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[updated April 23, 2020] I have received numerous calls from my California clients, wondering how their businesses can survive the loss of patients, staff, suppliers, and cash flow created by the COVID-19 "stay-at-home" orders. Everyone has heard something of the programs available to help them. Below is a summary of the recent moves made by our federal, state and local governments, and some commercial lease issues arising from these "stay-at-home" orders, to help the business community through this economic shutdown, with links to help you and your clients (as applicable) apply for these programs as applicable. Topics include (click to go directly to topic):

- A. [The Federal CARES Act](#)
- B. [Federal/State Tax Extensions and Deferrals](#)
- C. [Commercial Property Leases](#)
- D. [Employment Law Issues](#)
- E. [Other Significant Orders and Programs](#)

Also, international law firm, McDermott Will & Emery, has put out an extensive set of webinars, podcasts and articles on how COVID-19 affects various industries in particular areas. While the subject matter tends to be aimed at their large-cap and mid-cap multi-national business client base, some of you may find these useful for a deeper dive into the subject matter: [Coronavirus Resource Center](#).

I hope this information will be helpful to you and your clients. Please let me know if you have any comments or questions.

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## **A. The Federal CARES Act**

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, was passed by Congress and signed into law on March 29, 2020. You can read various summaries at your chosen news outlet, or (if you can't sleep) read the full 335-page text at [HR 748: Coronavirus Aid, Relief, and Economic Security Act](#). There are many programs meant to benefit employees and residential homeowners and tenants, but by and large those programs are not mentioned here. Matters of particular interest to my client base (professionals and small business owners, and those who advise them) include the following:

- 1. SBA Disaster Loans.** The SBA's Economic Injury Disaster Loan ("EIDL") program provides low-interest loans to businesses for declared disasters. The EIDL program also provides an up-to-\$10,000 emergency grant to small businesses for current operating costs, limited to \$1,000 per employee. If that grant is used for paid sick leave for employees unable to work due to the direct effect of COVID-19, maintaining payroll to retain employees during the disruption, meeting increased costs to obtain materials due to interrupted supply chains, making rent or mortgage payments, and repaying obligations that cannot be met due to revenue losses, the EIDL grant need not be repaid, even if you don't qualify for the EIDL loan. Please see the [SBA Application](#) and the U.S. Chamber of Commerce guide to [Corona Virus Emergency Loans](#) for more details. You can check the status of your EIDL application; see [Merchant Maverick](#) for details.
- 2. Paycheck Protection Program.** This program provides low interest loans through the SBA for small businesses (now including independent contractors and sole proprietors), that can be forgiven if all employees are kept on the payroll for eight weeks and the money is used for payroll, rent, mortgage interest, or utilities. Loans are through participating FDIC banks and SBA 7(a) lenders. Funds are first-come-first-served, and generally are only available through your business' current bank. Money has run out for this program, but additional funds are expected to be authorized this week. More details are available at [SBA Payment Protection Program](#).
- 3. Unemployment Benefits for Independent Contractors.** This program provides a temporary Pandemic Unemployment Assistance through December 2020 to help non-employees who lose work as a direct result of the COVID-19 pandemic. Apply through your state's labor department; in California that is the Employment Development Department (EDD). Please see the [EDD UI Online Application](#) and [EDD UI for Contractors](#) for more details.
- 4. Retirement Plan Withdrawals.** This program allows for withdrawals of up to \$100,000 from qualified retirement plans in 2020 without paying the 10% early withdrawal penalty, if **(A)** the taxpayer, or its spouse or dependent, is diagnosed with COVID-19, or **(B)** the taxpayer experiences adverse financial consequences as a result of being quarantined, furloughed, laid off or having work hours reduced due to the coronavirus pandemic. Income tax would be due on those withdrawals, and you would be selling stock during a strong bear market. Therefore, *I would strongly advise against doing so unless absolutely necessary.*
- 5. Student Loans.** Borrowers under student loans held by the Department of Education will have interest stop accruing, and need not make the otherwise required monthly payments, until October 1, 2020. These suspended payments will be treated as "paid" by credit reporting agencies. Also, any loan assistance paid by an employer between March 29, 2020, and January 1, 2021, up to \$5,250, will not subject the borrower to income tax.

