

May 12, 2020

UPDATE: New York State Extends Eviction and Foreclosure Moratoria, and Provides Certain Additional Benefits to Residential Tenants, During the Coronavirus Pandemic

Key Takeaways

- New York state extended through August 19, 2020 its moratoria on evictions and foreclosures for residential and commercial tenants suffering economic hardship from the COVID-19 pandemic.
- Residential tenants in New York suffering economic hardship from the COVID-19 pandemic can apply their security deposits to the payment of rent.
- No residential tenant in New York can be charged late fees for delinquent rent payments occurring between March 20, 2020 and August 20, 2020.

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On May 7, 2020, New York Governor Andrew Cuomo issued Executive Order 202.28¹ (the “Order”), which modified an earlier executive order² by (among other things) extending moratoria on tenant evictions and mortgage foreclosures, waiving late fees for delinquent rent payments by residential tenants, and allowing residential tenants who face financial hardship on account of COVID-19 to apply security deposits to rent obligations. A follow-on to the [Abandonment of Leases and Abatement of Rent During the Coronavirus Pandemic](#) memorandum issued March 23, 2020 and [UPDATE: New York State Legislature Considers Bill Affecting Certain Rents and Mortgage Payments During the Coronavirus Pandemic](#) issued March 25, 2020, this alert briefly summarizes those provisions in the Order.³

¹ State of New York, Executive Chamber, Executive Order 202.28, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, May 7, 2020.

² State of New York, Executive Chamber, Executive Order 202, Declaring a Disaster Emergency in the State of New York, March 7, 2020. This order has been modified a number of times since it was first issued.

³ While the Order states that the measures implemented therein are made effective through June 6, 2020, it expressly contemplates that a number of those measures (though not the security deposit measures discussed herein) will remain in effect beyond such date.

Extension of Moratorium on Evictions

The Order extends until August 19, 2020 an existing prohibition on the initiation or enforcement by residential or commercial landlords of eviction proceedings for nonpayment of rent by any tenant eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to COVID-19.⁴ The Order does not prohibit evictions for reasons other than nonpayment of rent (e.g., if a tenant breaches a nonmonetary lease covenant).

Extension of Moratorium on Mortgage Foreclosures

Similarly, the Order extends until August 19, 2020 an existing prohibition on the initiation or enforcement by residential or commercial lenders of mortgage foreclosure proceedings for nonpayment by any borrower eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to COVID-19. The Order does not prohibit foreclosures for reasons other than nonpayment (e.g., if a borrower breaches a nonmonetary loan covenant).

The Order does not provide benefits to lenders holding the applicable mortgage loans.

Use of Security Deposits

The Order permits residential tenants eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship on account of COVID-19 to apply their security deposits to the payment of rent (including past-due and future rent).

Tenants who exercise this option must replenish the security deposit (or portion thereof) so applied, in monthly installments equal to 1/12 of the amount so applied, with payments commencing no less than 90 days after the date of such application. Alternatively, such tenants may elect to “retain insurance that provides relief for the landlord in lieu of the monthly security deposit replenishment” and requires landlords to accept such insurance.

Prohibition on Late Fees

The Order prohibits residential (but not commercial) landlords from charging payments, fees or charges for late payments of rent occurring between March 20, 2020 and August 20, 2020.⁵

⁴ It is unclear what constitutes “financial hardship,” and what proof is required to make such a showing, for purposes of this provision or any of the provisions described below.

⁵ Although this Section of the Order does not specify that the prohibition applies only to residential tenants, the underlying law which was modified, Section 238-a of the Real Property Law, applies exclusively to residential dwellings.

This prohibition applies regardless of whether a tenant faces financial hardship due to COVID-19. However, when combined with the moratorium on evictions described above, this prohibition allows tenants facing such hardship to defer rent payments until August 20, 2020, without landlords being able to enforce remedies other than drawing down on security deposits.⁶ While commercial tenants facing such hardship cannot be evicted for nonpayment of rent during this period, they may be subject to late fees and interest charges, depending on the language of the underlying lease.

We will continue to monitor developments and keep clients apprised of pertinent information.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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⁶ See Ryan Tarinelli, New York Court System Plans to Relax Coronavirus Restrictions, Law.com (April 9, 2020 3:22 PM), <https://www.law.com/newyorklawjournal/2020/04/09/new-york-court-system-plans-to-relax-coronavirus-restrictions/>; Chava Gourarie, New York State Halts Evictions and Foreclosures Indefinitely, COMMERCIAL OBSERVER (March 16, 2020), <https://commercialobserver.com/2020/03/new-york-state-halts-evictions-and-foreclosures-indefinitely/>. While landlords could file demand actions, New York State courts are not currently accepting new “non-essential” actions. Landlords could file suit against any out-of-state lease guarantors, depending on the terms of the lease documents and whether the applicable state’s court system is accepting new cases.