

# A Practical Guide to the Newly Enacted Massachusetts Eviction Moratorium

Governor Baker declared a state of emergency on March 10, 2020. On April 20, 2020, the Governor also signed into law House Bill No. 4647, which is titled “An Act Providing For A Moratorium On Evictions And Foreclosures During The COVID-19 Emergency.” A copy of the so-called “moratorium” is [linked here](#) for your convenience. For those who own and/or manage commercial or residential properties, Bernkopf Goodman LLP offers the following overview and practical guidance as to the impact of this moratorium to your businesses in Q&A format.

## 1. Does the “moratorium” apply to both residential and commercial landlords?

Yes and No. The first substantive section of the Act applies only to residential landlords. Unlike commercial landlords, the Act prohibits a residential landlord for purposes of a non-essential eviction from issuing any notice to quit, terminating a tenancy, or commencing any eviction case for non-payment of rent, failure to vacate at the end of a tenancy, or for material lease violations that do not involve allegations of criminal activity or lease violations that may impact the health and safety of other residents or persons upon the property. This provision does not impact commercial landlords.

However, certain other provisions of the Act do apply to what is called a “small business premises unit,” which is defined as premises occupied by a tenant for a commercial purposes (profit and not for profit), but excludes tenants (or the party that controls, is controlled by, or is in common control with the tenant entity) that operate multi-state, operate multi-nationally, are publicly traded, or have not less than 150 full-time equivalent employees. Thus, if you have a multi-national corporation as your tenant, the Act would not apply.

## 2. What provisions of the Act impact landlords of a “small business premises unit”?

The Act has additional sections applicable to both residential landlords and landlords of a small business premises unit. The Act includes a section prohibiting all courts with jurisdiction over summary process cases from accepting new cases, entering judgments or executions, or scheduling any court events in non-essential evictions. While certain courts were previously accepting Agreements for Judgment, they are no longer permitted to enter any judgment. If you are already holding an execution for possession, a sheriff or constable is prohibited from enforcing it. However, the deadline or time period for you to act is tolled during the moratorium so you will not lose any rights.

Thus, distinct from residential landlords, commercial landlords of a small business premises unit are able to issue a notice of default for non-payment of rent, terminate the lease, and to accelerate the rent provided the lease permits same. A tenant in a small business premises unit therefore runs the

risk of losing its lease once the courts re-open and owing landlord a significant sum of money. Additionally, the recent Paycheck Protection Program (PPP) was designed, in part, to assist small businesses in paying rent and includes an element of forgiveness so small business tenants are incentivized to make rent payments, thus it is surprising small business units were included in the Act.

The practical application of the court prohibition is that a landlord of a small business premises unit can still terminate a tenancy during the moratorium, but it cannot file a summary process action for a non-essential eviction. However, it is critical to note that the Act also provides an exception for landlords of a small business premises unit that permits the courts to accept and process evictions if the basis is the expiration of the lease or a pre-state-of-emergency default. As such, if the landlord of a small business premises unit seeks to evict a tenant that is holding over after lease expiration or based upon a pre-state-of-emergency default, the court ban does not apply. With that said, many courts still have their own Standing Orders halting all non-emergency evictions until May 4, 2020.

The Act also prohibits both residential landlords and landlords of a small business premises unit from imposing a late fee for non-payment of rent or from furnishing rental payment data to a credit reporting agency, if within 30 days of the missed payment the tenant provides notice to the landlord that the missed payment was due to the financial impact from COVID-19. The Executive Office of Housing and Economic Development is charged with developing forms and recommendations.

### **3. What do you mean when you say the Act only covers non-essential evictions?**

For both residential landlords and landlords of a small business premises unit, the Act applies only to what is called a “non-essential eviction”. A non-essential eviction includes an eviction for:

- (a) non-payment of rent;
- (b) a foreclosure;
- (c) no fault or no cause (although, unlike a residential landlord, a landlord of a small business premises unit can seek eviction based upon expiration of lease term); and
- (d) any lease violation unless it is based upon allegations of criminal activity or other conduct that impacts the health and safety of other residents or persons on the property (although, unlike a residential landlord, a landlord of a small business premises unit can seek eviction if the violation occurred prior to the state of emergency declared on March 10, 2020).

### **4. What if a tenant doesn't pay and I am holding last month's rent or a security deposit?**

The Act specifically permits both residential landlords and landlords of a small business premises unit to access and use a tenant's last month's rent deposit to pay certain stated expenses if a tenant fails to pay rent. The permitted expenses include mortgage payments, utilities, repairs, and required upkeep. In order to do so, a landlord must notify the tenant in writing that: (i) that the funds have been so utilized before the last month of the tenancy; (ii) that the landlord remains obligated to apply that amount to last month's rent; and (c) that the tenant continues to be entitled to interest on such deposit as if such funds were not utilized before the last month of the tenancy. However, the Act is clear that a landlord cannot use last month's rent in advance for non-payment of rent. Lastly, the Act does alter any security deposit laws.

## **5. How long does the moratorium last?**

The Act took effect on April 20, 2020, and the moratorium remains in effect through the earlier of: (i) August 20, 2020, or (ii) forty-five (45) days from the lifting of the state of emergency. However, Governor Baker may postpone such expiration in increments of not more than ninety (90) days, but in no event can he postpone expiration more than forty-five (45) days from the lifting of the state of emergency.

## **6. What is the practical impact to my business?**

At this time, we are seeing tenant groups promoting a free rent period and encouraging tenants not to pay landlords. However, the Act does not excuse a tenant's obligation to pay rent. To the contrary, the Act expressly provides that: **Nothing in this section shall relieve a tenant from the obligation to pay rent or restrict a landlord's ability to recover rent** (emphasis added). As such, while landlords cannot take certain actions during the moratorium, we are working with landlords to send a notice reminding tenants that their obligation to pay rent remains in full force and effect.

In the interim, landlords can still work with tenants on making alternate payment arrangements. In fact, tenants are encouraged to work with landlords to resolve unpaid rent as there could be severe consequences to tenants who have large arrearages once the moratorium expires or who have had their small business premises lease terminated.

[Click here to download a copy of House Bill No. 4647.](#)

To the extent you have specific questions regarding the Act, please reach out to your Bernkopf Goodman team member, or contact [Jason A. Manekas](mailto:jmanekas@bg-llp.com), Esquire at 617-790-3308, or [jmanekas@bg-llp.com](mailto:jmanekas@bg-llp.com).