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## **B. Federal and State Tax Extensions and Deferrals**

1. **Income Tax Returns.** The IRS extended its 2019 individual tax return deadline from April 15 to July 15, 2020, no matter how much you owe, and without filing for an extension. California has matched this extension with extending the time to file tax returns by 3 months for returns due on or before July 31, 2020. See [IRS Notice 2020-18](#) and [Executive Order N-40-20](#) for more details.

2. **Income Tax Payments.** Federal quarterly estimated taxes (for S corporation and sole proprietorship distributions) ordinarily due on April 15, 2020, have also been extended to July 15, 2020, without penalty or interest. California quarterly estimated taxes (for S corporation and sole proprietor distributions) ordinarily due on April 15 and June 15, 2020, also have been extended to July 15, 2020. See [IRS Notice 2020-18](#) and [Executive Order N-40-20](#) for more details.

3. **Plan Contributions.** The deadlines for employer contributions to qualified retirement plans, health savings accounts, medical savings accounts, and contributions to personal IRAs, have also been extended to July 15, 2020. See [IRS Filing/Payment Deadlines](#) for more details.

4. **Payroll Tax Returns and Deposits.** The federal 6.2% employer social security tax due for wages paid after March 12, 2020, through December 31, 2020, may be deferred for payment through 2021 and 2022. (Section 2302). California will also permit deferral of your state payroll tax returns and deposits for up to 60 days due to COVID-19 impacts, but only upon written request within 60 days of the original due date. No form is yet available to make this request. See [EDD Coronavirus-19](#) for more details.

California will also permit deferral of your state payroll tax returns and deposits for up to 60 days due to COVID-19 impacts, but only upon written request within 60 days of the original due date. No form is yet available to make this request. See [EDD Coronavirus-19](#) for details.

**Important:** the CARES Act payroll tax deferral is not available to employers receiving benefits under the Paycheck Protection Program (both described in Part 1). Payroll tax deferral also will reduce the Employee Retention Credit under Section 2301, the Paid Sick/Family Leave Credit under the Families First Coronavirus Response Act, and other credits available under other federal tax law. Please talk to your CPA for details on the interplay of these federal tax credits.

5. **Sales/Use Tax Payment Plan.** Businesses with under \$5 million in annual taxable sales now can defer payment of up to \$50,000 of 1st quarter 2020 California sales and use tax liability without penalty or interest. The California Department of Tax and Fee Administration is now offering these 12-month payment plans, with the first payment due July 31, 2020. Further details are sparse, but see [CDTFA 20-07](#) for updates.

6. **Rare Property Tax Deferral.** San Francisco and San Mateo Counties have pushed the deadline for property tax payment to May 4, 2020 (the anticipated lifting of the Governor's stay-at-home order). To my knowledge, no other California counties are offering any deferment or payment plans for property taxes beyond the April 10 deadline. Given that property taxes supply the majority of local government funding, I doubt that we will see additional deferments. Some counties that are offering mechanisms for waiver of late payment penalties. See [Inside SALT: California Property Tax](#) for more details.

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### **C. Commercial Property Leases**

The CARES Act did not address eviction or foreclosure moratoriums for commercial property – only for certain classes of residential property, at Sections 4022-4024. Therefore, the current COVID-19 response for commercial property issues must be addressed at the state or local level. Expect new developments as the situation changes over time.

**1. California Judicial Council – Statewide Eviction Moratorium.** On April 6, 2020, the California Judicial Council ordered that no court filing or appearances on any residential or commercial judicial foreclosure or eviction proceedings would be permitted until 90 days after expiration or other termination of the COVID-19 “stay-at-home” order, with any trial dates continued for at least 60 days, “unless necessary to protect public health and safety.” Since the order only covers action by the court, it does not extend to landlord remedies, such serving a tenant with a 3-day notice to pay rent or quit (the first step toward eviction). It also doesn’t prevent local law enforcement from enforcing previously issued “lockout” orders to physically remove a tenant from the premises. See [Temporary Emergency Rules](#) for more details.

