



Issues Facing the Commercial Leasing Industry during the COVID-19 Pandemic

Apr 14, 2020

Categories:

[Coronavirus Response](#)

[Team](#)

[Publications](#)

Authors:

[Christina M. Sprecher](#)

The COVID-19 global pandemic has infected over 1.7 million people as of April 14, 2020, according to the [World Health Organization](#) (WHO). The pandemic's effects have reached nearly every corner of the planet. Social distancing, quarantine and business-shutdown measures enacted by national, state and local governments have placed tremendous pressure on private and public businesses. The decline in business accompanying the response to the pandemic has meant that many commercial tenants are not be able to make rental payments under their leases. The inability of commercial tenants to make these payments may cause commercial landlords to be unable to make debt-service payments to their lenders. This domino effect resulting from the shutdown of the normal function of society has presented commercial landlords, tenants and lenders with an uncertain and trying road ahead.

Several states, including [California](#), [New York](#) and [Pennsylvania](#) have imposed eviction moratoriums, which may extend to commercial leases. In [Ohio](#), Governor DeWine has issued an executive order that "requests" landlords to suspend rent payments and provide other relief for businesses that have been adversely affected by COVID-19. While these relief efforts may provide some resilience to the commercial leasing industry during the pandemic, commercial leasing stakeholders should immediately begin to review their rights and obligations with respect to their leases to be aware of their options.

Lease Defaults

Inevitably, a crisis like a pandemic will cause defaults to occur under commercial leases. While it is crucial that the parties to a commercial lease review the terms of their lease to determine how the pandemic and its effects are treated by the lease, there are certain defaults that are likely to be common across the

commercial leasing industry, including, but not limited to, the failure to:

- timely pay base rent and any additional rent, beyond any applicable notice and cure periods;
- continuously operate business or maintain normal operating hours;
- maintain the required level of occupancy (which could trigger a lease termination or rent abatement);
- meet construction and tenant improvement allowance payment deadlines;
- meet certain net worth or other financial tests; or
- operate the type of business expressly permitted by the use clause.

Once a default has occurred under a commercial lease, the default may also cause many of the other negotiated provisions in the lease to terminate or otherwise be negatively impacted. This could mean that any rights of first refusal, options to renew, allowances, signage and exclusive use provisions may terminate by the triggering of a default under the lease. Landlords and tenants should also consider how a default will impact each party's rights to any security deposit or other types of security, such as a letter of credit, provided for under the lease.

Insurance

Business interruption insurance policies may cover COVID-19 related losses. Some state legislatures have introduced measures that would require insurers to pay claims on business interruption losses attributed to the pandemic. There is pending legislation in New Jersey, New York, Massachusetts, Ohio, and Louisiana, which, if passed, could override the ability of insurance carriers to rely on policy exclusions for business interruption claims.

Force Majeure

Leases differ substantially from traditional commercial contracts in one major respect: leases involve the conveyance of an interest in

real property in addition to containing contractual rights and obligations. Because of the unique nature of leases, parties should be cautious in their interpretations of traditional common law reasons for nonperformance and force majeure doctrines as applied to leases. A force majeure provision is typically intended to extend the period for a party to act due to unforeseen and unavoidable delays. The law of reasons for nonperformance because of impossibility, impracticability and frustration of purpose vary from state to state, and commercial lease stakeholders should cautiously assess their positions for defaults that occur under commercial leases as affected by these doctrines.

In the immediate future, parties negotiating commercial leases should expect heightened scrutiny to be paid to the drafting of force majeure clauses. While the analysis of the effectiveness of a given force majeure clause and its applicability to all or a portion of a commercial lease is jurisdiction- and fact-specific, most courts narrowly interpret force majeure clauses. In some jurisdictions, language in force majeure clauses that attempts to capture every possible unforeseen event, such as the phrase “acts of God,” are not nearly as helpful as listing the specific type of unlikely event, such as specifically stating that the clause will be triggered by “pandemics,” “epidemics” or “government-imposed quarantines and/or closures of business.” If there is merely general, blanket language in a force majeure clause, then a court is likely to focus on the ability of the parties to the lease to have prevented the disputed situation if they had acted diligently. If the force majeure clause includes the specific language, for example, if the clause includes coverage for “pandemics,” then the current COVID-19 pandemic could trigger that particular force majeure clause if the current pandemic caused an inability to perform.

Communication and Notices during a Crisis

During the uncertain times created by the COVID-19 pandemic, it is important for landlords, tenants and lenders to be in communication with one another as to ongoing issues and desired outcomes. Each situation is unique, and parties will likely reach a mutually agreeable solution quickly and efficiently if the parties

discuss goals and maintain flexibility during negotiations. However, parties need to consider whether a notice of intent not to make payments (if the crisis continues) could be deemed an anticipatory breach of the lease or other agreements. Stating or implying the inability to pay debts as they become due could be an independent event of default under the lease. Commercial leases will typically spell out the notice periods, methods of notice, and instances in which notices must be given according to the lease. Parties affected by commercial leases should look to their leases to confirm their notice requirements and to ensure that notice obligations are being met in order to preserve rights under commercial leases.

Rent Relief

Parties to a commercial lease should be extremely cautious in their willingness to seek and grant rent relief, whether by deferral or abatement. By suspending rental payments that a tenant is obligated to make under a lease, a landlord may be defaulting under the terms of its loan agreement on the leased property. In many cases, the lender's consent is required for any lease amendments or modifications. Conversely, tenants should consider how taking steps toward requesting rent relief mechanisms or suspending payment of rent due under a commercial lease may affect other aspects of their rights under the lease. Therefore, before considering extending or requesting any rent relief, landlords and tenants should first review how their full positions, including any applicable loan documents, may be affected by rent relief measures. Many lenders are receiving these requests currently, and commercial lease stakeholders would be best served by communicating early with their lenders rather than potentially causing a loan default.

Small Business Loans

On March 25, 2020, Congress passed the \$2 trillion [Coronavirus Aid, Relief and Economic Security Act](#) (the "CARES Act") economic rescue package, which was signed into law by President Trump March 27, 2020. Of benefit to the commercial leasing industry, the

CARES Act notably (1) provides for \$454 billion in support of the Federal Reserve's lending facilities to eligible businesses, states, and municipalities that meet certain conditions, and (2) creates a \$376 billion Small Business Rescue Plan that provides \$349 billion in loan forgiveness grants to small businesses and nonprofits to maintain their existing workforce and help pay for payroll and essential expenses like rent, mortgage payments and utilities.

The CARES Act may provide meaningful support for and a direct infusion of capital to businesses struggling during the COVID-19 pandemic. For more details about the CARES Act and its provided stimulus benefits, please review the following [article](#) published by Frost Brown Todd's [Coronavirus Response Team](#).

There is no question that landlords, tenants, and lenders are facing financially uncertain times in the weeks and months ahead given the effects of and government response to the COVID-19 pandemic. All parties affected by commercial leases must be proactive and should be prepared for how the pandemic could impact their businesses. Closely scrutinizing the terms of any current and future commercial leases must be a crucial component of that preparedness.

For more information about the effects of the COVID-19 pandemic on the commercial leasing industry, please contact [Christina Sprecher](#), [Tyler Hall](#) or any member of Frost Brown Todd's [Real Estate Practice Group](#).

*To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a **Coronavirus Response Team**. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.*

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.