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No New Nonpayment Cases Until August, Late Fees and Security Deposits

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Late last week, Governor Cuomo issued Executive Order (“EO”) 202.28 in furtherance of his press conference held on May 7, 2020. EO 202.28 clarified some of the statements from the Governor’s press conference and added a few wrinkles, which are not favorable to landlords. Here is a list of the key provisions:

1. **Nonpayment Cases.** No new nonpayment cases, residential or commercial, may be commenced through August 20, 2020 against someone who is unemployed or “otherwise facing financial hardship due to the COVID-19 pandemic.” It appears that landlords will be able to file holdover proceedings once the Chief Administrative Judge announces that the NY courts are accepting the filing of new non-emergency cases. In addition, it is possible that commercial landlords may be able to commence nonpayment cases prior to August 20, 2020, subject to further clarification from the Governor in conjunction with the Chief Administrative Judge as to whether a commercial tenant qualifies as someone who is “otherwise facing financial hardship due to the COVID-19 pandemic.”
2. **Evictions.** No evictions, residential or commercial, may be completed through August 20, 2020.
3. **Late Fees.** Residential landlords (this would include cooperatives) may not charge late fees during the period from March 20, 2020 through August 20, 2020. Commercial landlords may continue to charge late fees.
4. **Application of Security Deposits.** EO 202.28 clarified that only residential landlords, and not commercial landlords, are required to apply security deposits toward rent arrears if requested by tenants who are unemployed or “otherwise facing financial hardship due to the COVID-19 pandemic.” Residential landlords can request permission from tenants to apply security deposits toward rent arrears, but must obtain the tenants’ written consent (email is acceptable).

Commercial landlords may apply security deposits against rent arrears subject to the terms of their leases, but are not mandated to do so by EO 202.28. Several of our commercial landlord clients have inquired about the proper procedure for applying a tenant’s security deposit and have raised questions about the related bankruptcy implications. This somewhat complicated issue is succinctly summarized in a recent article on our website linked here. <https://lasserlg.com/application-of-security-deposits-toward-commercial-rent-defaults/>

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