

BOARD of SUPERVISORS



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MEMORANDUM

TO: Dr. Grant Colfax, Director, Department of Public Health
Robert Collins, Executive Director, Rent Board

FROM: Erica Major, Assistant Clerk, Land Use and Transportation Committee

DATE: June 1, 2021

SUBJECT: LEGISLATION INTRODUCED

The Board of Supervisors' Land Use and Transportation Committee has received the following proposed legislation, introduced by Supervisor Preston on May 25, 2021:

File No. 210603

Ordinance amending the Administrative Code to establish a rebuttable presumption that a commercial tenant who was legally required to shut down due to COVID-19 may be excused from having to pay rent that came due during the shutdown.

If you have comments or reports to be included with the file, please forward them to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102 or by email at: erica.major@sfgov.org.

cc: Greg Wagner, Department of Public Health
Dr. Naveena Bobba, Department of Public Health
Sneha Patil, Department of Public Health
Arielle Fleisher, Department of Public Health

1 [Administrative Code - Effect Of COVID-19 On Commercial Leases]

2
3 **Ordinance amending the Administrative Code to establish a rebuttable presumption**
4 **that a commercial tenant who was legally required to shut down due to COVID-19 may**
5 **be excused from having to pay rent that came due during the shutdown.**

6 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.
7 **Additions to Codes** are in *single-underline italics Times New Roman font*.
8 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.
9 **Board amendment additions** are in double-underlined Arial font.
10 **Board amendment deletions** are in ~~strikethrough Arial font~~.
11 **Asterisks (* * * *)** indicate the omission of unchanged Code
12 subsections or parts of tables.

13 Be it ordained by the People of the City and County of San Francisco:

14 Section 1. Chapter 37C of the Administrative Code is hereby amended by adding a
15 new Section 37.4, renumbering existing Section 37.4 as Section 37.5, and revising existing
16 Section 37C.5, to read as follows:

17 **SEC. 37C.4. SHUTDOWNS DUE TO HEALTH ORDERS.**

18 *(a) Purpose and Findings. The COVID-19 pandemic has created an unprecedented crisis in*
19 *the City, leading to disputes between commercial landlords and tenants regarding whether a tenant is*
20 *required to pay rent that accrued during periods when the tenant was legally prohibited from operating*
21 *due to COVID-19. In some cases, where performance of a contractual duty has become impossible or*
22 *where the purposes of a contract have been frustrated, state law excuses a party to the contract from*
23 *performance. The Board of Supervisors finds that it is appropriate to presume – at least in the absence*
24 *of a contract provision or other agreement between the parties to the contrary – that a legally required*
25 *shutdown due to COVID-19 is a circumstance that made it impossible for those tenants to perform or*
frustrated the purpose of those tenants' leases. This presumption applies only to those situations where

1 a tenant fell under a category of businesses that was required to shut down under a health order, not
2 where a tenant would have been allowed to stay open but had to close due to a COVID-19 outbreak, or
3 where the tenant closed due to the economic impacts of COVID-19. The payment of rent pursuant to a
4 commercial lease should be excused if the operation of the business was rendered illegal by a COVID-
5 19 health order(s), if the parties have not agreed otherwise.

6 (b) **Excusing Performance.** Absent an agreement to the contrary between a Covered
7 Commercial Tenant and the landlord, if the Covered Commercial Tenant fell under a category of
8 businesses that was legally prohibited from operating in the unit due to a state or local health order
9 concerning COVID-19, then there shall be a rebuttable presumption that the shutdown frustrated the
10 purpose of the lease and that payment of rent covering the period of the shutdown is excused. The
11 Covered Commercial Tenant need not seek to terminate the lease to invoke the protections of this
12 ordinance. This presumption shall apply unless and until evidence is introduced that would support a
13 finding that, notwithstanding the shutdown order(s), the purpose of the lease was not frustrated and
14 performance remained possible.

15 (c) **Federal and state law.** Nothing in this Section 37C.4 shall be interpreted or applied so as
16 to conflict with the terms of the lease or any federal or state law. This Section 37C.4 does not override
17 the terms of any lease, does not modify any state laws that relate to the interpretation or enforcement of
18 leases, and does not alter the burden of proof under state law with regard to a landlord's claim that a
19 tenant has breached the lease or a tenant's defense or excuse regarding the alleged breach. Instead,
20 this Section 37C.4 seeks to simplify the burden of presenting evidence so that landlords and tenants,
21 especially those who may be unable to afford legal representation or protracted litigation, may resolve
22 their disputes more easily and more economically.

