

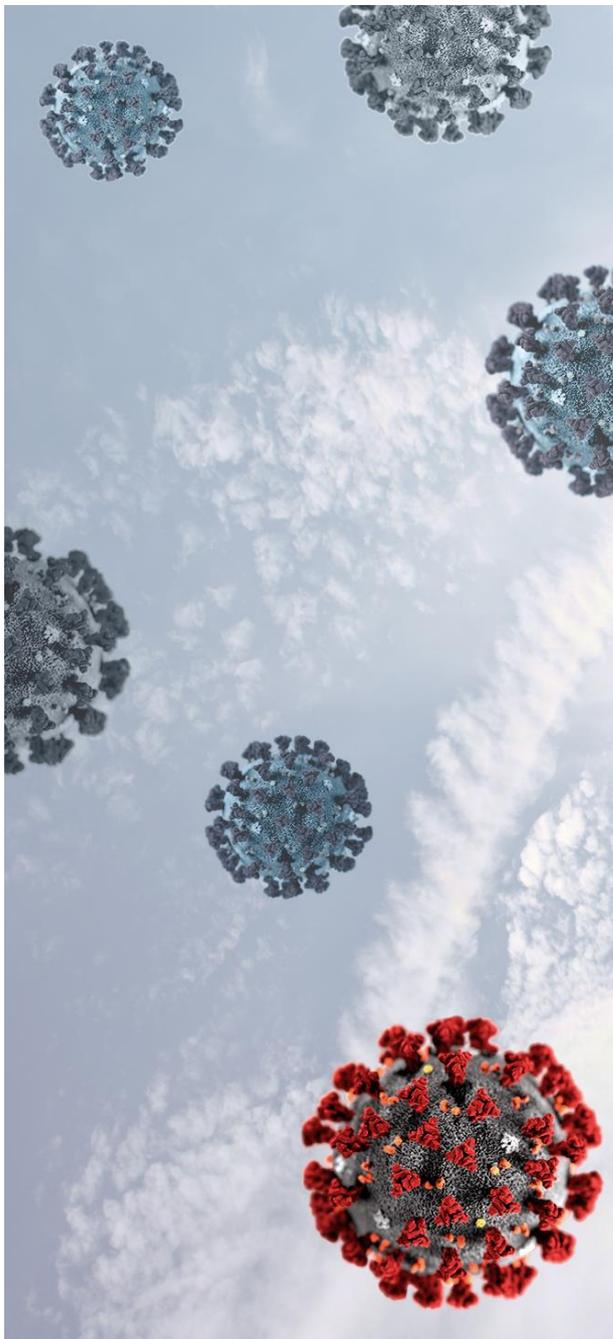
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# COVID-19: Leases

Newsletter | Portugal

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## Exceptional and temporary measures affecting lease and similar agreements

- > Suspension of business activities and services aimed at the public, and other restrictions
- > Moratorium on rent payments
- > Effects on lease termination



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## Exceptional and temporary measures affecting leases and similar agreements

To mitigate and prevent the progression of the COVID-19 pandemic, and to ease its economic consequences, the government and the Assembly of the Portuguese Republic have adopted a series of measures directly and indirectly affecting the real estate sector, specifically the rental market.

These measures include restricting the activity of many business and services establishments open to the public, granting an exceptional moratorium on rent due under residential and commercial leases, temporarily suspending the effects of lease termination, and temporarily suspending eviction orders and special eviction procedures.

Broadly speaking, the approved legislation aims to **increase protection for tenants** during this period, since, in certain cases, it allows them to defer the payment of the monthly rent due under their agreements or prevent their expiry to avoid them having to leave the leased premises during this period.

In addition to the approved legislation, it is important to bear in mind that the analysis of the pandemic's impact on lease relationships (and similar contractual relationships) must be conducted on a case-by-case basis, taking into account:

- the **specific provisions of the lease** (which, in certain cases, may expressly regulate this situation);
- the **general provisions on leasing**; and
- the **general principles of law** regulating the contractual effects of disturbances due to extraordinary events not attributable to either of the contracting parties (e.g., changes in circumstances, and temporary impossibility or objective impossibility) on the performance of agreements.

Having established this framework, we analyze the recently approved legislation:

### **Suspension of business activities and services aimed at the public, and other restrictions**

Following the declaration of the state of emergency applicable to all national territory, under **Presidential Decree 14-A/2020, of March 18** (updated by **Presidential Decree 17-**



**A/2020, of April 2**), the government approved Decree 2-A/2020, of March 20 (subsequently revoked and replaced by Decree 2-B/2020, of April 2), establishing a series of restrictions on the normal operation of different facilities or establishments open to the public:

➤ **Establishments that must close:**

The following establishments and facilities listed in Appendix I of Decree 2-B/2020 must close:

- a. Recreational, leisure and entertainment activities (e.g. clubs, bars and theme parks);
- b. Cultural and artistic activities (e.g. auditoriums, movie theaters and theaters);
- c. Sporting activities, except those used for professional sporting activities and by high-performing athletes for their training (e.g. soccer fields, pavilions and stadiums);
- d. Activities in open spaces, public spaces and roads, and private roads equivalent to public roads (e.g. cycling tracks);
- e. Gaming and gambling establishments (e.g. casinos and arcades);
- f. Catering activities (e.g. restaurants and similar businesses, terraces and tea shops), within the limits of the exceptions set out in the Decree;
- g. Baths and spas or similar establishments.