**2. Eviction/Lockout Moratoriums.** On March 16, 2020, Governor Newsom issued [Executive Order N-28-20](#) authorizing local governments to halt evictions for renters, encouraging financial institutions to slow foreclosures. Then on March 27, 2020, Governor Newsom issued [Executive Order 37-20](#) banning the enforcement of “lockout” if the tenant notifies the landlord in writing within seven days, and provides verifiable documentation within 30 days, that the tenant’s inability to pay was due to COVID-19, through May 31, 2020. Many cities and counties have already passed emergency ordinances preventing landlords from evicting or physically removing commercial tenants. Like Executive Order 37-20, local eviction or removal moratorium goes into effect only if the tenant notifies the landlord in writing of tenant’s COVID- 19 circumstances leading to non-payment of rent, but the requirements are not standardized. Also, these local moratoriums can’t shorten the Judicial Council’s or Governor’s timelines; they can only extend them.

Every city and county have their own approach, with different landlord notification requirements, notification deadlines, and moratorium timelines. Some, but not all, even prevent a landlord from issuing a 3-day notice to pay rent or quit (the first step toward eviction) if the tenant provides the required notice and documentation, or stop previously issued “lockout” orders. Close reading of the law is necessary to confirm your landlord notification letter meets the requirements of the emergency ordinance applicable to your commercial lease. I cannot provide specific rules for each city and county here, but on request I can prepare the appropriate letter for delivery to the landlord. See [COVID Notice](#) for more details.

**3. Rent Deferral.** Every eviction moratorium order and ordinance I’ve seen still requires the tenant to pay all the back rent due at some point after the eviction moratorium ends, ranging from “immediately due” to payments over nine months. However, State Senator Scott Weiner (D-San Francisco) said he was working on legislation to place “a strong moratorium on evictions,” and create a structure for renters to gradually pay back rent so they aren’t immediately hit with a large back rent payment at the end of the crisis. Stay tuned.

**4. Business Interruption Insurance.** Many commercial tenants are required to carry insurance, whether by the Lease itself, the terms of its purchase or buildout loan, or on their own volition. Frequently that includes business interruption insurance (aka loss of business income). Again, there is no California statute or case law that requires insurers to include any force majeure relief in their standard policies, and (again) the strict language in the policy determines coverage. Please review your insurance policy to see if there is any basis to make a claim against your business insurance policies due to COVID-19 “stay-at-home” order.

**5. Force Majeure (Act of God)?** Some clients have asked if it is possible to break their lease, or stop paying rent, based on “force majeure” – which translates to “superior force” in French. At law, it refers to unforeseeable circumstances that prevent someone from fulfilling a contract. California Civil Code Section 1511(2) temporarily excuses the failure or delay to pay rent to “[w]hen it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary.”

Note that the excuse works only as long as the causes exist: applying only “to the extent to which they operate.” Despite arguments made by some attorneys and commentators, I believe that the courts ultimately will read this statute to permit the deferral, and not the abatement, of rent payments. The “superhuman force” of COVID-19, and the orders of government officials, do not prevent rent from being paid at all ... they only prevent rent from being paid on time.<sup>1</sup> This is already the position that has been taken in all the eviction moratoriums described at Section 3 above. Certainly, many attorneys will make the argument that payment was made impossible due to business closures. However, it was the Governor, and your local supervisors or city councils, that ordered non-essential business closures. While COVID-19 prompted those closures, it is my opinion COVID-19 is not the actual, direct, and proximate cause of those closures..

Also, if your business is an “essential business” you are not required to close. Dental offices are one such essential service, and their closure has not been ordered by any government agency. The California Dental Association and American Dental Association are not government agencies, and therefore do not have the power to order closures, but even these organizations have only “highly recommended” closure of dental offices for non-emergency work. While lawyers may talk a good game, it’s a losing game for you, the tenant, to consider that legal action based on Section 1511(2) will be a cost-effective approach.

It is also possible (though extremely unlikely) that your Lease will have the “force majeure” language necessary for you to make a claim for rent reduction, but you can review your Lease to see if you have any basis for such a claim for the duration of the “stay-at-home” order.

