Committee on Small Business

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###### **THE COUNCIL OF THE CITY OF NEW YORK**

**Committee Report of the Governmental Affairs Division**

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**COMMITTEE ON SMALL BUSINESS**

**Hon. Mark Gjonaj, Chair**

##### March 17, 2020

**PRECONSIDERED INT. NO. 2243** By Council Members Rivera and the Speaker (Council Member Johnson)

**TITLE:** To amend the administrative code of the city of New York, in relation to extending temporary personal guaranty protection provisions for commercial tenants impacted by COVID-19

**ADMINISTRATIVE CODE:** Amends § 22-1005

1. **INTRODUCTION**

On March 17, 2020, the Committee on Small Business, chaired by Council Member Mark Gjonaj, will hear Preconsidered Intro No. \_\_, by Council Member Rivera and the Speaker (Council Member Johnson), to amend the administrative code of the city of New York, in relation to extending temporary personal guaranty protection provisions for commercial tenants impacted by COVID-19.

Those invited to testify at the hearing include representatives of the Department of Small Business Services (SBS), small business advocates, chambers of commerce, Business Improvement Districts (BIDs) and other organizations.

1. **BACKGROUND**

In late December 2019, a new virus, SARS-CoV-2, was detected in Wuhan, China and by January 30, 2020, the World Health Organization (WHO) declared that COVID-19, the disease caused by the SARS-CoV-2 virus, was now a Public Health Emergency of International Concern (PHEIC).[[1]](#footnote-1) As of March 10, 2021, COVID-19 has infected over 118 million people across 219 countries and territories, and has killed over 2.5 million.[[2]](#footnote-2) In the United States alone, there have been nearly 30 million infections and over 520,000 deaths.[[3]](#footnote-3) To date, New York has had over 1.7 million infections and over 48,000 deaths.[[4]](#footnote-4) Over 760,000 infections have occurred within the City itself, and nearly 30,000 City residents have likely died because of the virus.[[5]](#footnote-5)

The progressive nature by which the virus spreads has caused governments across the globe to shut down businesses, schools, religious and cultural institutions, and mandate various levels of social isolation. While this has seemingly helped to limit the spread of the virus, stay-at-home orders have had a catastrophic impact on economic markets, particularly small businesses that thrive from regular contact with their community and neighbors.

**1. Limitations on City Businesses in Response to COVID-19**

In New York, Governor Andrew Cuomo issued a series of executive orders to help stop the spread of SARS-CoV-2. Executive Order 202.3 prohibited all on-premises service by restaurants and bars, and ordered gyms, fitness centers, and movie theaters to cease operations entirely as of March 16, 2020.[[6]](#footnote-6) Drive-in theaters were allowed to open as of May 15, 2020,[[7]](#footnote-7) although indoor, movie theater service remained prohibited. Movie theatres in NYC were allowed to reopen at 25 percent capacity, with no more than 50 people per screen at a time, on March 5, 2021.[[8]](#footnote-8) When New York City entered Phase Two of the Governor’s reopening plan on June 22, 2020, restaurants and bars were allowed to begin outdoor dining, however they were unable to host any indoor dining until September 30, 2020, at which point the Governor announced they can operate at 25 percent capacity indoors.[[9]](#footnote-9) However, an increase in COVID-19 infections in NYC in the fall led Governor Cuomo to close indoor dining in the City on December 11, 2020.[[10]](#footnote-10) On February 8, 2021, Governor Cuomo announced that indoor dining in NYC could reopen at 25 percent capacity starting on February 12,[[11]](#footnote-11) and indoor dining was then allowed to expand to 35 percent starting on February 26, 2021.[[12]](#footnote-12) On March 10, 2021, Governor Cuomo announced that indoor dining in NYC could expand to 50 percent capacity starting on March 19.[[13]](#footnote-13) On August 17, 2020, the Governor announced that gyms and fitness centers could reopen at 33 percent indoor occupancy across the state, starting August 24, 2020, subject to the assent of local elected officials.[[14]](#footnote-14) However, Mayor de Blasio chose to delay the opening of gyms and fitness centers until September 2, 2020.[[15]](#footnote-15) Thus, by March of 2021, restaurants and bars, gyms, fitness centers and movie theaters will have been either prohibited from serving customers indoors, or subject to significant indoor occupancy restrictions for over 12 months.

