BCLP. Client Intelligent

Insights

U.S. COVID-19: CALIFORNIA SENATORS ATTEMPT TO PROVIDE SOME RELIEF FOR COMMERCIAL TENANTS

SENATE BILL 939 INCLUDES A COMMERCIAL EVICTION MORATORIUM, ADDITIONAL TIME TO PAY UNPAID RENT AND A RIGHT TO RENEGOTIATE RENT OR TERMINATE LEASE

Jun 05, 2020

In California, commercial landlords and tenants, as well as their investors and lenders, are paying close attention to Senate Bill 939 ("SB 939"). SB 939, which was introduced by Senators Scott Wiener and Lena Gonzalez on February 6, 2020, was recently passed in the Senate Judiciary Committee by a vote of five ayes and one no, as amended on May 29, 2020[1], and has been advanced to the Senate Appropriations Committee, where it is expected to be heard on June 9, 2020. The current version of the bill seeks to, among other things, (i) temporarily ban commercial evictions of qualifying commercial tenants impacted by COVID-19, (ii) provide qualifying commercial tenants impacted by COVID-19 with additional time to pay any unpaid rent that accrued during the state of emergency, and (iii) provide qualifying commercial tenants most severely impacted by COVID-19 a procedure by which they can attempt to modify rental obligations under their leases, and if unsuccessful in their efforts, to terminate their leases with limited financial consequences. The alert below describes some key aspects of the bill, and includes a discussion of the bill's next stop on the road to the Governor's desk.

In particular, the material provisions of SB 939 relate to the addition of new sections 1951.9 and 1951.10 to the California Civil Code.

New Civil Code Section 1951.9: Addressing the Eviction Moratorium and Repayment of Unpaid Rent

- New Civil Code Section 1951.9(b) and (c) would provide that until ninety (90) days after the state of emergency is lifted, commercial landlords may not serve an "eligible COVID-19 impacted commercial tenant" (as defined below), who has provided written notice to landlord affirming, under penalty of perjury, that such tenant is an eligible COVID-19 impacted commercial tenant, with a notice of unlawful detainer for:
  - failure to pay rent if such notice requires payment of rent that accrued during the state of emergency.
  - failure to perform other conditions under the lease if such notice requires replenishment of a security deposit that the landlord has applied to unpaid rent that accrued during the state of emergency.

Also, new Civil Code Section 1951.9(e) through (h) would provide that any previously provided notices described above would be void and for any unlawful detainer action in which a judgment for possession has been entered in favor of a commercial landlord, the commercial tenant would be able to move to have such judgment set aside on the basis of new Civil Code Section 1951.9. In addition, under new Civil Code Section 1951.9(h), a writ of possession would not issue while the motion to set aside is pending, and if any writ of possession was issued

prior to the filing of the motion to set aside, the court will stay execution of the writ while the motion to set aside the judgment is pending.

- New Civil Code Section 1951.9(i) would give eligible COVID-19 impacted commercial tenants up to twelve (12) months after the end of the state of emergency to pay unpaid rent accrued during the state of emergency, unless such tenants are given more time by their landlord.
- New Civil Code Section 1951.9(j) would provide that no late fees may be imposed for the unpaid rent that accrued during the state of emergency unless not re-paid by the time owed under the previous bullet point.
- As used in new Civil Code Section 1951.9, an "*eligible COVID 19 impacted commercial tenant*" is a commercial tenant that operates primarily in California, that occupies commercial real property and that meets one of the following criteria:
  - has experienced a decline of 20% or more of average monthly revenue over the two most recent calendar months when compared to its average monthly revenue for the two calendar months before the state or local shelter-in-place orders took effect or its average monthly revenue for the same calendar months in 2019, or
  - was prevented from opening or required to delay opening due to the state of emergency, or
  - has suffered a decline of 15% or more in capacity due to compliance with an official order or guideline for preventing the spread of COVID-19.

New Civil Code Section 1951.10: Addressing the Ability to Modify Rent or Terminate Lease

- New Civil Code Section 1951.10(b) and (c) would provide an "eligible COVID-19 impacted commercial tenant" (as defined below; note that though the same term is used in new Civil Code Section 1951.9, this term is defined more narrowly) the ability to serve written notice on the landlord (i) affirming, under penalty of perjury, that such tenant is an eligible COVID-19 impacted commercial tenant and (ii) stating the lease modifications that they desire to obtain.
- If the landlord and the eligible COVID-19 impacted commercial tenant are unable to come to an agreement to modify the lease within thirty (30) days following the date the landlord received the negotiation notice described above, new Civil Code Section 1951.10(d) would provide the eligible COVID-19 impacted commercial tenant the right to terminate the lease by serving a termination notice on the landlord within ten (10) days thereafter. In such event, the eligible COVID-19 impacted commercial tenant would have fourteen (14) days from service of such termination notice to vacate the premises. Once the eligible COVID-19 impacted commercial tenant vacates the premises:
  - The Lease and any third party guaranties will terminate;
  - No further liability for rent, fees or costs will accrue under the lease; and
  - In lieu of any other damages, the eligible COVID-19 impacted commercial tenant will be obligated to pay the landlord, within twelve (12) months of vacating, the following:
    - Three (3) months' worth of past due rent incurred during the state of emergency (or such lesser amount actually unpaid); and

- All unpaid rent that accrued outside of the state of emergency.

