

Coronavirus: Key Issues for Commercial Leases

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The outbreak of the novel coronavirus (COVID-19) and the measures being taken in response have raised many questions about the effect on commercial leases. The rapid spread of the virus and increasing scale of governmental response raise implications for the ability of landlords and tenants under office, retail and industrial leases to perform their respective obligations. In light of this rapidly evolving situation, commercial landlords and tenants should assess and understand their rights and obligations under their lease documents, including circumstances under which a party may potentially be excused from its obligations due to COVID-19.

In recent days, various state and local governments have taken drastic actions to curb the spread of COVID-19, including issuing stay at home orders and closures of non-essential businesses.

To the extent that the effects of COVID-19 and actions taken in response to it prevent tenants under commercial leases and their personnel from accessing and using their space for the operation of business, and/or landlords from running their buildings and providing required services to tenants, questions will arise concerning the obligations of the parties and relief which may be available. As the answer in each case will largely depend upon the specific provisions of each lease, landlords and tenants should review their leases with a particular eye toward the following issues and provisions.

Force Majeure

Force majeure clauses are contractual provisions that excuse parties from performing their contractual obligations when certain events or circumstances beyond their control prevent such performance. In commercial leases, these clauses may include events such as strikes, labor disputes, natural disasters, acts of God, inability to obtain materials, governmental actions, war, civil commotions, fire or other casualty, and possibly a catch-all such as "other causes beyond the reasonable control of the party obligated to perform." Parties should consider the following in analyzing force majeure provisions:

- Courts in most jurisdictions interpret force majeure clauses very narrowly and ordinarily a party will only be excused from performance if a force majeure clause specifically includes the event that precludes a party's performance.
- Force majeure clauses in commercial leases often expressly exclude and do not relieve a tenant of the obligation to timely pay rent. Thus, a tenant could find itself in a situation of having to pay rent even if it is unable to access or conduct business in its premises.
- Even if a lease does not specifically include a pandemic or outbreak of communicable disease as a force majeure event, it is possible that the COVID-19 outbreak or its effects could be the basis of a force majeure claim. Such claim will be more immediate in the face of a government order that prevents a tenant from accessing and operating in its premises, or a landlord from providing services required under the lease. While such a condition may not necessarily relieve a tenant of its obligation to pay rent as noted above, it may relieve the tenant of an obligation under the lease to continuously occupy and/or operate in the premises.
- If a lease does not have a force majeure clause, there is no general right to force majeure relief under the law. Instead, parties may potentially look to common law doctrines of "impossibility" and "frustration of purpose," which are recognized in most jurisdictions. Although beyond the scope of this alert, these doctrines are much more limited in scope than force majeure and often require a much higher standard to be met in order to be invoked.

Other Considerations

- Some commercial leases may contain provisions (which may be separate from a force majeure clause) under which a tenant may be entitled to abatement of rent in the event it cannot access or use the premises for a period of time due to the landlord's failure to provide services or utilities required under the lease. These clauses are often limited to situations caused by the landlord's negligence or willful misconduct and contain exclusions for force majeure events or the failure of third parties (e.g., failure of the utility company to supply power to the building) outside of the landlord's control.
- As noted above, certain tenants (particularly in the retail sector) may have obligations under their lease to continuously operate their business in their premises during certain hours and days, and/or to operate fully-staffed. As the COVID-19 outbreak and any government-ordered closures will likely bear on a tenant's ability to meet this obligation, it will be in the interest of tenants to communicate with landlords regarding any closures of the tenant's premises prompted by these events.

This is not intended to be exhaustive or include all issues that may arise or need to be considered in connection with commercial leases. The issue of what insurance coverage(s) may be available to the parties to cover a tenant's inability to make rent payments as a result of the COVID-19 outbreak is beyond the scope of this alert and should also be analyzed. Should you have questions about your particular lease situation, please contact C. Jason Kim (kimcj@whiteandwilliams.com; 212.714.3077), Rachel Schneidman (schneidmanr@whiteandwilliams.com; 212.631.1254) or another member of the Real Estate Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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