Executive Order 202.7, issued by the Governor on March 19, 2020, restricted the operation of personal care services.[[16]](#footnote-16) Barbershops, hair salons, nail salons, tattoo or piercing parlors, and related personal care services were required to close to the public as of March 21, 2020.[[17]](#footnote-17) Barbershops and hair salons were then allowed to re-open at 50 percent capacity on June 22, 2020, when NYC entered Phase Two of the Governor’s reopening plan.[[18]](#footnote-18) Nail salons, tattoo parlors, piercing parlors, and other related personal care services subject to Executive Order 202.7 were allowed to re-open at 50 percent capacity on July 6, 2020, when NYC entered Phase Three of the Governor’s reopening plan.[[19]](#footnote-19) Thus, by the end of March 2021, these businesses will have been fully closed for over three months and open at half capacity for nine months.

With the issuance of the Governor’s Executive Order 202.8, which modified Executive Order 202.6, non-essential businesses were closed beginning March 22, 2020.[[20]](#footnote-20) When New York City entered Phase Two on June 22, 2020,[[21]](#footnote-21) many of these non-essential businesses were allowed to reopen at 50 percent capacity, including retail businesses.[[22]](#footnote-22) As was the case with personal care businesses, non-essential businesses subject to this guidance will have been closed for three months and open at half capacity for nine months by the end of March 2021.

While it has been over a year since businesses in New York City have either been prohibited from operating with any indoor occupancy at all or subject to significant indoor occupancy restrictions, the timeline for when businesses in the City will be able to completely reopen for full customer capacity remains unclear. According to The New York Times, New York City is still an area where residents are at “extremely high risk” for contracting COVID-19.[[23]](#footnote-23) As of March 11, 2021, only 657,110 adult New Yorkers have been fully vaccinated.[[24]](#footnote-24) It may therefore take months to vaccinate enough City residents for the risk of contracting COVID-19 to decrease to the point where COVID-19 related restrictions on businesses are relaxed.

**2. The Impact on Small Businesses Amid the COVID-19 Crisis**

As businesses were subject to operational restrictions and New Yorkers stayed home to stop the spread of the virus, consumer spending declined in the City. In late March 2020, consumer spending dropped 44 percent year-over-year, according to Mastercard.[[25]](#footnote-25) The Manhattan Chamber of Commerce reported that foot traffic in Manhattan at the end of August 2020 was down nearly 40 percent compared to pre-COVID times.[[26]](#footnote-26) According to another August 2020 report by the City Comptroller, small business revenues had dropped 26.4 percent since the previous January, ranking New York City 40th among the 52 largest American cities.[[27]](#footnote-27) Opportunity Insights reported that as of February 22, 2021, small business revenues in the City were down around 60 percent in comparison to February of 2020.[[28]](#footnote-28)

The drastic drop in consumer spending in the City and resulting loss in revenue for businesses has made it difficult for business owners to continue paying rent. The Hospitality Alliance surveyed over 400 restaurants, bars, nightclubs, and event venues in New York City about their rent obligations in December. The resulting report found that approximately 92 percent of respondents did not pay their full rent in December, while around 60 percent of landlords did not waive rent payments for restaurants, bars and nightclubs.[[29]](#footnote-29) The current outlook for many small businesses is dire as they experience massive revenue declines but must continue paying the same fixed costs, such as rent, as pre-COVID times. Camilla Marcus, the owner of the restaurant west~bourne in Soho wrote in an op-ed about her business’s closure, “Restaurants are universally facing a simple and stark equation: our income has been cut by 75%, but most of our operating costs, including our rent, remain the same. And, there's no end of the tunnel in sight.”[[30]](#footnote-30) Over 300 city restaurateurs have since joined a class action lawsuit against the City and the State over the prohibition on serving customers indoors;[[31]](#footnote-31) the NYC Hospitality Alliance has also threatened a lawsuit.[[32]](#footnote-32) On September 9, 2020, Governor Cuomo announced the indoor dining may resume in New York City beginning September 30, but even then only at 25 percent capacity.[[33]](#footnote-33) As mentioned previously, an increase in COVID-19 infections in New York City in the fall led Governor Cuomo to close indoor dining in the City on December 11, 2020.[[34]](#footnote-34) On February 8, 2021, Governor Cuomo announced that indoor dining in the City could reopen at 25 percent capacity starting on February 12, 2021,[[35]](#footnote-35) and indoor dining was then allowed to expand to 35 percent starting on February 26, 2021.[[36]](#footnote-36) On March 10, 2021, Governor Cuomo announced that indoor dining in the City could expand to 50 percent capacity starting on March 19, 2021.[[37]](#footnote-37)

