

D.C. Council Passes Tenant-Friendly COVID-19 Legislation on May 5, 2020

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On May 5, 2020, the Council of the District of Columbia unanimously passed the “Coronavirus Omnibus Emergency Amendment Act of 2020” (Bill 23-750) with amendments (the Act). This legislation is one of several that have followed in the wake of D.C. Mayor Muriel Bowser’s March 11th Executive Order declaring a public health emergency due to the COVID-19 pandemic. The Council’s passage of the Act comes one day after the Mayor signed the “COVID-19 Supplemental Corrections Emergency Amendment Act of 2020” into law. Both that law and the Act contain several provisions, including many that are very “tenant friendly” as described below, that will be of interest to commercial and residential property owners, operators and tenants in D.C.

The Act will become law if the Mayor signs it within 10 days of presentation to her, which she is expected to do, or if she neither signs nor vetoes it within that time. If she vetoes it, the Act can still become law if within 30 days thereafter the Council votes to pass the Act into law by a two-thirds majority.

Because the Council passed the Act and the Coronavirus Omnibus Emergency Amendment Act of 2020 on an emergency basis, each is effective only for 90 days from the day it became, or becomes, law.

Significant Provisions in the Act

Section 9: Mandatory Rental Payment Plan Program. This section requires a “provider” (e.g., owner, landlord, or lessor) of commercial retail property or residential property with five or more residential rental units to develop a rental payment plan program (“Program”) for “eligible tenants” (described below). Providers must offer a Program during the time for which the Mayor has declared a public health emergency and for the lesser of one year thereafter or when the tenant’s tenancy ends (the “Period”). A provider must notify each tenant of the Program and that the tenant may submit an application to participate in it.

- A provider’s Program must: (1) permit eligible tenants to enter into a payment plan for rent due in the Period; (2) waive fees for entering into such a plan; and (3) require that the provider not report the tenant to a credit bureau as delinquent for rental payments subject to the plan.
- An “eligible tenant” is one that is “a tenant of a residential or commercial retail property” that: (1) has notified the landlord of its inability to pay all or a portion of the rent due as a result of the public health emergency; (2) is not currently receiving a rent reduction pursuant to Section 202 of the D.C. COVID-19 Response Emergency Amendment Act of 2020, effective March 17, 2020 (this law granted rent relief to a tenant whose landlord obtained mortgage

forbearance from its lender and was thus required to reduce rents proportionately – see further discussion below); and (3) is not a franchise, unless the franchise is owned by a D.C. resident and operated in D.C.

- A provider must approve a tenant’s application to participate in its Program if, among other things, the tenant agrees in writing to make payments in accordance with the plan and submits evidence of a financial hardship resulting from the public health emergency that is in addition to any delinquency or future inability to make rental payments existing before the emergency started.
- A payment plan must be agreed to in writing, and must allow a tenant to pay more than the monthly amount set forth in the plan. A provider cannot require or request a tenant to make a lump-sum payment in excess of the amount required under the plan. If the tenant agrees in writing, a provider may use any security deposit, last month’s rent, or other amount held by the provider on behalf of the tenant to satisfy amounts owed by the tenant under a payment plan. Beyond these things, however, the Act does not specify what a payment plan must or must not contain.

Section 11: Commercial Rent Increases. This section clarifies prior legislation prohibiting rent increases on commercial property during the period of the public health emergency and for 30 days thereafter by making clear that the prohibition applies only to commercial *retail* property, not all commercial property.[1]

Section 12: Evictions. D.C. Code § 16-1501 pertains to court proceedings for eviction. Section 12 of the Act adds a provision to that section of the code to provide that the aggrieved party, typically the landlord, “shall not file a complaint for relief” pursuant to that code section during a public health emergency declared by the Mayor and for 60 days thereafter. Evictions had been previously suspended for a 90 day period starting March 11, 2020 (the day the Mayor declared a public health emergency).

Section 13: Pro rata Refund for Amenity Charges. Section 13 requires a housing provider to give a pro rata refund for charges a tenant has paid for amenities the provider temporarily stopped making available during a public health emergency declared by the Mayor. Refunds are not required if the amenity fee was included as part of the overall charge for rent (rather than being separately stated).

