

Rent Relief

Strategies for Small Businesses

February 26, 2021

State of Affairs

- ▶ Feb. 10, 2021: 33.2% of the retail small businesses open in D.C. as of January 2020, have closed. Opportunity Insights, <https://tracktherecovery.org>
- ▶ Businesses nation wide have been struggling with loss of customers and revenue. With an immediate need for assistance for rent, payroll, insurance premiums, and other basic expenses.
- ▶ According to the JP Morgan Chase Institute, 50 percent of U.S. small business only have enough of a cash buffer for two weeks or less, and only 40 percent have enough for three weeks or more.
- ▶ See <https://www.dcpolicycenter.org/publications/small-businesses-coronavirus/>

Roadmap for Today's Session

- ▶ The Public Health Emergency (PHE): Rent Deferral for Commercial Tenants, Prohibitions for Commercial Landlords
- ▶ Outside the PHE: Negotiating with your Landlord over Your Lease
- ▶ Note: this presentation is not legal advice, but see:
→Resources at the end of this presentation.

Relief Available During and Beyond the Public Health Emergency

- ▶ Mortgage relief for landlords
- ▶ Tenant Rent-Payment Plan Programs
- ▶ Prohibition on eviction
- ▶ Prohibition on rent increases
- ▶ Beyond the pandemic: when you can negotiate or walk away from your lease.

COVID-19 Public Health Emergency Declared by Mayor Muriel Bowser

- ▶ Mayor Bowser has extended the emergency through Wednesday, March 17, 2021
- ▶ See Mayor's Order 2021-004, Section III (effective 1/11/21)
- ▶ See https://ota.dc.gov/sites/default/files/dc/sites/ota/publication/attachments/2021.01.29%20OTA%20COVID-19%20and%20Tenant%20Rights-Resources.FINAL__0.pdf

“Coronavirus Support Temporary Amendment Act of 2020”

- ▶ Section 401 - Mortgage Relief
- ▶ Section 402 - Tenant Payment Plans
- ▶ Section 404 - Eviction Prohibition
- ▶ Section 406 - Prohibition on rent increases

Mortgage Relief - Help for Your Landlord

- ▶ Mortgage Relief (Section 401)
 - ▶ Requirement for mortgage lender to develop a deferment program for borrowers.
 - ▶ Minimum 90-day deferment of interest and principal, and waiver of any late fee, processing fee or any other fee accruing during public health emergency.
 - ▶ Lender may not report to credit reporting agency as delinquent the amounts subject to deferral.
 - ▶ Borrower to demonstrate evidence of financial hardship resulting directly or indirectly from the public health emergency.
 - ▶ Repayment period is either (a) a reasonable agreed upon time period, or (b) otherwise, 3 years from the end of the deferment period or maturity date, whichever is sooner.
 - ▶ Lender may not request or require a lump sum repayment.
 - ▶ Applicable during the public health emergency and for 60 days thereafter.
- ▶ See <https://code.dccouncil.us/dc/council/laws/23-130.html>

Tenant Rent-Payment Plan Programs During the Public Health Emergency

- ▶ § 42-3192.01. Tenant payment plans (temporary legislation expiring April 1, 2021)
 - ▶ Upon request of the tenant, a landlord shall make an application for a payment plan available to commercial tenants.
 - ▶ A commercial tenant whose application for a payment plan is denied may file a written complaint with the Department of Consumer and Regulatory Affairs
- ▶ See <https://code.dccouncil.us/dc/council/code/titles/42/chapters/311/>

Tenant Payment Plans (Sections 402)

- ▶ Landlords required to offer a rent-payment-plan program for eligible tenants. Landlords required to notify all tenants of the availability, terms and application process.
- ▶ “Eligible tenant” means:
 - ▶ Notified Landlord of inability to pay all or a portion of the rent due as a result of the public health emergency;
 - ▶ Not a franchisee unless franchise is owned by a District resident; and
 - ▶ Residential tenant, commercial retail tenant or commercial tenant of office premises comprised of less than 6,500 square feet.
- ▶ Applicable during the public health emergency and for 1 year thereafter (“program period”).
- ▶ Covers gross rent and other amounts due under the lease during program period and prior to cessation of tenancy, with a minimum length of one year unless a shorter payment plan term length is requested by the eligible tenant.
- ▶ Waiver of any fee, interest or penalty that arises out of an eligible tenant entering into a payment plan.
- ▶ Landlord may not report to credit reporting agency as delinquent the amounts subject to payment plan.
- ▶ No loss of rights under lease as a result of the payment plan.
- ▶ See <https://www.lawhelp.org/dc/resource/commercial-leasing-during-pandemic-update-webinar>

Tenant Payment Plans

- ▶ LL must accept payments in equal monthly installments for the duration of the payment plan unless a different payment schedule is requested by the tenant.
- ▶ LL may not request or require a lump sum repayment.
- ▶ To be agreed upon in writing.
- ▶ Minimum deferral of 1 year, unless shorter term requested by tenant.
- ▶ Tenant must show financial hardship resulting directly or indirectly from the public health emergency.
- ▶ If denied, commercial tenants may file a written complaint with Department of Consumer and Regulatory Affairs (DCRA).
- ▶ <https://dcra.kustomer.help/contact/consumer-complaint-form-B1YD95vAL>
- ▶ During the program period, unless landlord offers payment plan, prohibited from filing collection lawsuit or eviction for non-payment of rent.
- ▶ See <https://dcra.dc.gov/release/rent-payment-plans-commercial-tenants>.