Because of the high cost of rent and the inability to make adequate revenue, restaurant and other small business owners affected by COVID-19-related restrictions on their operations had urged the Council to extend Local Law 55 of 2020 (Int. No. 1932-A), which protects certain COVID-19-impacted commercial tenants from personal liability when a default of other such event occurs between March 7, 2020 and September 30, 2020. Personal liability provisions in commercial leases may hold a business owner personally responsible if they are unable to pay rent by threatening the seizure of their personal assets or property.[[38]](#footnote-38) In order to prevent this, an owner must turn in the keys to the property, effectively ending their lease. According to one restaurant owner, “Come September 30… if [Local Law 55] doesn’t get extended – [you] might see a massive number of evictions. Evictions will continue to happen at an exponential rate, and I think this will be the specific last straw many restaurateurs are holding onto.”[[39]](#footnote-39) The owner predicted that if Local Law 55 is not extended, it would be “a fatal blow to the restaurant industry.”[[40]](#footnote-40)Another owner predicted that many restaurants that have not already closed would “giv[e] up, thinking there’s no real help at all.”[[41]](#footnote-41) The Council extended Local Law 55 through the passage of Local Law 98, which extended the protections offered by Local Law 55 through March 31, 2021.

In addition to paying rent, small businesses have had the added burden of locating and purchasing personal protective equipment (PPE). To both ensure the safety of their employees and create a safe environment for consumers to shop, small business owners have purchased stockpiles of PPE, plexiglass shields, and other safety devices. Restaurants, retail stores, grocery stores, and other establishments have had to retrofit their spaces to abide by the State’s reopening guidelines.[[42]](#footnote-42) A recent report by McKinsey concluded that small grocery stores could spend up to 1 percent of their revenue in cleaning products and possible additional labor costs.[[43]](#footnote-43) According to Dr. Susan Bailey, president of the American Medical Association, the dramatic increase in need for PPE will continue to be a problem for "churches, schools, businesses, everyone that's trying to reopen needs PPE, and we're all competing for the same small supply."[[44]](#footnote-44) To assist small businesses in this effort, the City has been distributing free face coverings for reopening businesses of 100 employees or less.[[45]](#footnote-45) Additionally, the City has created an online, searchable directory of PPE suppliers.[[46]](#footnote-46)

Thousands of small businesses have closed in New York due to their inability to continue paying their fixed costs such as rent and the new safety COVID-related equipment they must purchase. In his May 22nd press conference, Governor Cuomo reported that over 100,000 small businesses have closed across the State since the pandemic began.[[47]](#footnote-47) According to the City Comptroller report, at least 2,800 small businesses closed permanently between March 1st and July 10th.[[48]](#footnote-48) Partnership for New York City predicts that as many as a third of the 230,000 small businesses in New York City may never reopen.[[49]](#footnote-49)

As small businesses have shut their doors, the livelihoods they generate for both employees and business owners have drastically decreased. The unemployment rate in the City, at 11.4 percent as of December 2020,[[50]](#footnote-50) was over 7.5 percentage points higher than the previous December,[[51]](#footnote-51) and may continue to be high even after the pandemic subsides as thousands of small businesses might permanently close. Labor statistics from the New York State Department of Labor indicate that employment in the “Food Services and Drinking Places” industries are down 43.4 percent in December 2020 as compared to December 2019,[[52]](#footnote-52) and employment in “Full Service Restaurants” is down 55.3 percent.[[53]](#footnote-53) From February 2020 to December 2020, the City lost over 131,000 jobs in the food services and drinking subsector.[[54]](#footnote-54)

According to the Department of Labor report, many “Retail Trade” businesses are also down. For example, employment in “Clothing Stores” is down 49.9 percent.[[55]](#footnote-55) Employment in “Furniture and Home Furnishings Stores” is down 27.3 percent,[[56]](#footnote-56) and in “Sporting Goods, Hobby, Book, and Music Stores,” it is down 17.6 percent.[[57]](#footnote-57) The increase in unemployment in these retail sectors led the City to lose around 25,200 jobs between February 2020 and December 2020.[[58]](#footnote-58) Employment in the “Personal and Laundry Services” subsector, which includes barbershops, hair salons, and the other personal care businesses, is down 30.7 percent.[[59]](#footnote-59) Between February 2020 and December 2020, the industry lost 19,900 jobs.[[60]](#footnote-60)

