Q&A for Commercial Landlords and Tenants: Tips on Negotiating Leases & Addressing Lender Issues

May 18, 2020

Categories:

Coronavirus Response Team
Publications

Authors:

Craig D. Hardwick
Monisha Coelho
Jerry J. Ruiz

Landlords and tenants need help restructuring lease agreements to preserve their legal rights and obligations and limit damages. Numerous laws banning evictions, rent increases, and foreclosures by state and local governments create complex compliance issues and increased liability for parties during Covid-19.

Below is a comprehensive Dos' & Don'ts for landlords and tenants to help assess problem areas, find solutions with newly available resources, and apply best practices moving forward.

How Can I Best Take Advantage of Force Majeure Provisions in My Real Estate Lease?

Force Majeure (FM) clauses in a contract fully or partially excuse a party from performing its obligations under the contract when certain specified events occur that are unforeseen or unanticipated and beyond the control of that party. E.g., war, natural disasters, pandemics, strikes.

- In lease agreements, landlords' and tenants' abilities to excuse the performance of their obligations under the contract will depend entirely on the scope and terms of the FM clauses, if any. FM relief is thus available only as per the express terms of the lease. FM terms require parties to give timely and adequate notice to the other side if they are invoking the clause – failure to do so waives relief from FM. Parties must use reasonable and best efforts to avoid an FM default and minimize the damages to the other side, including full documentation.
- Generally, landlords draft FM clauses that are narrowly tailored to benefit them and not the tenants. Payment of rent is rarely excused under FM provisions in a lease.
- Landlords receiving FM notices should carefully evaluate options and ensure tenants have complied with the FM

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

requirements in the lease.

- On receipt of FM notices from tenants, landlords should provide written communication whether they agree or disagree with the FM notice, whether they are/are not waiving the right to collect full rent payment with late fees, interest, etc., and whether the landlord is/is not waiving the right to require performance of other terms of the lease. It must include notice the landlord is not waiving any legal or equitable rights under the lease and an objective determination of when the force majeure event ends. The communication could include suitable and balanced accommodations or options for tenants to continue performing under the lease. Such communications are critical and bode favorably for the landlord should the matter end up in court.
- Tenants providing FM notices must ensure they are complying with all the requirements of the FM provisions and copiously documenting their compliance efforts. Negotiate with your landlords to find balanced and reasonable alternatives to non-performance of the lease terms. Such compliance and documentation are not only required by law but will likely be viewed favorably by courts should the matter end up in litigation.
- Consider frustration of purpose and the impossibility doctrine, alternate legal theories in California, as a backup or where no FM provisions exist in contracts.
-

What Alternatives Do I have When Restructuring a Lease?

- **Full or Partial Rent Abatement**
  - Tenants can ask for an abatement of some or all of base rent, CAM, real estate tax, insurance reimbursement obligations, etc. Paying some rent, which helps landlords with ongoing property expenses and maintaining reserves required by lenders, will be received more favorably.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

- Landlords should ensure a fixed end date for the abatement, e.g., at the end of 30 days with further extensions permitted based on market conditions, for a flat six-month term, within 3-6 months of tenant's business reopening, etc.
- Tenants should ensure they get as much time as possible and, if beneficial, tie it into the tenant's business reopening.

- **Rent Deferral**
  - Tenants can ask to simply defer all rent payments and work out a time and method of repayment, e.g., lump sum payments, installments payments, etc.

- **Blended Options**
  - Landlords could agree to base rent abatement or deferral conditioned on the tenants extending the lease term for the same/additional number of months, rent, and terms, as the rent deferral/abatement period. This maintains the property's income generation and the value of the lease. It also retains the value of the real estate. These are important considerations for landlords for future calculations of the appraised value or purchase price of the property on a market capitalization rate basis,
  - Tenant Improvement Allowances – landlords could provide tenants with allowances to improve their space, refurbish tenant fixtures/equipment in exchange for a significant extension of the lease term. This would apply mainly to institutional tenants or those with solid payment histories.
  - Landlords could provide rent abatement/deferrals in exchange for corporate/personal guaranty(s) or agreed upon percentage shares in tenants' revenues.

- **Lease Termination**
  - If tenants are sure their businesses are not returning, they should start minimizing their risks under the lease.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

Tenants could start communications with their landlords on lease terminations but need to carefully evaluate financial and legal liabilities that can result from termination notices going out. Tenants will need to find ways to minimize their financial and legal obligations. The terms of, or modifications to, lease termination need to be properly understood and documented to avoid liability and lawsuits in future.

- **Landlords Beware**
  - Landlords should be careful not to declare tenants to be in default or threaten eviction of tenants without first checking federal, state, county, and city orders governing evictions during Covid-19 to ensure they do not prohibit such statements.

How Can I Restructure my Lease if I am in the Build-Out Phase?

- Landlords or tenants in a build-out phase with rent coming due when the build-outs are completed (for landlords) or after a set number of months irrespective of build-out completion (for tenants) could negotiate extensions of time, if possible, using some of the options discussed above.
- For ground leases, etc. that depend on local government agencies' approvals for building permits, occupancy certificates, etc., parties could seek extensions of time using alternatives discussed above. Force majeure provisions might be helpful here if government offices are closed and have stopped providing authorizations and clearances.
- While negotiating extensions of build-out phases and ground leases, parties also need to look ahead, evaluate additional labor, material, and other costs due to delays and shortages, and factor those into negotiations now to avoid missed deadlines and overrun budgets (and disputes) in future.

How Can I Restructure a Construction Contract?

