

Surviving as a Tenant In the Age of Coronavirus:

A Checklist

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Many tenants have asked us how to revoke, amend, or negotiate relief under their current leases in light of the extreme hardships being caused by the Coronavirus and COVID-19 (the “Virus”). There is no solution that fits everyone: every lease, every tenant’s needs, and every landlord’s ability and willingness to accommodate is different. But if you are currently struggling under a commercial lease as a result of the operational impediments or revenue freefall caused by the Virus and wondering what provisions in the lease or law might enable you to improve your situation, here is a non-exclusive list of issues and provisions to consider.

Rent Support:

The Paycheck Protection Program (PPP) of the Federal CARES Act may offer you the opportunity to borrow money that can be applied to your rental obligations (though you may jeopardize loan forgiveness if you use more than 25% of the loan for non-payroll purposes). You should also consider borrowing under the Economic Injury Disaster Loan (“EIDL”) program (once funding again becomes available, which should happen this week).

Rent and Eviction Relief:

Many states have disallowed evictions for several months – if you’re having trouble meeting your rental obligations and worried about the implications of a default, check local law.

Note: For Massachusetts readers, on April 21 Governor Baker signed into law a bill disallowing new non-essential eviction cases, such as those for non-payment of rent or minor lease violations, and waiving certain late fees and credit reporting. Most protections apply only for the next four months or, in some cases, until 45 days after the coronavirus state of emergency is lifted, and only for residential units, though several apply to “small business premises units.”

Force Majeure:

Clients have asked whether they can rely on the “force majeure” clause in their lease. (That is the provision found in many contracts that excuses a party’s failure to perform when this is due to causes beyond that party’s control.) Unfortunately for tenants, many of these clauses are written to benefit just the landlord, and even in those leases that provide reciprocal force majeure relief, we have yet to find one that doesn’t *exclude* the obligation to pay rent.

Impossibility:

Even in the absence of a formal force majeure clause, the contract laws of most jurisdictions recognize the related defenses of *impossibility* and *frustration*. These should certainly be considered, particularly in cases where the landlord (or government) has denied tenants access to the building/premises, failed to provide the services it is required to provide (HVAC, utilities, cleaning), or otherwise made it difficult for the tenant to use the premises as contemplated. But appreciate that the law has recognized such impossibility/frustration defenses in limited and

extreme circumstances, which are unlikely to apply to your Virus shutdown.

Construction Delays:

Depending on the terms of your lease, a construction delay caused by the Virus could affect lease commencement, delay rent commencement, create additional rent deferral (adding one day for each day of late delivery is a common lease remedy for construction delays), or even give rise to termination rights, depending on the language in the lease. *If you're waiting for access to your space while the landlord constructs improvements, check the terms of the lease to see if they give you any particular rights or options.*

Access Denied/Services Suspended:

What if you can't get into your space, or your use is hampered by the absence or cut back of certain services (e.g., janitorial service is reduced or absent, or certain utilities are affected by the Virus)? Check your lease to see whether: the landlord has an affirmative obligation to provide these missing services; the lease provides rent relief for such failures (many leases expressly grant a rent abatement if a service suspension interferes with the tenant's use of the premises for longer than a specified period, such as 3, 5 or 7 days); or the failure is a default, and what remedies may be available (occasionally a tenant has a right to cancel or take other action if the landlord breaches and fails to cure).

Note: If the lease contains a force majeure clause, *the landlord may be able to use that as a defense to its failure to perform*. Also, many (if not most) leases provide that even if the landlord is in default, the tenant must keep paying rent (an example of the infamous principle: they have you coming and going), so look closely before acting or assuming.

Security Deposit:

It is unlikely the lease permits the tenant to unilaterally elect to apply the security deposit to current rent obligations. Still, a friendly landlord might agree to use all or some of the deposit for that purpose, with the understanding that it will either be restored in the near future (when the worst is over) or be permanently reduced. (If it must be restored, be clear about how and when, to avoid default.)

Note: Some leases provide that the security deposit will "burn down" over time. In theory, these should be the easiest to convince the landlord to apply (since effectively all you may be seeking is an acceleration of the burn down).