A May 2020 report from the New York City Independent Budget Office projected that a total of 115,000 leisure and hospitality jobs would be lost by October 2020,[[61]](#footnote-61) and that even if distancing restrictions are relaxed, industries with “strong ties to tourism,” such as hospitality, would continue to lose jobs due to a decline in foreign tourists.[[62]](#footnote-62) A Partnership for New York City report from July 2020 classifies an estimated 679,000 accommodation and food service jobs as vulnerable to loss – the most of any sector in the city – 58 percent coming from small businesses that employ fewer than 100 people.[[63]](#footnote-63) The closure of City businesses will leave households “struggling to feed their families and pay rent,” [[64]](#footnote-64) and the impact of job loss in the City may disproportionately affect Black, Hispanic and Asian residents. The report estimates that 40-50 percent of jobs held by people of color are at risk of loss,[[65]](#footnote-65) as opposed to 30 percent for white residents.[[66]](#footnote-66) The survival of the small business economy is essential to ensure the City can have a strong, equitable economic recovery from the financial collapse caused by the pandemic.

1. **LEGISLATIVE ANALYSIS**

**Preconsidered Int. No. \_\_\_\_\_, A Local Law to amend the administrative code of the city of New York, in relation to extending temporary personal guaranty protection provisions for commercial tenants impacted by COVID-19**

Section one of the bill sets forth the Council’s legislative findings and intent. Section two of the bill would amend Local Law 98 of 2020, which had in turn amended Local Law 55 of 2020, by extending the time period during which the laws’ protections would apply. This bill would therefore temporarily prohibit the enforcement of personal liability provisions in commercial leases or rental agreements, or relating to such leases or agreements, involving certain COVID-19 impacted tenants if the default or other event causing the natural person to be liable occurred between March 7, 2020 and June 30, 2021. Local Law 98 had established that such protections applied if the default or other event occurred up until March 31, 2021, extended from Local Law 55’s end date of September 30, 2020.

The local laws that would be extended by this bill provide protection to businesses that have been impacted by mandated closures and service limitations in the Governor's Executive Orders, as extended. Specifically, the local laws cover (1) businesses required to stop serving food or beverages on-premises or to cease operations altogether under Executive Order Number 202.3 issued by the Governor on March 16, 2020; (2) non-essential retail businesses subject to in-person limitations under guidance issued by the New York State Department of Economic Development pursuant to Executive Order Number 202.6 issued by the Governor on March 18, 2020; and (3) businesses required to close to the public under Executive Order Number 202.7 issued by the Governor on March 19, 2020. Threatening to or attempting to enforce a personal liability provision is also considered an illegal form of commercial tenant harassment under the local laws.

Additionally, the local laws require SBS, or another agency or office designated by the mayor to conduct an information and outreach campaign in order to educate commercial tenants affected by the legislation about the laws’ protections.

Preconsidered Int. No.

By Council Members Rivera and the Speaker (Council Member Johnson)

..Title

A Local Law to amend the administrative code of the city of New York, in relation to extending temporary personal guaranty protection provisions for commercial tenants impacted by COVID-19

..Body

Be it enacted by the Council as follows:

Section 1. Declaration of legislative intent and findings. a. The council finds and declares that:

1. The city is in the midst of a local, state, and federally declared disaster emergency due to a global pandemic. While the numbers increase daily, the 2019 novel coronavirus, or COVID-19, has killed over 2.5 million people worldwide, over 513,000 people in the United States, and about 47,200 people in New York state. Within the city itself, about 755,000 people have been infected with the disease and more than 29,000 people have likely died because of it.

2. Governments around the world, the country, and the state, including the city, have taken drastic measures to limit the spread of COVID-19. While many of these measures appear to have helped slow the progress of the disease, many have also contributed to a catastrophic impact on the city’s economic and social livelihood.

3. For example, as part of the effort to stop the spread of COVID-19, the governor in March 2020 issued executive order numbers 202.3, 202.6, and 202.7. These orders, as subsequently amended and extended through other executive orders, and interpreted through guidance issued by the New York state departments of economic development and health, effectively prohibited restaurants, bars, gyms, fitness centers, movie theaters, non-essential retail stores, barbershops, hair salons, nail salons, tattoo or piercing parlors, and related personal care services from operating with any indoor occupancy.