➤ **Suspended activities:**

In addition to the establishments and facilities that must close, the government also **suspended business and services activities aimed at the public, except those marketing essential goods or providing services deemed essential**, such as those included in Appendix II to Decree 2-B/2020 (e.g., supermarkets and hypermarkets, drugstores, pharmacies, establishments selling cosmetics and hygiene products, establishments selling DIY materials, banking, financial and insurance services, student housing accommodations, among others).

The suspended activities list **does not include** office buildings (despite the need for remote working measures, if they are compatible with the activity), industrial establishments or tourist complexes (except campsites).



### > Exceptions or mitigated suspensions:

As an exception, retail business activities and provision of services on the roads network, in airports and hospitals are not suspended.

Moreover, catering and similar establishments **can continue their activity** exclusively on a takeaway or home-delivery basis, either directly or through an intermediary, being exempted from any specific licensing requirements.

Finally, Decree 2-B/2020 clarifies that e-commerce activities, remote service provision (with no contact with the public) and service provision via electronic platforms **are not suspended**.

### > Effect on leases:

The closure of facilities and establishments under Decree 2-B/2020 cannot be invoked as grounds for termination (*resolução*), early termination (*denúncia*) or any other form of discharge of commercial leases or other contractual forms of exploitation of real estate assets, or as grounds for eviction from the properties they occupy.

### > Other restrictions:

In addition to the restrictions in Decree 2-B/2020, **Ministerial Order 71/2020, of March 15**, approved in a phase prior to the declaration of the state of emergency, must also be taken into account. It establishes the restrictions on the maximum number of people accessing retail establishments, large commercial areas and shopping complexes, **which cannot exceed 1 person for every 25 sqm** (excluding the workers and service providers working in the establishment). Under Decree 2-B/2020, these restrictions also apply to wholesale establishments and to any market authorized to operate.

### Moratorium on rent payments

Also, within the context of the health crisis, Law 4-C/2020, of April 6, establishes an extraordinary moratorium on rent due under residential and commercial leases, as follows:

### > Beneficiaries of the moratorium:

(1) **Residential tenants** (or holders of similar agreements allowing the temporary use of properties for residential purposes) meeting both of the following requirements:



- i. the **tenant's household income falls by over 20%** with regard to the immediately preceding month or the same period of the previous year; **and**
- ii. the **household's stress index** (calculated based on the percentage of the household's income linked to the rent payment) **is or rises above 35%**.

The criterion used to determine the reduction in income will depend on the Ministerial Order approved by the minister responsible for housing.

**(2) Commercial tenants** (or holders of similar agreements allowing the temporary use of properties for commercial purposes):

- i. **performing any of the retail or service provision activities suspended under Decree 2-B/2020** and the related laws that implement the state of emergency, even when those tenants continue to perform e-commerce activities or to provide services remotely or via electronic platforms; **or**
- ii. **operating a catering or similar establishment**, even if they are developing their activity as a takeaway via collection or delivery.

At first glance, tenants performing activities not suspended under the legislation approved by the government are excluded from this moratorium regime. However, this in itself will not prevent these tenants from applying other contractual or legal provisions to deal with the restrictions imposed as a result of the COVID-19 pandemic in the context of their leases.

### > **How the moratorium works:**

The moratorium **defers the obligation to pay rent due during the state of emergency period and the following month**. The deferred amount must be settled in **12 monthly installments** along with the payment of the respective monthly rent (from the second monthly rent payment due after the end of the state of emergency). It is important to highlight that Law 4-C/2020 applies retroactively to rents due on April 1, 2020.

*Example:* If the state of emergency persists until May 1, the moratorium will potentially affect the rent due in April, May and June, and tenants meeting the requirements to apply it must pay the deferred amounts from the rent payment due in July.

It should be pointed out that the law only expressly applies the moratorium regime to rent, and so it can be debated whether this regime also applies to service charges and other expenses due under leases.



### > Tenants' duty of information:

**Residential tenants** must communicate their intention to apply the moratorium regime to the landlord at least **five days prior to the respective monthly rent payment due date**. The notice must include the documentation proving that the tenants meet the requirements to benefit from the moratorium under the Ministerial Order.

In the case of the monthly rent payment due on April 1, 2020, the above period does not apply, so the tenants may issue the notice up to **20 days after the entry into force of Law 4-C/2020**.

