

Real Estate Law: COVID-19 presents unique challenges for commercial leasing

The nationwide spread of COVID-19, and governmental regulations enacted in response to the outbreak, has had a significant impact on the commercial real estate world, and commercial leasing in particular.

With governmental regulations growing increasingly more restrictive, many people are beginning to face the reality that the ramifications of the pandemic are likely to last much longer than initially anticipated. Already, commercial landlords have begun fielding requests from tenants for rent abatement due to mandated closings and are unsure whether they are required to provide the same. During this time of uncertainty, it is important for commercial landlords and tenants to be cognizant of their respective rights and obligations under their leases in light of COVID-19.

One lease provision that may be implicated by the pandemic is the force majeure provision: a provision which excuses the parties' non-performance in certain limited circumstances where performance is prevented by an event beyond the parties' control. Force majeure provisions are interpreted very narrowly; whether an event is covered by force majeure will vary and depends on whether or not such event is contemplated in the force majeure provision of the lease. Examples of events commonly contained in force majeure provisions include war, natural disaster, "acts of god," and labor strikes. In determining whether COVID-19 excuses a landlord's and/or tenant's performance of certain obligations under a lease, examples of key terms to look for that may capture the virus would be epidemic, pandemic, outbreak or occurrence of any disease or contagion, or other like terms. Even if terms similar to the foregoing are not contained in the force majeure provision such that the virus



Karianne M. Polimeni

with a national or other public emergency, for example, may trigger the force majeure provision under the lease.

Many force majeure provisions also contain catchall language, such as, for example, any unforeseen event outside of the parties' control, in addition to the specific events listed in the provision. Whether or not COVID-19 would be captured under the catchall language depends on whether it is similar to the specific events listed prior to the catchall. If it is not similar in nature to the events specifically listed therein, it would likely not be covered.

In addition to determining whether COVID-19 is considered an event of force majeure under the lease, it is important to keep in mind the underlying obligation seeking to be excused. For example, if a commercial tenant is bound by a covenant of continuous operation giving rise to a landlord termination right if the tenant does not continuously operate its business from the leased premises for a certain period of time, so long as COVID-19 is captured under the

itself would not be considered an event of force majeure, reactions to the virus may qualify, nonetheless. Terms such as governmental regulations or control or controls in connection

lease's force majeure provision, the tenant would likely be excused from such obligation and therefore not in default under the lease. However, most commercial leases contain language expressly providing that force majeure does not excuse the timely payment of any amounts due under the terms of the lease, meaning, for example, that the tenant would still be obligated to pay rent, and the landlord would be obligated to pay the tenant improvement allowance, despite the occurrence of an event of force majeure.

Along with looking to the lease's force majeure provision as a potential source for economic relief, many commercial landlords and tenants are wondering whether they can turn to their business interruption insurance (also known as business income insurance) for relief. Often, tenants will obtain business interruption insurance as part of their property insurance policy. Landlords have the option of securing a similar type of insurance (also commonly referred to as rental income insurance) as part of their property insurance policies, as well. Coverage under these types of policies is not typically triggered unless such business or rental interruption is the result of physical damage or loss to the property such that the tenant is rendered unable to occupy the leased premises. In order to determine whether business or rental income losses due to COVID-19 would be covered by insurance, the parties would need to review the specific policies and determine whether the coverage is limited, and if so, to what extent.

As we all continue to monitor an ever-changing landscape, it is clear that the sustained COVID-19 response is going to require every industry to adjust to a new normal. The above are only a few examples of potential lease implications resulting

from COVID-19. Commercial landlords and tenants should take the time to review their leases in detail in order to be best prepared for both the anticipated and unanticipated

ramifications on commercial leasing from this challenging situation.

Karianne M. Polimeni is an associate in the Real Estate practice at Harter Secrest &

Emery LLP. She can be reached at kpolimeni@hselaw.com.