**6. Eminent Domain?** It is possible that these government-mandated COVID-19 closings constitute an act of “eminent domain” or “condemnation,” because your closure converted your business to “public use.” If this argument is accepted by the courts, business owners would demand “just compensation” from the government body that shut them down. I know of no case law that would currently support this novel legal argument, but I am certain it will be tried. Again, stay tuned.

**7. Frustration of Purpose?** It is also possible that the COVID-19 shutdown allows a tenant to use “frustration of purpose” or “impossibility of performance” as a defense to the lease. Numerous California cases have this defense: “a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made .... [but] It is not enough that the transaction [will] become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract [emphasis added].”

I believe the “stay-at-home” orders are very unlikely to require complete business closure for more than 3 consecutive months. Therefore, by the time the courts re-open to hear these kinds of cases, the “stay-at-home” orders will have been lifted and the tenant’s purpose will no longer be frustrated. While the coronavirus may be “novel,” arguing “frustration of purpose” won’t be successful, at least in the context of a long-term lease that extends beyond the duration of the “stay-at-home” order.

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<sup>1</sup> I know of no statutory or case law that describes government officials, as a class, as being “enemies of the state.”

**8. Lease Renegotiation?** Tenants may be allowed to not pay rent during their area's eviction moratorium, but that balloon rent payment due 2-12 months afterwards could put many of them out of business. It's also possible that the landlord could invoke a "continuous operation" clause to put the tenant into default. What will landlords actually do when they are permitted to demand back rent or otherwise claim a default? You'll need to consider your particular landlord's motive for the answer.

If the landlord wants to take back the space for more profitable purposes – a sale free of any leases, demolition for redevelopment – the landlord will be unwilling to give the tenant any rent discounts beyond the landlord's timeframe to sell or redevelop. A landlord also may be unhappy with under-market rent, or a lease that makes it hard to pass through increasing property taxes, insurance or maintenance costs.

Absent those special circumstances, it still may be in the landlord's interest to negotiate a rent deduction, a deferred repayment schedule for back rent, a tenant improvement allowance, changes to non-monetary terms of the existing lease, or any combination. Certainly, there is a risk, though minor, that some of the "force majeure" or "impossibility" claims would be successful in court, and those laws are certainly worth bringing up in some lease renegotiations. However, the more powerful reason for negotiating a rent reduction is that it is far more expensive for a landlord to bring in a new tenant than to keep the existing tenant.

Advertising and broker commissions may have to be paid to obtain a new tenant. Repainting, repairs and other upgrades may be required. A prospective tenant could demand free rent and a tenant improvement allowance, particularly if there is a glut of available space due to permanent business closures. Furthermore, that prospective tenant may be one that already lost their pre-existing lease due to the COVID-19 shutdown. Finally, the only winners in lawsuits to collect back rent from evicted tenants will be the lawyers. It is virtually certain that, absent unlikely circumstances, the landlord is going to be in a far better financial position if it can keep its existing tenants, and the only way to do so is not force them out of business. That is the way some big landlords are thinking: some of the biggest landlords in southeast Asia are offering up to 50% rent abatements to their retail tenants.

As for the timing for a tenant to request a rent reduction, it all depends on the parties' particular situations and thought processes. On March 18, my (proactive and thoughtful) landlord granted the entire building a 15% base rent credit for April (and extended through May), noting that "everyone will be encountering economic hardship during this time of uncertainty. We will be experiencing little or no leasing activity and perhaps increased vacancy.... We will review the status of COVID-19 this time next month and will notify you of any rent assistance that may be provided." I think these observations will apply to every landlord throughout the country, and every landlord will have to consider tenants' renegotiation requests.

Landlords themselves have their own concerns. Certainly, the landlord needs to collect rent to pay for insurance, property taxes, utilities, maintenance costs and loan payments. However, rent reductions could trigger default of their property acquisition loan, by breaching a "full rent required," "no lease amendment," or "minimum operating income" covenant in their lenders' loan documents. Landlords need to review their loan documents and check with their lenders to confirm that any tenant rent relief granted will not endanger the landlord's position with its lender. See [COVID-19 Impact on Lease Obligations](#) for more details.

