

## Outside Counsel

# 2019 Rent Laws: Impact on Commercial Landlords

**O**n June 14, 2019, Gov. Andrew Cuomo signed legislation modifying existing rent laws and enacting significant landlord-tenant reforms including the Statewide Housing Security and Tenant Protection Act of 2019 (collectively, the 2019 Rent Laws). To date, the real estate industry has focused primarily on the sweeping impact the new laws will have on residential tenancies and the deregulation of rent-stabilized apartments. The reforms, however, also dramatically impact commercial tenancies by altering non-residential summary proceedings and significantly hampering the ability of commercial landlords to respond effectively and quickly to tenant defaults.

### New York Summary Proceedings: Background

Summary proceedings were intended to provide landlords with a simple and expeditious method of

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regaining possession of leased space without the need for a lengthy ejectment action. There are two primary types of summary proceedings—non-payments and holdovers. Prior to commencing a non-payment proceeding, a landlord must serve a statutory rent demand setting forth a good-faith estimate of the rent due. To commence a holdover proceeding, a landlord must first terminate the lease by serving a notice of termination based on a breach by a tenant of a lease provision known as a conditional limitation. Both proceedings can ultimately result in a tenant's eviction and entry of a monetary judgment for unpaid arrears.

### Effect of 2019 Rent Laws

**Delay:** The 2019 Rent Laws significantly delay resolution of both non-payment and holdover proceedings. For example, under prior law, a

three-day rent demand was required before commencing a non-payment case. The amended laws now mandate a 14-day notice. RPAPL §711(2). In addition, the deadline for a tenant to answer a non-payment petition

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has been extended from five to 10 days. RPAPL §732(3).

The 2019 Rent Laws also add a new requirement that “if a [landlord] fails to receive payment of rent within five days of the date specified in the lease agreement, such [landlord] shall send the [tenant], by certified mail, a written notice stating the failure to receive such rent payment.” RPL §235-e(d). If a landlord fails to send this additional notice prior to commencing a proceeding based upon the failure to pay rent, the tenant can raise such omission as an affirmative defense. *Id.* It is unclear, however, if this new notice is required as a predicate to

commercial summary proceedings because the requirement is contained in a section that appears to deal exclusively with residential issues. Furthermore, it is uncertain whether this additional notice must be sent prior to service of rent demands and notices to cure. Until these ambiguities are resolved, landlords should send this additional notice prior to serving predicate notices for non-payment of rent.

Under the revised laws, after issue is joined in a summary proceeding, the court is required to grant an adjournment of at least 14 days upon request by either party. RPAPL §745(1). The court also has discretion to grant subsequent adjournments without limitation. *Id.* Although under prior law the court ostensibly only had discretion to adjourn the trial of a summary proceeding for a maximum of 10 days, additional adjournments were routinely granted. Nonetheless, the extended timeframes under the 2019 Rent Laws will likely result in even further delays.

**Use and Occupancy:** The 2019 Rent Laws make it more difficult for a landlord to obtain an interim order requiring payment of use and occupancy during the pendency of a summary proceeding. In the past, use and occupancy orders were not discretionary. Instead, the court was required to direct payment of use and occupancy if the necessary conditions were satisfied. Now, the court in its discretion, “upon consideration of the equities,”

can determine whether a use and occupancy order should be issued. RPAPL §745(2)(a). Moreover, under prior law, the request for a use and occupancy order was traditionally made in court by oral application. Pursuant to the 2019 Rent Laws, a landlord must serve a written motion on notice. *Id.*

Under prior law, the court was required to issue a use and occupancy order upon the earlier of: (1) a tenant’s second adjournment request; or (2) 30 days after the parties’ first court appearance. The 30-day threshold has now been extended to 60 days. *Id.* Moreover, unlike the prior law, an adjournment requested by a tenant to retain counsel is not counted towards these timeframes. *Id.*

The RPAPL also previously required that deposits of use and occupancy be completed within five days of the court’s directive. The 2019 Rent Laws eliminate this requirement. *Id.* The prior law also mandated that the deposit be comprised of rent or use and occupancy accrued from the date that the petition was served. Under the 2019 Rent Laws, the tenant is only required to pay use and occupancy that becomes due subsequent to the order. *Id.* Significantly, a tenant’s failure to comply with a use and occupancy order no longer results in dismissal of its defenses and counterclaims or issuance of judgment in favor of the landlord. Rather, the 2019 Rent Laws prohibit the court from striking a tenant’s

defenses or counterclaims and provide that the court, in its discretion, can only order an immediate trial. RPAPL §745(2)(d)(i).

