

COMMERCIAL LEASES AND COVID -19

Every business owner will be affected by the measures that are being taken to protect against the spread of the COVID-19 virus. It is vital that business owners assess the economic impact to their business and plan for the future. Many business owners are subject to a lease whether as a tenant or landlord. Understanding the obligations under that lease will be important in the business owner's economic assessment and business planning. Commercial landlords and tenants are urged to review their lease documents to determine the obligations and then communicate with one another regarding issues or concerns. In conducting that review the following common lease provisions should be evaluated.

Force Majeure (Unavoidable Delay)

Force majeure clauses provide for the postponement or suspension of a party's obligations under the lease for events that cannot be reasonably anticipated or controlled. The current pandemic likely falls into the definition however, it does not automatically excuse a party from performing. Performance is excused only if the obligation cannot be performed as a result of the event. In addition, a party's financial inability to perform is often carved out of the force majeure provision. Therefore, a tenant typically must continue to pay rent.

Landlords and tenants should also consider (i) what constitutes an excusable obligation under the lease; (ii) how the inability to perform those obligations affects the landlord's and tenant's business; and (iii) whether the tenant is able to continue to perform in accordance with its permitted use.

Insurance

Leases will typically have tenant insurance obligations and may also have landlord insurance obligations. Within the required coverage "business interruption insurance" is common. Business interruption insurance typically addresses "property" coverage (dealing with physical damage to property) and may exclude virus-related causes.

Policies may also include coverage for action taken by civil authorities and may provide some relief if business income loss is a direct result of restricted access to the property in compliance with local or federal authority directives. Landlords may also have rent loss insurance and that coverage may be dependent on factors such as tenant's corresponding right to abate the rent. Insurance policies differ and both landlords and tenants should review their insurance policies and discuss the coverage with their insurance providers and counsel.

Casualty

Landlords and tenants plan for damage to the leased property through a lease Casualty provision. This typically provides that damage to the premises or building, either partially or in its entirety, rendering the premises inaccessible or unusable will trigger rights of the parties regarding rent,

rent abatement, and lease termination. Whether the COVID-19 pandemic rises to the level of a Casualty is factual and will need to be determined on a case-by-case basis.

Common Areas, Services, Abandonment of Premises, and Operating Hours

These provisions provide for certain lease obligations and the expectations for use of the premises and building. The shared common areas may be shut down or materially restricted during the governmental restricted periods. Services may be delayed, or unavailable and operating hours may be modified. The tenant's intended use of the space may prohibit it from operating within the space.

Each obligation will need to be analyzed to determine if it falls under a force majeure exclusion. While some states are restricting landlords from evicting tenants for failure to pay rent during this time, landlords will need to consider how to address failure to pay rent when the tenant shuts down operations for a continued period of time. Both parties should also review the lease for applicable rent abatement provisions. This may aid the parties in addressing and adjusting rent obligations.

In reviewing services provisions in the lease, the obligation for janitorial services will typically be assigned to one of the parties. Janitorial services are usually basic cleaning services such as trash removal, dusting, and window cleaning. We are seeing that some landlords are now proactively completing deep cleaning services for their building. In one instance the landlord immediately charged back the cleaning service to the tenant and the cost was then negotiated. From both a landlord and tenant perspectives deep cleaning services should be explored regardless of lease provisions.

Notices

Communication between the landlord and tenant is crucial. Each party should keep the customary lines of communication open. Formal communications such as notices for non-performance must be sent in accordance with the notice provisions in the lease document. Both tenants and landlords should be mindful of existing health guidelines to determine their responsibility should exposure to COVID-19 be found on the premises or in the building.

Questions to Consider:

Do the COVID-19 events prevent performance and trigger the force majeure clause?

Is the landlord required to keep the building open and provide customary services?

What are tenant's obligations to remain open and operate?

Are there lease termination or rent abatement rights in the lease?

Is there insurance coverage for the COVID-19 events?

What are the applicable notice requirements for non-performance?



Have there been any issues or concerns with access or use of the premise of building in which it is located?

The force in which the COVID-19 events have hit our economy and each of us personally has been intense. It requires that all business owners' assess the economic impact to their business and carefully plan for the future. Part of that planning must be the review of existing contractual relationships including the business's commercial lease or leases. Please feel free to contact Momkus LLC with your questions, concerns, or for assistance with your lease review. Momkus LLC continues to operate as an "essential service" during this crisis and we are ready and prepared to help.