

U.S. COVID-19: Commercial Leases - Rent Obligations in the United States

What should commercial landlords and tenants be doing right now in response to the COVID-19 crisis and looming rent payments?

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While it is true that a number of States and local municipalities have stopped all eviction proceedings and many courts are currently closed, the issue of rent remains front and center between landlords and tenants. The following sets forth some guidelines to begin thinking about these issues:

- Review your Leases. Payment obligations will generally rest on the specific language of the lease, but the answers may not be as clear as a landlord or tenant might assume. Provisions often relegated to the “Miscellaneous” section in leases (e.g., force majeure, severability, independent covenants etc.) may take center stage.
 - Lease provisions that **landlords** should focus on include:
 - Requirements that rent be paid without deduction or set-off;
 - Provisions that afford a landlord broad rights to shut down its building in an emergency without any abatement of rent;

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- Force majeure clauses that carve out monetary obligations from their applicability;
 - In the retail setting, operating covenants and, if breached, the effect on percentage rent;
 - Provisions that spell out the independent nature of lease covenants, arguing that the tenant's obligation to pay rent is independent from the obligation of the landlord to keep its building open; and
 - The availability of their tenants' credit support - Are letters of credit getting close to expiration and what are the draw procedures (and is the bank's draw office available for presentment)?
- Lease provisions that **tenants** should focus on include:
 - Abatement and other rights in the event of loss of access to the building or cessation of landlord's services;
 - Force majeure clauses that do not carve out monetary obligations;
 - Provisions that guarantee the tenant's right to access or use the premises;
 - Condemnation/casualty provisions if drafted to extend to a loss of access or use as a result of governmental action;
 - In the retail setting, co-tenancy requirements that require shopping centers to maintain a certain level of occupancy or certain stores in operation (the failure of which can trip termination and other rights in favor of tenants);
 - Quiet enjoyment rights; and
 - The tenants' lease security - the identity and financial resources of the corporate tenant, whether security deposits are evergreen (so if drawn down, do they need to be replenished?), whether tenants are entitled to the return or reduction of lease security under as yet unexercised lease provisions, and the scope and viability of lease guaranties.

Tenants, in particular, may also seek grounds outside of the four corners of their leases (such as a supervening illegality or a basis arising from a lack of habitability or possession) in support of arguments for rent relief.

- Review your Credit Documents. Landlords should be looking at their loan documents to make sure that appropriate notices and consents are obtained from their lenders as landlords make decisions in how to handle rent relief requests from tenants. Tenants should be reviewing their agreements with landlords' lenders, as well as their own credit facilities. Obviously, landlords and tenants may encounter serious liquidity issues depending on the duration of COVID-19 impacts on the real estate sector, and so they may find themselves needing to assess all options, including the protection afforded under bankruptcy laws.
- Review your Insurance. Landlords and tenants should be reviewing their insurance policies for possible coverage. In particular, landlords will be looking at their rent loss coverage, and tenants will be looking at their business interruption coverage.
- Monitor Legal Developments. Landlords and tenants should be paying close attention to Stay at Home orders and other governmental directives and evaluating their impact on their businesses - Is the landlord required to close the building? Is the tenant required to shut down operations at the building? Landlords and tenants will want also to monitor the growing number of executive orders that stay evictions and seek legal advice concerning their impact. Landlords, in particular, will want to consider how to comply with those orders without waiving future claims.
- Preserve your Rights. Landlords and tenants should be taking steps to preserve their rights. Giving necessary or advisable notices pursuant to their leases and insurance policies is critically important. Moreover, the parties should carefully consider how their current decisions and communications during this crisis will be viewed in the future, when the dust settles, by an arbitrator or court in the event they find themselves in dispute proceedings.

- Amicably Resolve. With so much uncertainty regarding how the current crisis will impact landlord and tenant rights, the best option at present is for parties to come together and cooperate during this unprecedented pandemic. Depending upon the duration of shut downs, the dollars at stake will widen the gap between the parties and may diminish the likelihood that landlords and tenants, along with their lenders and insurers, will be able to quickly agree on equitable risk allocations. Agreeing upon and documenting those resolutions, while the situation is still evolving, may be challenging but could ultimately provide much desired certainty going forward.

BCLP is monitoring developments in the law as they arise, and we expect legal issues stemming from the COVID-19 crisis to remain fluid for some time to come.

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