

Real Estate Law: Things to consider post-COVID for commercial landlord-tenant relationships

The effects of the COVID-19 pandemic on the world, the economy, and our daily lives have been both widespread and unexpected. Who could have anticipated that this is what things would look like almost nine months into the COVID crisis? Certainly, such a thing was not contemplated when most commercial landlords and tenants first entered into lease agreements. How could they have possibly anticipated the far-reaching effects of a highly contagious virus on their relationship?

The question now is, what effect will this have on their relationship going forward? This column addresses some of the issues landlords and tenants should consider when entering into new leases and amending existing leases in a post-COVID world.

First and foremost, it is important to recognize that the pandemic has affected everyone. It is best for both the landlord and the tenant if they work together in the spirit of compromise. It is unlikely that either party will get exactly what it wants; however, if they work together, they may be able to make sure that they each get what they need to ensure that their respective businesses survive these difficult economic times. Landlords should remember that if a tenant's revenues are down, they may be unable to pay rent or may not want to pay rent if their employees are working remotely. Tenants should remember that landlords rely on rental income to pay their mortgages. If they each approach negotiations in the spirit of good faith and compromise, there is a good chance that both businesses can survive these dark economic times and move to a bright future.

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provisions. Landlords should know when their tenants are in default and should make sure to give them proper notice of such default to preserve their rights under the lease. From a landlord's perspective, it is preferable that a lease not contain a notice and cure period before a late-paying tenant is in default. Landlords should always try to include a right to review their tenant's financial statements so they can stay informed of their tenant's financial positions, especially if the tenant starts to get into financial trouble. Again, this information will be helpful when negotiating a mutually beneficial solution with the tenant. Landlords might also consider requiring letters of credit or secured guarantees since these can be relied upon to make a landlord whole in the event of default regardless of the tenant's financial stability.

Tenants should also read their leases carefully, especially their payment and other financial obligations. They should analyze their financial position to determine what rental payments they can make and then approach the landlord with a plan. It is preferable if the

tenant can pay a portion of the rent now and defer (or possibly abate) the remainder because it will be difficult to make up the deferred rent in the future once the tenant is in a more favorable financial position. Tenants should be cognizant of the fact that their landlords may be limited in their ability to modify their leases by their agreements with their lenders. It is also favorable for tenants to consider looking to their insurance policies (i.e., business interruption insurance) or emergency relief (i.e., Small Business Association loans) for financial support.

The force majeure clause has been getting a lot of attention lately since tenants are relying on it to avoid or defer their payment obligations; however, the force majeure clause might excuse a tenant's performance obligations, but it rarely excuses a tenant's payment obligations. Both parties can strive to craft a force majeure provision that would address something like a global pandemic, but it is important to remember the unpredictability of something like COVID-19. The other problem with relying on the force majeure provision is that if the tenant prevails and is excused from paying rent, the landlord may not be able to pay the mortgage and may lose the property in foreclosure.

These difficult times call for a practical approach where landlords and their tenants seek to reach a long-term solution that preserves their relationship and allows their respective businesses to survive and prosper. Doing so will greatly benefit both parties in the post-COVID world.

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