

# MSF CLIENT ALERT

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## New York City Council Passes Bill Suspending Personal Liability Provisions in Commercial Leases

*The New York City Council has passed a bill temporarily prohibiting enforcement of personal liability provisions in commercial leases involving certain COVID-19 affected tenants. The bill, referred to as Int. No. 1932-A and passed on May 13, was one of several bills aimed at helping businesses affected by the economic fallout of the COVID-19 pandemic. Mayor de Blasio has signaled his support for the legislation and is likely to sign it into law in the coming weeks.*

May 20, 2020

This bill is intended to cover (1) businesses that were required to stop serving food or beverages on-premises (restaurants and bars); (2) businesses that were required to cease operations altogether (gyms, fitness centers, movie theaters); (3) retail businesses that were required to close or subject to in-person restrictions; and (4) businesses that were required to close to the public (barber-shops, hair salons, tattoo or piercing parlors and related personal care services).

### ***What is the Purpose of Int. No. 1932-A?***

Int. No. 1932-A, which amends the City's Administrative Code by adding Section 22-1005, is designed to protect small businesses affected by the COVID-19 pandemic, with a focus on the restaurant and retail industries, both of which have suffered massive losses in recent months (and which may well continue in the months ahead). The City Council was concerned that the rising lease default rate caused by the COVID-19 pandemic will lead commercial landlords to enforce personal liability provisions in leases, putting business owners' personal assets and properties, including their homes and personal bank accounts, at risk.

As passed by the City Council, the bill appears to cover personal guaranties, including so-called "Good Guy Guaranties." Good Guy Guaranties typically provide that if a tenant surrenders possession of the leased premises to the landlord before the end of the lease term, and certain conditions are met, the guarantor's liability is capped at the amount due on the date the tenant surrenders possession of the leased premises. But in light of governmental restrictions resulting from the COVID-19 pandemic, many commercial tenants now find it highly onerous, if not impossible, to meet surrender-the-premises conditions. For one thing, commercial moving companies are not considered essential services under Governor Cuomo's executive orders, so business may not be able to surrender possession of their leased premises broom-clean, which is often a requirement in Good Guy Guaranties.

### ***What does Int. No. 1932-A Provide?***

Int. No. 1932-A applies specifically to "commercial tenants" and "commercial leases," and makes no mention of residential tenants or residential leases. As such, residential tenants and leases are likely to be deemed outside the scope of the bill's coverage.

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To qualify for coverage under Int. No. 1932-A, a commercial tenant must satisfy one of the following requirements:

- The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under Governor Cuomo's executive order of March 16, 2020;
- The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state Department of Economic Development pursuant to Governor Cuomo's executive order of March 18, 2020; or
- The tenant was required to close to members of the public under Governor Cuomo's executive order of March 19, 2020.

If the tenant satisfies one of these requirements, the bill renders unenforceable the personal liability provision in the tenant's "commercial lease or other rental agreement." This means that a landlord cannot rely on a commercial lease or rental agreement's personal liability provision to recover amounts owed for "rent, utility expenses or taxes," nor for "fees and charges relating to routine building maintenance."

In addition to making personal liability provisions unenforceable, Int. No. 1932-A also provides that threatening or attempting to enforce personal liability provisions in a lease will be deemed a form of "commercial tenant harassment."

## ***What are the Limitations of Int. No. 1932-A?***

A close reading of the text of the bill suggests that it is subject to several notable limitations.

Critically, any "default" or "other event" triggering liability under a personal liability provision must have occurred between March 7, 2020 and September 30, 2020 to qual-

ify under Int. No. 1932-A. That means that liability triggered by a default that occurred prior to March 7, 2020 is unlikely to be covered by the bill, even if such default is directly attributable to the COVID-19 pandemic.

Int. No. 1932-A does not cover all forms of personal liability provisions. The bill applies only where there is a "provision in a commercial lease or other rental agreement involving real property located within the city that provides for one or more natural persons who are not the tenant under such agreement[.]" This suggests that if an individual, rather than a business entity, is named as the tenant in a commercial lease, the bill would not excuse that individual from his or her personal liability on the lease. In contrast, the bill applies to personal guaranties, as the only way a natural person that rents through an entity could be personally liable on the lease is if he or she provided a guaranty.

Additionally, the reference to "natural persons who are not the tenant" suggests that, in addition to business owners, the bill also protects other personal guarantors who do not necessarily have an ownership stake in the business or property in question, but excludes any corporate guaranty, such as in the case of a corporate parent.

## ***Legal Challenges can be Expected***

Assuming Mayor de Blasio signs Int. No. 1932-A into law, it is safe to assume that real estate groups and landlord associations, in addition to private landlords, will challenge the legality of the bill. Such challenges have been foreshadowed by the testimony that took place when passage of the bill was being debated; a representative of the Real Estate Board of New York testified that the bill

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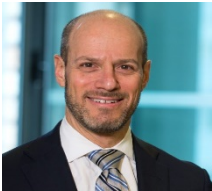
calls for a “seemingly impermissible unilateral amendment of existing valid contracts.”

Those opposing the bill are likely to assert that New York law prohibits, or at least limits, the ability of the government to interfere with and “rewrite” private contracts such as commercial leases and rental agreements. Opposers are also likely to raise constitutional concerns, including potential violations of the Contracts, Takings, and Due Process Clauses of the federal Constitution, which circumscribe the government’s power to deprive citizens of their property rights.

These ambiguities and legal challenges are likely to take shape in the weeks and months ahead as commercial tenants, business owners, and guarantors begin citing the bill (once it is signed into law) as a defense to enforcement of personal liability provisions in commercial leases and rental agreements.

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For more information or if you have any questions about how this new development may affect your business, please contact a member of our team.



**Howard S. Koh**  
Partner | Commercial Litigation  
212.655.3587 | [hsk@msf-law.com](mailto:hsk@msf-law.com)



**Scott A. Newmark**  
Partner | Co-Chair, Real Estate  
(212) 655-3509 | [san@msf-law.com](mailto:san@msf-law.com)



**Amit Shertzer**  
Associate | Commercial Litigation  
(212) 655-3510 | [as@msf-law.com](mailto:as@msf-law.com)

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