Section 14: Cleaning Common Areas in Residential Buildings. This section provides that an owner of a building with one or more residential units must clean common areas “on a regular basis,” including “surfaces that are regularly touched, such as doors, railings, seating, and the exterior of mailboxes.”

Sections 25: Notarization by Remote Means. To facilitate the completion of transaction documents during the COVID-19 public health emergency, Section 25 authorizes the Mayor to permit notaries to notarize documents if the notary is in simultaneous audio-video communication with the signatory of the document. This section also sets out procedures for notarizing documents in this manner.[2]

Failed to Pass: Section 2, That Would Have Required Insurance Companies to Cover COVID-19 Related Business Interruption Insurance Claims. Section 2 of the Act, as originally introduced, was not included in the version of the Act passed by the Council on May 5th. Section 2 provided that business interruption insurance policies in force as of March 25, 2020 be construed as covering claims for the partial or complete suspension of a business’s activity directly or indirectly resulting from the COVID-19 pandemic. Typically, those kinds of policies only provide coverage for interruption

or stoppage in business activity that results from damage to property. Therefore, many insurers have already been routinely denying claims made on business interruption policies on the grounds that the pandemic or an associated government closure order caused the interruption in the business's activity, not damage to its property. Section 2, if it became law, would have prevented insurers from denying business interruption claims on these grounds.

Significant Provisions in the COVID-19 Supplemental Corrections Emergency Amendment Act of 2020

Notably, Section 2 of the COVID-19 Supplemental Corrections Emergency Amendment Act of 2020, which the Mayor signed into law on May 4th, makes some technical amendments to Section 202 of the COVID-19 Response Supplemental Emergency Amendment Act of 2020 (D.C. Act 23-286) that went into effect April 10th. Of particular importance, Section 202(b), as now amended, requires mortgage lenders that make or hold servicing rights to a residential or commercial mortgage under the jurisdiction of the Commissioner of the D.C. Department of Insurance, Securities, and Banking to develop a program to grant 90-day or longer deferrals of mortgage principal and interest payments to borrowers due to the COVID-19 public health emergency.

Under Section 202(g), as now amended, a borrower that receives a Section 202 deferral for a mortgage on a property that has a tenant must reduce the rent charged on the property to a "qualifying tenant" during the period of time the forbearance is in place. A "qualified tenant" is a person that (1) has notified the landlord of its inability to pay all or a portion of its rent due as a result of the COVID-19 public health emergency and (2) is a tenant on property owned or controlled by one who has received a mortgage deferral under Section 202. The rent reduction the borrower provides the tenant must be proportional to the deferred mortgage amount paid by the borrower to the mortgage lender as a percentage of total expenses reported in the borrower's 2019 Income and Expense report provided to the D.C. Office of Tax and Revenue. The borrower may require the tenant to repay the difference in the amount of the rent stated in the lease and the reduced rent, without interest or fees, within 18 months, or on cessation of the tenancy, whichever occurs first.

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We at Kelley Drye look forward to assisting with any questions you may have regarding the D.C. legislation and laws discussed above as well as other issues your business may be facing as a result of the COVID-19 pandemic. Please contact [Ira Kasdan](mailto:ikasdan@kelleydrye.com) [ikasdan@kelleydrye.com, (202) 342-8864]; [Aaron Rosenfeld](mailto:arosenfeld@kelleydrye.com) [arosenfeld@kelleydrye.com, (202) 342-8605]; or [Allan Weiner](mailto:aweiner@kelleydrye.com) [aweiner@kelleydrye.com, (202) 342-8431] if you have questions or need eNotarize services.

[1] The prior legislation provides that "Notwithstanding any other provision of law, a rent increase for a commercial property shall be prohibited during a period for which a public health emergency has been declared ..., and for 30 days thereafter." Section 11 of the Act amends that provision by replacing "commercial property" with "commercial retail property."

[2] Kelley Drye has available eNotarize authority to carry out notarization procedures in compliance with this provision.