotiation Agreement with tenant
 - help you identify all potential alternative solutions
- *Consider mediation principles in reaching creative resolution*
- *Use best practices in marketing vacant properties*



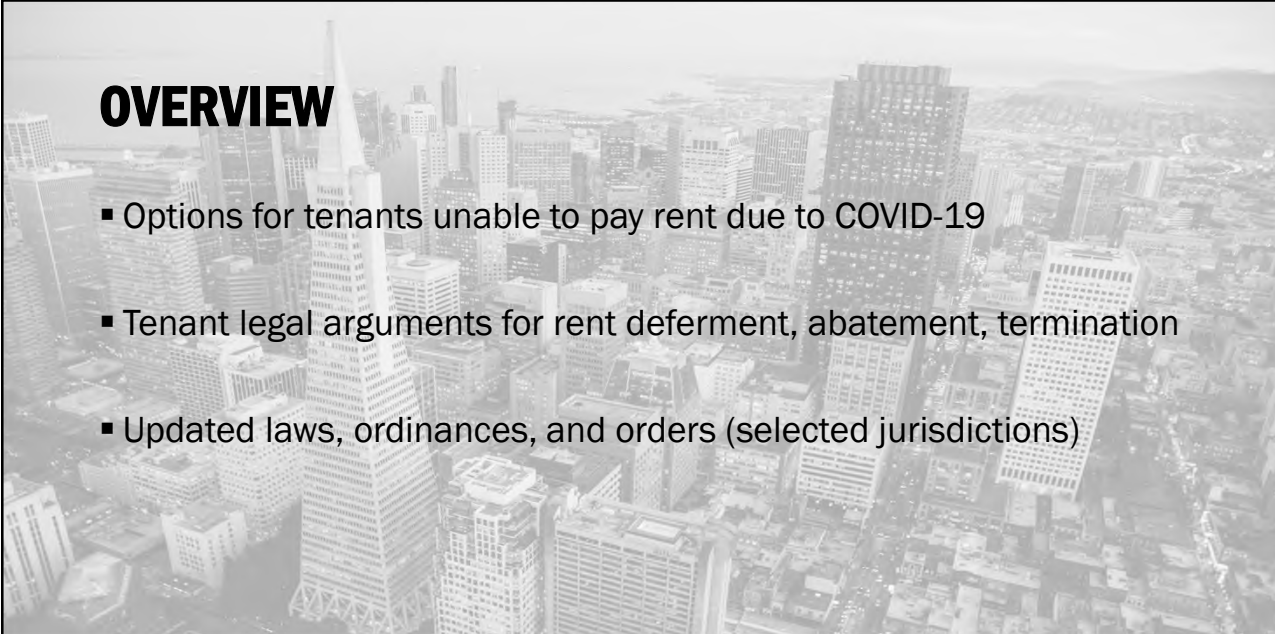
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**COVID-19:
COMMERCIAL LEASING ISSUES
FROM THE TENANT'S PERSPECTIVE**


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OVERVIEW

- Options for tenants unable to pay rent due to COVID-19
- Tenant legal arguments for rent deferment, abatement, termination
- Updated laws, ordinances, and orders (selected jurisdictions)



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2

POTENTIAL TENANT OPTIONS

- Deferment/repayment, abatement/waiver, termination, etc.
- Contingencies for “dimmer switch” changes in local restrictions
- Commitment to reassess later if emergency orders not lifted



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LEASE TERMS

All Leases

- Force majeure
- Landlord maintenance
- Casualty/condemnation
- Tenant use/access rights
- Quiet enjoyment

Retail Leases

- **Operating Covenants and Go Dark Restrictions...**is tenant required to stay open; if so, for certain hours.
- **Co-tenancy...**is landlord required to have certain tenants or percentage occupancy?

