



Guidance for Landlords, Tenants, Developers and Contractors

As the coronavirus outbreak enters another month, now is the time for all parties to commercial leases, commercial loan agreements, and construction contracts to consider and take appropriate response actions to help mitigate their risk and prepare for how they will deal with the fallout from the coronavirus.

Landlords, Tenants, Developers and Contractors should begin to take the following actions now to identify the impact of the coronavirus and help mitigate risk.

Review Lease "Force Majeure" and other Relevant Provisions

Force majeure refers to a legal doctrine under which a party may be relieved from liability for non-performance if circumstances beyond the party's control prevent the party from fulfilling its obligations under a contract. Force majeure provisions are standard in commercial leases, loan agreements, and construction contracts, but can vary greatly depending on how they were drafted by the parties. The specific force majeure lease language will be very important. Does the provision cover pandemics/disease/epidemics, governmental orders, and/or voluntary business closures during a health emergency? Does the provision apply to (or specifically exclude) obligations to pay rent and/or continuously operate at the premises? If the lease does not contain a force majeure provision, the parties may have similar common law or statutory rights, depending on the jurisdiction. For example, many states recognize "impossibility" or "frustration of purpose" (including in some states, temporary frustration) where an unforeseen event significantly alters the circumstances such that performance under the lease no longer fulfills the parties' original purpose. Force Majeure provisions may also provide relief to developers or contractors under construction contract agreements.

Review All Notice Requirements

If a Landlord, Tenant, Developer or Contractor has a valid defense to performance under the Lease/contract, whether it be force majeure or otherwise, such party should make sure to give proper notice to the other party in accordance with the terms of the Lease/contract in order to avoid any arguments that it waived its rights.

Begin Communications with your Landlord, Tenant, or Contractor NOW

Whether or not any formal notices are required, Landlords, Tenants, Developers and Contractors should begin communications about possible and actual coronavirus impacts immediately. Many Tenants are sending notices that they will be discontinuing operations and/or that they may be unable to pay some

or all of their rent during the current epidemic. Many parties to commercial leases and construction contracts have also begun to negotiate agreements in order to address the initial impacts of the coronavirus. Such agreements may include full or partial deferral of rent for up to 90 days (with Tenant agreeing to extend the lease and pay such amounts at the end of the term at an appropriate escalated rental rent), and the extension of delivery timelines. The parties to leases will also need to negotiate how CAM, real estate taxes and insurance will be paid during any rent deferral period, and determine which other provisions in the lease will be impacted by an extension of the lease term (renewal options, for example).

Begin Communications with your Lenders, NOW

As more and more Tenants seek deferrals, abatements or other concessions, or actually begin to fail to pay rent, Landlords will need to immediately engage their Lenders in the process as this will impact their ability to timely pay their mortgages. In addition, most loan documents will require that any agreements, deferrals or amendments with Tenants, in particular those that modify rent or lease term, are subject to Lender's review, consent and approval. As the Lenders may need some time to assess the situation and obtain such approvals, Landlords should start that process now. Tenants will also need to immediately engage with its leasehold lenders to discuss rent deferrals, lease extensions and other revisions to the lease, which may require lender review, consent and approval. The same goes for construction loans where delivery timelines and closing of finished units can be delayed.

Insurance

Landlords, Tenants, Developers, and Contractors should immediately review applicable insurance and lease provisions with their risk management or insurance consultant. It is not clear yet how each case will be handled but parties will generally want to file claims to preserve rights if they have been impacted. Typically, business interruption insurance, rent loss insurance and commercial general liability insurance claims require a physical damage. However, parties may have specific endorsements or coverages that expand that coverage and ultimately we don't know yet how the courts will treat coronavirus claims under these types of policies.

Assess the Impact of State and Local Government Orders

In determining whether to pay rent and while negotiating deferral agreements or other lease amendments, the parties should assess the impact of state and local orders. Many jurisdictions have temporarily halted commercial evictions. Even in the absence of such orders many courts have temporarily closed or have limited hours meaning that any lease litigation may be significantly delayed. Tenants should note that many of the eviction orders do not expressly apply to other, non-evictions actions under the lease such as for past due rent (or actions against a lease guarantor for monetary damages). In addition, once the orders are lifted, Tenants could still face eviction for uncured defaults or past due rent that accrued during the moratoriums. Developers and Contractors should similarly assess these impacts on their contracts.

Assess the Impact of the "CARES Act"

Landlords, Tenants, Developers, and Contractors should assess any benefits that may be available to them under the CARES Act for commercial leasing purposes. For example, the \$349 billion Paycheck Protection Loan Program, which covers the period February 15, 2020, through June 30, 2020, greatly expands the SBA loan eligibility and will allow businesses suffering due to the coronavirus outbreak to borrow money for a variety of qualified costs related to employee compensation and benefits, including, in addition to payroll and other items, rent.

Future Commercial Lease/Contract Planning

Landlords, Tenants, Developers and Contractors should update and revise their "form" leases/contracts to address the coronavirus and other epidemics, including force majeure, rent abatement, insurance, co-tenancy (if applicable), continuous operation (if applicable), covenant of quiet enjoyment (if applicable) and other relevant provisions.

In summary, it is important for Landlords, Tenants, Developers and Contractors to take the foregoing steps now, as appropriate, in order to help mitigate their risk of suffering negative impacts from the coronavirus. For additional web-based resources available to assist you in monitoring the spread of the coronavirus on a global basis, you may wish to visit the [CDC](#) and the [World Health Organization](#).