**Post-Judgment Relief:** The 2019 Rent Laws significantly increase a tenant’s post-judgment rights. For example, under the former RPAPL §749(3), the court could vacate a warrant of eviction for good cause at any time prior to the eviction. The modified law allows the court to restore the tenant to possession even after eviction. The 2019 Rent Laws also require the court to vacate the warrant of eviction in a non-payment proceeding if the tenant tenders or deposits the rent due at any time prior to the warrant’s execution unless the landlord establishes that the tenant withheld rent in bad faith. RPAPL §749(3).

Furthermore, pursuant to the revised RPAPL §749(2), the time limit specified in a pre-eviction notice served by a city marshal, sheriff or other authorized official has been extended from 72 hours to 14 days. Accordingly, even if a landlord obtains a judgment of possession after trial in a non-payment proceeding and a warrant of eviction issues, the tenant has at least two weeks to pay the arrears, stop the eviction and continue its tenancy. Finally, RPAPL §749(1) permits the court, upon a showing of good cause, to enjoin a landlord from re-letting or renovating the premises for a reasonable amount of time.

**Bankruptcy Implications:** In bankruptcy proceedings, landlords often contend that a debtor-tenant may

not assume or assign a lease that was terminated prior to the bankruptcy filing. 11 U.S.C. §365(c)(3). Unlike the prerequisite termination notice in a holdover proceeding, however, the predicate rent demand in a non-payment proceeding does not purport to terminate the tenancy. Until the enactment of the 2019 Rent Laws, in a non-payment proceeding, the tenancy was deemed terminated upon the issuance of the warrant of eviction pursuant to RPAPL §749(3) which provided, in pertinent part, as follows: “[t]he issuing of a warrant for the removal of a tenant cancels the agreement under which the person removed held the premises, and annuls the relation of landlord and tenant . . . .” The 2019 Rent Laws have eliminated this language.

Accordingly, under the revised statute, it is unclear when a lease is deemed terminated in a non-payment proceeding and whether such lease may be assumed or assigned in a bankruptcy proceeding notwithstanding issuance and even execution upon the warrant of eviction. This issue is less relevant in holdover proceedings where the tenancy is cancelled upon service of a termination notice in accordance with the lease’s conditional limitation provision.

### Unanswered Questions

The 2019 Rent Laws afford housing

and civil court judges significant discretion to determine use and occupancy, adjournments and post-warrant stays. It remains to be seen how courts will exercise this discretion and whether legal challenges will be interposed. It is also unclear when a lease will be deemed canceled in a non-payment proceeding and lease termination damages accrue. The application of RPL §235-e(d), which requires notice upon a tenant’s failure to timely pay rent, is also uncertain. For example, does this provision apply to commercial proceedings? Can the additional notice be served simultaneously with a rent demand or notice to cure? Will the courts enforce contractual waivers of RPL §235-e(d) and other provisions of the new law?

### Landlord Strategies

In light of the 2019 Rent Laws, holdover proceedings may be the best option to address significant tenant defaults. Landlords should ensure that leases contain conditional limitations for non-payment of rent and bolster provisions pertaining to damages, bankruptcy, security deposits, self-help, holdover and legal fees. It is inadvisable to compromise on these protections during lease negotiations because the revised statutory remedies may no longer serve as a sufficient deterrent to tenant defaults.

### Conclusion

The 2019 Rent Laws adversely impact the rights of commercial landlords in both holdover and non-payment proceedings by extending time periods, adding additional notice requirements, authorizing protracted adjournments, drastically curtailing the right to compel a tenant’s payment of use and occupancy and codifying pro-tenant post-judgment relief. The new laws have an even greater adverse impact on non-payment proceedings because they extend the predicate demand from three days to 14 days, the time to answer the petition from five to 10 days and grant a right of redemption until execution on the warrant. These statutory changes could significantly hamper expeditious resolution of commercial lease disputes. The non-payment proceeding is now of questionable value to landlords and the holdover proceeding may be the better alternative in most circumstances. To the extent practicable, landlords should strengthen relevant lease provisions so that contractual remedies can offer protections no longer provided by statute.

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