- New Civil Code Section 1951.10 would not be applicable to any publicly traded company or a company that is owned by or is affiliated with a publicly traded company.
- New Civil Code Section 1951.10 would be inoperative on December 31, 2021, or two (2) months after the declared state of emergency ends, whichever is later.
- As used in new Civil Code Section 1951.10, an "*eligible COVID 19 impacted commercial tenant*" is an ***eating or drinking establishment, a place of entertainment or a performance venue that is a small business*** *(e.g., a business that is not dominant in its field of operation, the principal office of which is located in California, the officers of which are domiciled in California, and which has 500 or fewer employees)* that operates primarily in California, that occupies commercial real property and that meets one of the following criteria:
  - has experienced a decline of ***40%*** or more of average monthly revenue over the two most recent calendar months when compared to its average monthly revenue for the two calendar months before the state or local shelter in place orders took effect or its average monthly revenue for the same calendar months in 2019, or
  - was prevented from opening or required to delay opening due to the state of emergency, or
  - has suffered a decline of ***25%*** or more in capacity due to compliance with an official order or guideline for preventing the spread of COVID-19.

*N*ote that the differences in the definition of an "eligible COVID 19 impacted commercial tenant" as defined in new Civil Code Section 1951.9 are italicized above.*

A Brief Overview of the Path That the Bill Will Likely Follow if the Bill Continues on the Road to Becoming Law in California

According to staff of the Senate Appropriations Committee, the committee will review the bill to determine its level of fiscal impact and: (1) if the bill is found to have no to low fiscal impacts, the committee will advance the bill to the Senate Floor for Second Reading without a hearing in the committee, (2) if the bill is found to have fiscal impacts that do not meet the criteria for referral to the Suspense File but have more than a low fiscal impact, the committee will propose the bill for consent and vote in the Senate Appropriations Committee, or (3) if the bill is found to have fiscal impacts that meet the criteria for referral to the Suspense File, the committee will place the bill on the Suspense File where the bill will either move on to the Senate Floor for further consideration, be amended in fiscal impact and policy and then advanced to the Senate Floor or be held in committee and under submission[2]. If the bill ultimately gets advanced to the Senate Floor and is passed, the bill will then go to the Assembly where it will go through a similar process (i.e., the bill will be assigned to a policy committee in the Assembly and if passed in that committee, further advanced to the Assembly Appropriations Committee if it is determined to have a fiscal impact or a state cost, and if passed in the Assembly Appropriations Committee advanced to the Assembly Floor for vote). If the bill is passed on the Assembly Floor and no amendments are made to the bill, the bill would advance to the Governor. If, on the other hand, the bill is amended by the Assembly, the bill would need to go back to the Senate, the house of origin, for approval, and if approved by the Senate would advance to the Governor. The

Governor then has twelve (12) days (or thirty (30) days for bills submitted when the annual winter recess is near at hand) to either: (1) approve without signature, (2) approve and sign or (3) veto the bill. In the event that the Governor vetoes the bill, a two-thirds vote in each house can override the veto. If approved by the Governor and chaptered by the Secretary of State, the law will take effect immediately as SB 939 includes an urgency clause.

The Judiciary Committee's Review of the Bill: Amendments to Address the Legal Opposition

If the bill is signed into law, it will likely be faced with opposition from many in the commercial real estate industry (a list of those who opposed SB 939 is attached to the bill analysis prepared by the Senate Judiciary Committee)[3]. As noted in the bill analysis, there are several policy and constitutional arguments that opponents have made which were reviewed by the Senate Judiciary Committee and led to some amendments to the bill. Ultimately, the amended bill passed in the Senate Judiciary Committee but it remains to be seen whether the amendments satisfactorily addressed the concerns voiced by opponents in order to garner enough support to pass through the Senate and the Assembly. We will continue to closely monitor SB 939 as it makes its way through the legislative process with the next stop being the Senate Appropriations Committee as noted above.

1 http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB939

2 https://sapro.senate.ca.gov/FAQs#:~:text=What%20is%20Suspense%3F,referral%20to%20the%20Suspense%20File

3 http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB939

RELATED PRACTICE AREAS

- Commercial Real Estate
- Real Estate
- Real Estate Sector
- Corporate Occupiers & Tenants
- Asset Management
- Retail & Consumer Products

MEET THE TEAM

Victoria I. Goldson

Co-Author, St. Louis

tory.goldson@bclplaw.com
+1 314 259 2567

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.

© 2024 Bryan Cave Leighton Paisner LLP.