4. These operational limitations, while necessary to combat the spread of a global pandemic, have contributed to the severe economic damage suffered by the city. For example, the most recently available labor statistics from the New York state department of labor relating to the businesses subject to these orders indicate that:

(a) The city lost 131,300 jobs in the food services and drinking places subsector from February 2020 to December 2020, leaving employment in that subsector down 43.4% in December 2020 compared to December 2019. This includes a loss of 89,000 jobs in the full service restaurants industry between February 2020 and December 2020, which left employment in that industry down 54.4% in December 2020 compared to December 2019.

(b) Within the retail trade sector, the city lost about 25,200 jobs from the clothing stores industry, the furniture and home furnishings stores subsector, and the sporting goods, hobby, book, and music stores subsector between February 2020 and December 2020, which left employment in those industries and subsectors down 49.9%, 27.2%, and 17.6%, respectively, in December 2020 compared to December 2019.

(c) Within the personal and laundry services subsector, which includes barbershops, hair salons, and other personal care businesses, the city lost 19,900 jobs, leaving employment in that subsector down 30.7% in December 2020 compared to December 2019.

5. While businesses may be willing to weather the economic hardships imposed upon them by governmental measures to combat COVID-19 by either staying open or temporarily closing and later reopening, individual owners and other natural persons who personally guarantee the financial obligations of these businesses face a different and more substantial risk than losing revenue and profit. They risk losing their personal assets, including their possessions and even their own homes, transforming a business loss into a devastating personal loss. This is particularly a risk for small businesses, as the scale of the financial obligations of larger businesses generally renders having a natural person guarantee those obligations impracticable.

6. If these individual owners and natural persons are forced to close their businesses permanently now or to suffer grave personal economic losses like the loss of a home, the economic and social damage caused to the city will be greatly exacerbated and will be significantly worse than if these businesses are able to temporarily close and return or, failing that, to close later, gradually, and not all at once.

7. For the foregoing reasons, the council passed, and the mayor signed, local law number 55 for the year 2020 and local law number 98 for the year 2020, which provided and extended temporary protections to natural persons who personally guarantee the financial obligations of businesses subject to the substantial occupancy limitations imposed by the above-described executive orders issued by the governor. These protections are, however, due to expire on March 31, 2021.

8. As of March 31, 2021, these businesses will have been either prohibited from operating with any indoor occupancy at all, or subject to significant indoor occupancy restrictions, for over 12 months, and it is likely that such significant indoor occupancy restrictions will continue for the foreseeable future as the existing COVID-19 crisis has not yet subsided, new variants of COVID-19 have emerged in the city and elsewhere, and the rate at which the COVID-19 vaccine is being administered in the city indicates that it will take several months at a minimum to vaccinate enough of the population to achieve “herd immunity” to COVID-19 and its variants. As of March 9, 2021, only 623,719 adults in New York city had been fully vaccinated.

9. Extending the duration of the personal liability protections contained within local law number 98 for the year 2020 by three months, as this local law does, is intended to provide these businesses a reasonable recovery period with a duration that is comparable to the period of time that these businesses were forced to close or operate with significant limitations on indoor occupancy and thereby to provide them with an opportunity to not only survive but also to generate sufficient revenues to defray owed financial obligations.

10. As with local law number 55 for the year 2020 and local law number 98 for the year 2020, this local law does not, nor is it intended to, limit any other lawful remedies that a landlord may be able to seek against a commercial tenant itself, such as bringing suit against that tenant for damages; collecting or offsetting financial obligations by using the revenues, inventory, equipment, or other assets of that tenant; or evicting or declining to renew the lease or rental agreement of that tenant.

b. For the foregoing reasons, the council finds that it is necessary and appropriate to extend the duration of the personal liability protections in local law number 55 for the year 2020 and local law number 98 for the year 2020.

§ 2. Paragraph 2 of section 22-1005 of the administrative code of the city of New York, as added by local law number 98 for the year 2020, is amended to read as follows:

2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and [March 31, 2021] June 30, 2021, inclusive.

§ 3. The department of small business services, or another mayoral agency or office designated by the mayor, shall conduct an information and outreach campaign to educate commercial tenants affected by this local law about its protections.

§ 4. This local law takes effect immediately.

10:45AM 3/10/21

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