1 **SEC. 37.45. SEVERABILITY.**

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4 **SEC. 37C.65. SUNSET PROVISION.**

5 This Chapter 37C shall expire by operation of law on June 30, 2025~~after the Tier 1~~
6 ~~Forbearance Period has ended~~. Upon expiration, the City Attorney shall cause this Chapter 37C
7 to be removed from the Administrative Code.

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9 Section 2. Severability. If any section, subsection, sentence, clause, phrase, or word of
10 this ordinance, or any application thereof to any person or circumstance, is held to be invalid
11 or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not
12 affect the validity of the remaining portions or applications of the ordinance. The Board of
13 Supervisors hereby declares that it would have passed this ordinance and each and every
14 section, subsection, sentence, clause, phrase, and word not declared invalid or
15 unconstitutional without regard to whether any other portion of this ordinance or application
16 thereof would be subsequently declared invalid or unconstitutional.

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1 Section 3. Effective Date. This ordinance shall become effective 30 days after
2 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the
3 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board
4 of Supervisors overrides the Mayor's veto of the ordinance.

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6 APPROVED AS TO FORM:
7 DENNIS J. HERRERA, City Attorney

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9 By: /s/
10 MANU PRADHAN
11 Deputy City Attorney
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LEGISLATIVE DIGEST

[Administrative Code - Effect Of COVID-19 On Commercial Leases]

Ordinance amending the Administrative Code to establish a rebuttable presumption that a commercial tenant who was legally required to shut down due to COVID-19 may be excused from having to pay rent that came due during the shutdown.

Existing Law

Chapter 37C of the Administrative Code grants eviction protections to Covered Commercial Tenants who could not pay their rent due to the financial impacts of COVID-19. The term “Covered Commercial Tenant” means a tenant or subtenant registered to do business in San Francisco with combined worldwide gross receipts for tax year 2019 equal to or below \$25 million, but does not include for-profit tenants and subtenants who are occupying space zoned or approved for Office Use under the Planning Code. The eviction protections for Covered Commercial tenants are currently scheduled to expire in June 2023.

Meanwhile, state law may excuse a party to a contract from performing under the contract, in some cases, if performance has become impossible or where the purposes of a contract have been frustrated.

Amendments to Current Law

The ordinance would enact a new provision, Section 37C.4, that would apply to any Covered Commercial Tenant who had been legally prohibited from operating in a unit due to a state or local health order concerning COVID-19. As to that situation, Section 37C.4 would create a rebuttable presumption – absent a contract provision or other agreement between the parties to the contrary – that the tenant’s shutdown frustrated the purpose of the lease and that the tenant’s duty to pay rent that accrued during the period of the shutdown is excused. This presumption would apply unless and until evidence was introduced that would support a finding that the purpose of the lease was not frustrated and that performance remained possible, notwithstanding the shutdown order(s). Section 37C.4 would sunset on June 30, 2025. The expiration date of Chapter 37C’s eviction protections would not change.

Background Information

The purpose of the ordinance is to simplify the burden of presenting evidence so that landlords and tenants, especially those who may be unable to afford legal representation or protracted litigation, may resolve their disputes regarding COVID-19 more easily and more economically.

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Introduction Form

By a Member of the Board of Supervisors or Mayor

Time stamp
or meeting date

I hereby submit the following item for introduction (select only one):

- 1. For reference to Committee. (An Ordinance, Resolution, Motion or Charter Amendment).
- 2. Request for next printed agenda Without Reference to Committee.
- 3. Request for hearing on a subject matter at Committee.
- 4. Request for letter beginning : "Supervisor inquiries"
- 5. City Attorney Request.
- 6. Call File No. from Committee.
- 7. Budget Analyst request (attached written motion).
- 8. Substitute Legislation File No.
- 9. Reactivate File No.
- 10. Topic submitted for Mayoral Appearance before the BOS on

Please check the appropriate boxes. The proposed legislation should be forwarded to the following:

- Small Business Commission
- Youth Commission
- Ethics Commission
- Planning Commission
- Building Inspection Commission

Note: For the Imperative Agenda (a resolution not on the printed agenda), use the Imperative Form.

Sponsor(s):

Subject:

The text is listed:

Signature of Sponsoring Supervisor:

For Clerk's Use Only