Rent Reduction:

Increasingly we have seen clients specifically request a temporary or more permanent rent reduction. Some landlords are willing to talk (especially where the landlord's expenses are lower because many tenants are absent and not consuming various services). A common approach is to seek suspension of rent for several months, with an offer to increase the term of the lease by 1X or 2X the length of the deferral period. If the tenant can demonstrate a need for relief on the one hand, but financial viability on the other – why would a landlord provide concessions to a tenant headed for bankruptcy? – a reasonable landlord might be persuaded to accept some tradeoff of current rent for future occupancy.

Note: Bear in mind that if the building is mortgaged, the landlord may not be able to offer rent concessions without the approval of its lenders, making this a collaborative process all around.

Barter (quid pro quo):

Above we noted that some tenants are proposing a term extension in exchange for a rent abatement or suspension. However, creative tenants should consider whether they can offer their landlord other benefits in exchange for the desired rent relief such as: releasing the landlord from particular duties (e.g., office cleaning, improvement allowance, 9-5 heat); waiving certain rights or options (e.g., giving up your right to extend or expand); agreeing to relocate; or

offering some performance related to tenant's own business (e.g., if the tenant is a restaurant, consider offering no-fee or low-fee food services).

Term/Termination:

As suggested above, consider negotiating an extension or *shortening* of the lease in consideration for rent abatement, reduction or delay. Be sure to check the lease to see if it contains an *early termination provision* that you might wish to exercise (or forgo in exchange for some rent concession).

Escalation:

If, as alluded to above, the landlord has been able to cut back services (e.g., if the building is on lock-down, HVAC charges may be lower and the cost of janitorial and security – e.g., guards on patrol – may have also decreased), a tenant paying an estimated portion of “increased” annual operating expenses could request the Landlord to voluntarily recompute the escalation in light of the lower-than-anticipated operating costs.

Note: Be wary here: a landlord might have *increased* security and/or cleaning costs, which you don't want to encourage it to impose on you sooner than planned.

Casualty:

Virtually every lease contains a provision that describes what happens if the building or premises are wholly or partially destroyed or rendered untenable as a result of “fire or other casualty.” Though unlikely, there may be situations in which the Virus arguably constitutes a casualty (e.g., a Viral outbreak in the building caused the landlord to close it temporarily for cleaning) and give rise to affirmative landlord obligations (generally, to repair and restore) and/or tenant abatement rights (if prevented from using the premises due to the casualty). Of all the longshots described here, this is one of the longest.

Expansion/Renewal FMR:

If the lease contains an option to extend or expand – which generally provides that the rent will be determined on a “fair market rent” basis – consider whether the current crisis has caused a reduction in fair market rent for purposes of pricing the extension.

Guaranty:

If the lease is guaranteed by a third party, be sure to consider the implications to the guarantor of a breach or default in rent payment.

Insurance:

Finally, check to see whether you have an insurance policy that covers any of your losses. In general, most business interruption policies require physical damage and therefore expressly or impliedly exclude losses due to infectious diseases and viruses. Although legislation has been proposed in several states to require insurers to cover such losses (despite policy exclusions), and lawsuits claiming coverage have been filed, few commentators think such new laws will pass or prevail – and “the jury is still out” on the pending suits – so for now don't count on such relief.

Still, there could be circumstances where closure due to Viral contamination is a covered loss, so consider your particular situation and, working with your lawyer and insurance agent, see if there is any possible claim to submit (if there is, submit it *quickly!*). It is also possible that your landlord has a policy that protects it from defaulting tenants, even under these circumstances, so it may be useful (from many perspectives) to have a frank discussion with your landlord of all possible ways of proceeding.

Bottom Line: Absent fairly unique circumstances – or a surprisingly tenant-friendly lease – your ultimate solution is probably negotiating a rent reduction or abatement with a cooperating

landlord in exchange for some concession, such as extending the lease. Be sure that any agreement you reach is clear, documented in writing and states that you aren't in default.

Morse is following this topic closely. Please feel free to contact **Howard Zaharoff** directly, should you have any questions.

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