Consequences

- Default
- Remedies
- Rent increases
- Remaining term



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CALIFORNIA LAWS



- California statutes and common law:
 - Civ. Code §§ 1441 (impossible K = void) and §1511 (perf./delay excused when perf. is impossible and purpose is frustrated)
 - Frustration of purpose, impossibility, impracticability
 - What is the purpose of the lease? Does LL warrant suitability for use? Is change of use allowed?
 - Monetary vs. non-monetary obligations
 - Financial hardship/more expensive ≠ impossible/impracticable
- Statewide
 - Exec. Ord. N-28-20: Local governments have authority to suspend evictions when basis is nonpayment of rent due to losses caused by C-19 pandemic
 - Cal. Judicial Council emergency rules: no summons issued on UD's until 90 days after emergency period, except where necessary to protect health/safety
 - SB-939 (defeated for now)



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SAN FRANCISCO LAWS



Mayor's supplemented proclamation applies to commercial tenancies; currently extended to Aug. 15, 2020

- SF tenants with w/gross annual receipts of \$25m or less
- Tenants are protected against eviction for missed rent payments after March 17, 2020 if they show LL documented inability to pay due to "financial impact related to C-19" or any govt. response to C-19
- "Financial impact" = substantial decrease in income due to illness or other disruption, reduced opening hrs or reduced consumer demand, or temp. closure of the business, incl. temp. closure required to comply with restrictions



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SAN FRANCISCO LAWS (cont.)



- Protection period may be extended monthly up to 6 months with continued T documentation
- LL can draw from security deposit if lease allows, but can't evict for T not replenishing
- Landlord can evict after 6 months if still unpaid rent (but CJC rules still say no summons on a UD)
- Office of Economic & Workforce Development guidelines provide for landlord hardship exemptions in limited circumstances (e.g. default on LL's loan, obligation to lease to new tenant)
- Does not relieve T rent obligations or prohibit LL actions for unpaid rent



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MARIN COUNTY LAWS



- Bd. of Supervisors Resolutions 2020-27, 2020-40 (applies to all cities, towns, and unincorporated areas in Marin)
- Commercial tenant eviction protections expired May 31 and have not been renewed; Ts have 90 days to repay starting May 31
- Tenants who miss rent payments between Feb. 22 and May 31 could get eviction protection with notice to LL within 30 days after of inability to pay rent



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MARIN COUNTY LAWS



- T must have provided “objectively verifiable information” that inability to pay is “due to financial impacts [directly or indirectly] related” to C-19 or govt. orders
- T who demonstrates C-19 financial impact has up to 90 days after expiration of the resolution to pay past-due rent **“before the tenant shall be deemed to be in default of rent payment obligations.”**
 - → no landlord actions for unpaid rent in meantime (*cf.* San Francisco)
- County has now dialed back re-opening; potential push for more protection from businesses forced to shut down again



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WHAT WE DO FOR LANDLORDS AND TENANTS

www.realestateinvestorlaw.com

- Prepare customized action plan to make sure you’re covering all the bases
- Lease analysis to make sure you understand your strengths/weaknesses
- Loan documents analysis to make sure you understand what you can and can’t do
- Insurance analysis to determine if you have coverage to help and the best way to submit your claim to increase the chance of your carrier providing coverage
- Prepare Pre-Negotiation Agreement (Landlord)
- Negotiate, Mediate, Arbitrate and Litigate to protect your interests
- Prepare Compromise Lease Addendum
- Prepare Rent Deferment Agreement
- Prepare Rent Abatement Agreement
- Prepare Loan Conversion Agreement



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THANK YOU!

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The cover of a report titled "A COMMERCIAL LANDLORD'S CORONAVIRUS GUIDE AND ACTION PLAN". The background is a black and white photograph of a modern skyscraper with a glass facade. The title is in large, bold, sans-serif capital letters. Below the title, there is a paragraph of text: "THERE ARE SO MANY COMPLEX LEGAL, FINANCIAL, AND STRATEGIC ISSUES THAT MUST BE CONSIDERED IN DEVELOPING AND IMPLEMENTING YOUR RESPONSE TO THE CURRENT CRISIS THAT THE ONLY WAY TO MAXIMIZE THE POTENTIAL FOR A GOOD OUTCOME IS TO SEEK PROFESSIONAL HELP FROM THE BEGINNING." At the bottom of the cover, there is the Lerman Law Partners, LLP logo, a phone icon with the number "415-454-0455 OR 800-5-LERMAN (900-553-7626)", and a website icon with the URL "WWW.REALESTATEINVESTORLAW.COM".

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