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#### **D. Employment Law Issues**

- 1. Required Paid Sick Leave.** The Families First Coronavirus Response Act (FFCRA) was passed by Congress and signed into law on March 18, 2020. The full text can be found at [H.R. 6201: Families First Coronavirus Response Act](#). Among other matters, the FFCRA expanded paid sick/family leave rights for all employees, regardless of the size of the employer. Small businesses with fewer than 50 employees may be exempt from providing FFCRA sick leave due to school closings or childcare unavailability, if the leave requirements would jeopardize the viability of the business as a going concern, but rules are not yet final. See [Dept. of Labor: Paid Leave](#), [Temporary Rule: Paid Leave](#) and [National Law Review](#) for more details. See Section 5102. California also provides a fairly thorough explanation of its paid sick leave requirements at [DIR FAQs on COVID-19](#).
- 2. Paid Sick Leave Tax Credit.** The FFCRA also provides a payroll tax credit to employers (including self-employed individuals) who make qualified sick leave payments. See [IRS Tax Credits for Paid Sick Leave](#) for more details. (Sections 7001 through 7003)
- 3. Staff “Short Notice” Terminations.** For the duration of the COVID-19 emergency declaration, California small employers (less than 75 during the last 12 months) need not give 60 days’ written notice of termination under specific COVID-19-related circumstances. See [Executive Order N-31-20](#) and [DIR Workforce Guidance](#) for more details.

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### **E. Other Significant Orders and Programs.**

- 1. Essential Service Sectors.** The California “stay-at-home” order does not apply to workers in essential service sectors. On March 22, 2020, the California State Public Health Officer provided a list of designated “Essential Critical Infrastructure Workers.” That list includes many of you in my client base: doctors, dentists, psychologists and psychotherapists, home health care workers, construction workers and suppliers (including general contractors), and financial service workers (e.g., mortgage and practice acquisition lenders). It also includes attorneys and accountants assisting other critical sector services (such as myself). See [Essential Sector List](#) for more details.
- 2. Continuing Professional Education; License Reactivation.** Under authority of [Executive Order N-40-20](#), the California Department of Consumer Affairs has extended for 60 days “Division 2” health care professional’s continuing education requirements for 60 days (e.g., medical and naturopathic doctors, dentists, chiropractors, psychologists, physical therapists, and veterinarians). The DCA has also waived certain fees and educational requirements for reinstatement of Division 2 licenses. See [Current DCA Waivers](#) for details and future changes.
- 3. Department of Motor Vehicles.** Executive Order N-40-20 also suspends the requirement of DMV in-person license renewals for 60 days. The DMV is expanding online services to permit title transfers and registration renewals, and has requested law enforcement agencies to exercise discretion before citing drivers for expired licenses or registrations. See [DMV COVID-19 Response](#) for details.
- 4. Residential Mortgage Relief.** A number of banks and credit unions have agreed to provide mortgage and fee relief for loans secured by the borrower’s residence. I do not know if any of these lenders have extended this relief to commercial property borrowers, but I would anticipate that relief eventually will be forthcoming. See [DBO Mortgage Relief](#) for contact information on participating lenders.
- 5. Utility Shut-Off Relief & Enforcement.** The California Public Utilities Commission (PUC) sent letters to all energy, water, sewer and communications (cable internet) companies under PUC regulation recommending that non-payment due to the current state of emergency should not result in any customer service disconnections, and that data caps and overage charges should be suspended on wireless and internet services. While these PUC letters do not mandate a moratorium on non-payment disconnections, they do imply that non-compliant companies will be subject to heightened scrutiny and possible penalties.

On April 2, 2020, Governor Newsom issued an executive order restricting water shutoffs to small businesses. Many counties and cities have imposed mandatory utility shut-off moratoriums, while many major utility companies have already done so voluntarily (e.g., Southern California Edison, Pacific Gas & Electric, San Diego Gas & Electric, and Pacific Power). See [Executive Order N-42-20](#), [PUC Coronavirus Information](#), and your local utility company website for more details. National details are available at the [NARUC State Response Tracker](#).

However, some government officials are moving in the opposite direction – punishing business that violate the “stay-at-home” order. For example, the Los Angeles Department of Water and Power has been ordered to shut off services to non-essential businesses that continue to operate despite the California “stay-at-home” order. See [LA Public Order 4/1/20](#) for more details.

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