Prohibitions

- ▶ Eviction Prohibition (Section 404)
 - ▶ Prohibited during public health emergency and for 60 days thereafter.
- ▶ Rent Increase Prohibition (Section 406)
 - ▶ No rent increases for commercial retail tenants or commercial office tenants if premises comprised of less than 6,500 square feet.
 - ▶ Applicable during the public health emergency and for 30 days thereafter.
 - ▶ Any rent increase notice that was issued before the Emergency, but that was to take effect after the Emergency, is unenforceable. The landlord must issue a new 30-day notice when the Emergency ends.
- ▶ Always prohibited: changing the locks without taking you to court.

Summary: Protections under the PHE

- ▶ March 17 + 60 days: Eviction prohibited.
- ▶ March 17 + 30 days: No rent increase. LL must issue new 30 day notice after March 17 for rent increase agreed to in lease before or during the PHE.
- ▶ March 17 + 1 year: LL must honor payment plan.

If You Need to Walk Away: LOOK AT YOUR LEASE

- ▶ Is there a “force majeure” provision? (something out of your control that forces you to shut down completely) Does it release you from rent?
- ▶ Who signed the lease? Did you sign as yourself (personally liable), or as your company?
 - ▶ Did you sign as an Individual?
 - ▶ Did you sign as a corporation, or a limited liability company?
 - ▶ Did you guarantee the lease as an individual?
- ▶ Consequences:
 - ▶ Individual signer → Personal liability
 - ▶ At risk: personal assets both connected with and separate from the business

If You Need to Walk Away, II: Assigning or Subletting the Lease; Selling Your Business

- ▶ Does the lease allow you to sublet or assign the lease?
 - ▶ Must the LL consent? Does the lease require continuation of same kind of business?
 - ▶ Sublease: You're still on the hook.
 - ▶ Assignment: Lease must release you from continuing responsibility for the rent.
- ▶ Release of lease for any reason: lease may require continuation of same type of business.

Duty to Mitigate, Trans-Lux, and Rent Acceleration

- ▶ Unless the obligation is stated in the lease, the landlord is under no obligation to try to re-rent a property if the tenant leaves before the lease expires. The tenant is legally liable for the rest of the rent due under the lease. *Simmons v. Federal Bar Bldg. Corp*, 275 A.2d 545 (D.C.App. 1971).
- ▶ If a court orders a judgment for eviction for non-payment of rent, tenants may “redeem” their lease by paying back rent, fees, and court costs within 3 days of the order. The DC Superior Court has a form which calculates the amount the tenants owe to avoid eviction under the “Trans-Lux” case. See:
- ▶ [https://www.dccourts.gov/services/forms/forms-by-location?location\[0\]=legallandtenant&location\[1\]=lease](https://www.dccourts.gov/services/forms/forms-by-location?location[0]=legallandtenant&location[1]=lease) → click on “Notice to Tenant of Payment Required to Avoid Eviction: Commercial
- ▶ Landlord may not terminate a lease and also enforce a rent acceleration clause. *16 Cobalt LLC v. Harrison Career Institute*, 590 F. Supp. 2d 44, 49 (D.D.C. 2008).

Lease Termination

- ▶ Lease may include an early termination right, with fees and costs. May only be permitted during last 2-3 years of term
- ▶ If not in lease, but LL agrees to terminate anyway, get the agreement and surrender in writing - that way, LL can't accelerate rent.
- ▶ Termination fee could be negotiated as base rent that would be collected over a certain period plus the unamortized portion of improvements and landlord costs (e.g., brokerage commissions, tenant improvement allowances, legal fees)

Practical Tips - Negotiating within the PHE

- ▶ Research how much tenants are paying in your area
 - ▶ Tenant should be as informed as possible when entering rent negotiation
- ▶ What does your landlord want?
 - ▶ Where can you meet in the middle?
- ▶ Consider Timing
 - ▶ When it comes to timing, there are two things to keep in mind: your financial situation and where you are in your lease. If you're out of work or dealing with reduced income because of the pandemic, you should bring this up with your landlord before you're behind on payments.
- ▶ **A tenant might agree to:**
 - ▶ Move out after a certain period of time
 - ▶ Pay back rent over a period of time
 - ▶ Pay rent on time for a certain period
 - ▶ Behave in a certain way (for example, not having too much trash in the unit) for a certain period of time
 - ▶ Make sure unauthorized occupants leave the unit
- ▶ **A landlord might agree to:**
 - ▶ Give the tenant a neutral reference
 - ▶ Not raise the rent for a certain period of time
 - ▶ Not collect some or all of the back rent owed
 - ▶ Make repairs by a certain date

Reputation Risks?

- ▶ Not a risk for “mom and pop” shops
- ▶ Most landlords will not hold you for a reputation risk for not paying. More for larger businesses.
- ▶ Will not affect your credit and security deposits
- ▶ E.g., If you have set up a payment plan, your landlord cannot report it to the credit bureau or the state.

Additional Resources

- ▶ Mayor Bowser Recovery for Business Website: <https://coronavirus.dc.gov/page/recovery-businesses>
- ▶ SBA - Menu of Covid Relief Programs
 - ▶ See <https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources>
 - ▶ NEW: 2/24/2021 - 3/9/2021: exclusive window for small businesses and sole proprietors to apply for Paycheck Protection Program. PPP closes March 31.
 - ▶ Related: DC Small Business Development Center, <https://dcsbdc.org/>;
 - ▶ Latino Economic Development Center, <https://www.ledcmetro.org/sbapp>
- ▶ Legal Help: DC Bar Pro Bono Center
 - ▶ <https://www.lawhelp.org/dc/ced>
 - ▶ Free help with a commercial lease: <https://forms.office.com/Pages/ResponsePage.aspx?id=p07fiREqZ0iKFeLmEC3rBHypqghPtBJKhIVdB73nplpUQUQ3UzJZWDBSOzRFSDFKRUFGNUtMNFkwRS4u>
 - ▶ DC Refers: <https://dcrefers.org/>