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The Governor's Executive Order on Evictions: Why It Fails to Protect Tenants, What Can Still Be Done to Provide Meaningful Protections

The Governor's March 27 Executive Order N-37-20 is intended to be a delay—not a moratorium—on evictions. Unfortunately, it provides little practical help for renters during the COVID-19 pandemic. Under the Order, even tenants who have a COVID-related income loss and can meet the notice and documentation requirements of the Order can still be evicted. At best, the order extends the time period before they are physically locked out by the sheriff. Moreover, by relying on a flawed legal approach, the order will mislead tenants who have a real defense to the eviction, preventing them from responding in court in a timely manner.

The Executive Order is Not a Moratorium on Evictions

The Executive Order purports to extend by 60 days the time a tenant has to respond to a summons in an unlawful detainer (eviction) case filed by a landlord. However, that extension applies only for unlawful detainers based on nonpayment where the tenant (a "covered tenant") has satisfied certain conditions:

1. The tenant has a COVID-related loss of income;
2. The tenant has notified the landlord within a reasonable time period not to exceed 7 days; and
3. The tenant retains certain documentation of the COVID-related loss.

All other unlawful detainer cases are unaffected by the Order. This includes cases where the tenant can't meet the documentation requirements, evictions alleging other breaches of a lease, no fault evictions, and others. These evictions can move forward so long as the courts are open.

The Executive Order Provides No Defense to an Eviction Even for Covered Tenants

Even for tenants who can demonstrate a COVID-related loss of income and do everything required of them, while the Executive Order is in effect a landlord can still:

1. Issue a three-day notice demanding the tenant pay the rent or vacate their unit.
2. Refuse to accept partial or full late rent payments after the three-day notice has expired.
3. File an eviction action against that tenant in court.
4. Serve the action on the tenant, requiring them to file a written response in court within five days.
5. Obtain a default judgement against the tenant if they fail to respond within five days of being served.
6. Obtain an order from the court directing the sheriff to remove the tenant from their home.

In addition, in some cases, a tenant may even be locked out by the sheriff, if the local sheriff is continuing to enforce evictions.



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The Executive Order is Legally Flawed, Confusing to Tenants, and May Result in More Evictions

The Executive Order relies on two approaches to prevent tenants from losing their homes, both of which are legally insufficient:

1. First, it extends the time for some tenants to answer an eviction action. This provision cannot legally or practically be implemented by the courts. When a landlord files an eviction action, the court issues a summons. If a tenant does not respond to the summons within five days, the landlord can immediately file a request for entry of default judgment. In this situation, California Code of Civil Procedure Section 1169 mandates that the court clerk issue a judgment for possession. This is a ministerial act by the clerk; if the defendant has not responded by the deadline, the clerk **MUST** issue the judgment. Court clerks do not have the authority to judge the underlying facts. Even if they had that authority, they would have nothing except the landlord's initial filing to review, which would not include any information as to whether the tenant is a covered tenant under the Order.

Thus, clerks will have no way of knowing whether a tenant is entitled to more time to respond pursuant to the Executive Order. Faced with a request by a landlord to enter a default judgment, it is unclear what the clerk will do. One very real possibility is they will enter a default judgment on the sixth day, as the law requires them to do, even though the Order purports to give covered tenants 60 more days. This will irreparably prejudice covered tenants who may, based on misinformation in news reports and pronouncements by the Governor's office, believe either that there is an eviction moratorium in place or that they at least had more time to respond.

2. Second, the Executive Order directs sheriffs not to enforce lockouts for covered tenants. When a judgment is entered for the landlord in an eviction case, the landlord can request that the court issue a writ of possession—the lockout order that the sheriff will post on the tenant's door giving them five days to move out or be physically removed. The Executive Order does not sufficiently protect tenants during this step of the eviction process either. It is impossible for the sheriff to know from looking at the writ (or anything else) whether the tenant is a covered tenant. All they have is a valid judgment from the court and a writ directing them to enforce it. Moreover, even if somehow the sheriff knew the details of the particular tenant's situation, the idea that the sheriff, based on facts that have presumably already been adjudicated, could second-guess the judge in the case and refuse to enforce an order of the court presents troubling separation of powers issues. Presumably, many sheriffs will avoid that legal peril and simply enforce the order. The result: covered tenants could be locked out by the sheriff, even during the pendency of the Order.

In addition to failing to achieve the goal of preventing COVID-related nonpayment evictions, the Executive Order may produce the unintended consequence of driving tenants, landlords, attorneys, and witnesses to court at a time when all residents in our state are meant to be sheltering in place. Many tenants covered by the Order but concerned about the confusion and uncertainty it creates may still choose to file an answer to the eviction action within the five-day period listed on the summons. In that case, the court is mandated to set the case for trial within 20 days of the landlord requesting it, unless the court's trials have been suspended during the pandemic. In other words, covered tenants who have



done everything asked of them could swiftly find themselves in an unlawful detainer trial for which they are required to be present.

Similarly, the many tenants who should have had more time to respond based on the Order but who have received a default judgment and a sheriff's lockout notice will file motions to set aside the default judgment. This too will mean both tenants and landlords flooding the courts over evictions that the Executive Order failed to effectively put on hold.

California Still Needs Real Eviction Protections in the Interest of Public Health and Basic Fairness

We have heard over and over again that staying in one's home is the most important things people who have housing can do to stop this pandemic. Allowing evictions to proceed is inconsistent with this directive. The state needs meaningful protections from eviction during this time to ensure that California can meet this public health challenge head-on and protect residents at all income levels. The virus has elevated the need to protect tenants from displacement and there are still a number of actions that can be taken to avoid the economic and social ripple effects that a wave of evictions will create.

We continue our call for Governor Newsom to enact a strong moratorium on all evictions, regardless of the underlying basis, during this public health crisis. Only those evictions meant to address a concrete and significant safety concern should be allowed to move forward during this time. The Governor has the power to accomplish this by taking the following actions for the duration of the crisis:

1. Suspend Code of Civil Procedure Section 1161, 1161a and 1946.1, except where a landlord seeks to recover possession under Section 1161(4) of the Code of Civil Procedure to address a specific, immediate, and present danger related to health and safety, such as the grounds listed for a protective order in Section 6250 of the Family Code.
2. Suspend the portion of the Ellis Act that authorizes a filing of notice with the local government and with tenants.
3. Toll the notice period for all notices that have not yet expired under Code of Civil Procedure Sections 1161, 1161a, 1946.1; Government Code Section 7060.4; and Civil Code Section 798.55(b).
4. Suspend the calendar preference for unlawful detainer matters under Code of Civil Procedure section 1179a, except those under section 1161(4) as outlined above.
5. Suspend the five-day summons under Code of Civil Procedure 1167.
6. Prohibit execution of a writ of possession by the sheriff during the emergency.
7. Clarify that any action by a local government that provides more protections against eviction is not preempted.

Taking these actions would extend similar protections to renters as have been given to homeowners and would preserve the ability of tenants to follow public health directives and shelter in their homes. These actions will create the certainty and stability we need to ensure that no tenants are at immediate risk of losing their housing while we work to find longer-term solutions for handling unpaid rent, providing economic support for both tenants and landlords moving forward, and ensuring that tenants can remain stably housed even after the immediate crisis has abated.