However, the Law does not clarify the consequences applicable for not issuing the notice or if it does not meet the requirements established by Ministerial Order. Likewise, it is not clear whether the tenants must show that they meet the requirements to benefit from the moratorium on a monthly basis.

Regarding **commercial tenants**, the Law does not stipulate any notification procedure.

### > Consequences of non-payment of rent:

**Landlords cannot terminate or discharge leases due to non-payment of rent subject to the moratorium regime**, unless the tenant fails to pay the monthly installments relating to that rent within 12 months of the end of the moratorium in monthly installments of at least one-twelfth of the total amount deferred.

During the moratorium period, landlords cannot apply the penalties established in law or the agreement in the case of delayed rent payments.

### > Lease termination:

If the tenant decides to terminate the lease, the rent whose payment has been deferred under the moratorium **will become immediately payable**.

However, the Law does not clarify if upon termination by the landlord with just cause (*resolução*) the rents subject to the moratorium regime become immediately payable; in other words, it is not established whether, when the termination is the result of the tenant's willful behavior despite not being directly attributed to their own initiative, the rents subject to the moratorium also become immediately payable.



### > **Alternative to the moratorium in residential leases:**

**Residential tenants who meet the requirements to benefit from the moratorium** may request the Housing and Urban Rehabilitation Institute (Instituto da Habitação e da Reabilitação Urbana or IHRU, I.P.) to grant an interest-free loan to finance the difference between the monthly rent and the amount resulting from applying a maximum stress index of 35% to the household income for the rent payment, taking into account that the available household income cannot be lower than the social benefits benchmark rate (IAS, in Portuguese), which is €438.81.

This regime also applies to the guarantors (*fiadores*) of students with no earnings whose accommodation is over 50 km from the main family home.

However, it should be pointed out that the terms of this financial support have not yet materialized in a regulation, which must be drafted by the IHRU, I.P. In any case, tenants whose drop in income reduces the amount of the rents due pursuant to special lease or rent regimes may not avail of this support.

### > **Financial support for residential tenants:**

**Landlords (individuals) with residential leases** may also avail of the financial support mentioned above if they meet both the following requirements:

- i. The landlord's family income drops over 20% with regard to the immediately preceding month or the same period of the previous year due to tenants' non-payment of the rent under this law.
- ii. The landlord's available household income is below the social benefits benchmark rate (€438.81 in 2020).

### > **Public entities**

During the validity period of Law 4-C/2020, **public entities** with properties leased or assigned under any form of agreement may:

- i. reduce the rent for tenants whose income has fallen by over 20% with regard to the preceding month or the same period of the previous year and a stress index of over 35% in relation to the rent (it will not apply to the beneficiaries of special residential leasing or rent regimes);
- ii. release from paying the rent the tenants who prove that they have ceased to receive income since March 1, 2020;



- iii. establish moratoriums for tenants.

### Effects on lease termination

**Law 1-A/2020, of March 19** (in its version amended by **Law 4-A/2020, of April 6**), establishes a set of measures aiming to protect tenants, affecting the termination, opposition to renewal, revocation, expiry and other forms of termination of residential or commercial leases, as well as eviction procedures.

The Law essentially stipulates that the following suspensions apply **while the COVID-19 pandemic prevention, containment and mitigation measures are in effect and for 60 days afterwards** (these measures will only be deemed expired when the government expressly decrees their expiration):

- i. The effects of the early termination of any residential and commercial leases carried out by the landlord.
- ii. Residential and commercial leases will not expire upon their term, unless the tenant has no objection to the expiry.
- iii. The effects of any mutually agreed revocations of residential and commercial leases.
- iv. The effects of any opposition to renewal served by the landlords under any residential and commercial leases.
- v. The period foreseen in article 1053 of the Portuguese Civil Code (*Código Civil*) relating to eviction from the leased premises is deemed suspended if the term ends while the mitigation measures are still in effect.
- vi. Eviction orders, special eviction procedures and leased asset handover enforcements are suspended when, under the final judicial decision to be adopted, the tenant may be in a vulnerable position due to not having a place to live or another significant social reason.

However, the Law does not envisage what will happen if the tenant opposes to the renewal of the lease or has stated their intention to terminate it. Aside from this, unlike **Law 4-C/2020**, this law is not expressly applicable to similar contractual forms of temporary exploitation of real estate assets.

Finally, Law 1-A/2020 also envisages the suspension of mortgage foreclosure on properties that are the main and permanent residence of the foreclosed party.



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Cuatrecasas has set up a Coronavirus Task Force, a multidisciplinary team that constantly analyses the situation emerging from the COVID-19 pandemic. For additional information, please contact our taskforce by email [TFcoronavirusPT@cuatrecasas.com](mailto:TFcoronavirusPT@cuatrecasas.com) or through your usual contact at Cuatrecasas. You can read our publications or attend our webinars on our [website](#).

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