For construction projects, contractors can seek to invoke force majeure benefits because of closed government offices, materials

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

shortages, domestic and international supply chain delays. The Stay Home orders and local government restrictions on constructions could also support a force majeure claim. For certain cities like Los Angeles, which have no moratoriums on construction, contractors will need to focus on project delays caused by supply chain disruptions, labor shortages, and public health and safety mandates.

How Can the Government Orders Shuttering Businesses Help Me?

- The government orders can provide a legal basis for tenants to stop operations in the leased premises since most leases have provisions requiring tenants to comply with all government laws and rules relating to occupancy and business operations in the tenant space. Tenants may or may not have the ability to withhold rent, based on lease terms.
- Force majeure clauses, and the frustration of purpose and impossibility doctrines in California, could be invoked, relying on the government orders requiring offices and businesses to cease occupancy and operations. However, tenants must give landlords notice and comply with force majeure requirements (discussed above) to receive its benefits.

What Should I Do If My Tenant is Not Able to Pay Rent?

- Landlords should be careful not to declare tenants to be in default or threaten eviction of tenants without first checking federal, state, county, and city orders governing evictions during Covid-19 to ensure they do not prohibit such statements.
- Ensure that you are not governed by California's price gouging law, Penal Code section 396, which imposes a moratorium on eviction and rent increases for mainly residential tenants and mobile home parks during a state of emergency. Details on eviction and rent increase moratoriums during Covid-19, and the civil and criminal penalties for violating them, under California's price gouging law section 396, are explained in our client alert available **here**.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

- If not impacted by governmental restrictions, landlords should continue serving notices of default (including late fee and interest provisions) as permitted by the lease to preserve their claims and rights.
- Default notices could include language that tenants impacted by Covid -19 could contact landlords to evaluate tenant options.
- If landlords are accepting partial rent payments from tenants, they should be sure to document in writing they are not waiving their rights to collect full rent payment with late fees, interest, etc. Nor that landlords are waiving any legal or equitable rights under the lease. Nor that partial payment of rent constitutes a modification or amendment of the tenants' lease terms.
- Work with tenants to find a balanced, meaningful resolution whenever possible.
- Even if tenants do not accept the options provided, landlords can demonstrate to a judge, they made good faith efforts to assist their tenants and avoid evictions if the matter goes to court. Courts will likely consider the landlords' attempts to assist tenants favorably when deciding on the eviction.

What Should I Do If I Can Not Pay Rent to my Landlord because of Covid-19?

- Review the various federal, state, county, and city moratoriums on evictions of commercial tenants and filing of eviction lawsuits to see if they benefit you.
- Work with your landlord to find balanced, meaningful resolutions or alternatives, whenever possible.
- Even if your landlord does not accept the alternatives you suggest, you can demonstrate to a judge that you made a good faith effort to pay rent and work with your landlord to avoid an eviction when the matter goes to court. Courts will likely consider your attempts to pay rent and work with your landlord favorably in calculating damages and deciding on the eviction.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

- Consider if the legal doctrine of frustration of purpose could be helpful to you as a tenant in nonpayment of rent cases where the fundamental purpose of the lease is frustrated by unanticipated and unforeseen events outside the tenant's control, e.g. business that mandatorily had to shutter due to government restrictions.

Is there a Pending Bill Limiting Eviction of Commercial Tenants in California?

There is a proposed senate bill before the California legislature that would prohibit landlords from evicting tenants in commercial properties, including businesses and non-profit organizations, during a state of emergency. The bill applies retroactively to make any commercial evictions that occurred after March 4, 2020 void and unenforceable. A violation of this proposed law would be a misdemeanor, an unlawful business practice, and an act of unfair competition. The bill has not yet passed. This fact sheet will be updated as and when the bill becomes law.

Will the Real Estate Loan/Mortgage with My Lender be Impacted if I Restructure My Tenant's Lease?

- Any changes to tenants' lease terms must be consistent with the terms of the landlords' loan agreements with its lenders to avoid triggering negative provisions such as the loan becoming nonrecourse, becoming due immediately, etc. Many loan terms require written lender consent before any material changes in lease agreements, including changes to tenant subordination and attornment provisions.
- Statements by landlords to their lenders that landlords cannot pay their debts in due course could trigger nonrecourse provisions in a loan and make guarantors personally liable.
- Review the various federal, state, county, or city forbearances on mortgage payments to see if they apply to you as set out below. AlvaradoSmith has a client alert on extensions of time to make mortgage payments being offered by various lenders under the "Covid19 Resources" tab on its web page.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

Is there a Moratorium on Recording Foreclosures & an Extension of Time to Make Mortgage Payments in California?

Based on Executive Orders issued by the Governor of California, the California Department of Business Oversight negotiated informal agreements with lenders to provide financial relief for commercial and residential borrowers during Covid-19. To obtain relief, borrowers must contact their financial institution.

Financial institutions holding home or commercial mortgages including, Citigroup, JPMorgan Chase, U.S. Bank, Wells Fargo, and nearly 200 state-chartered banks and credit unions, are permitting a 90-day informal moratorium on recording foreclosures and a 90-day grace period to make mortgage payments for Californians economically impacted by Covid-19 as follows.

- **90-Day Grace Period/Forbearance for Mortgage Payments.** Financial institutions will offer, consistent with applicable guidelines, mortgage payment forbearances of up to 90 days to borrowers economically impacted by Covid-19 causes:
    - a substantial decrease in household or business income,
    - substantial out-of-pocket medical expenses caused by Covid-19, or
    - consequences of any local/state/federal government response to Covid-19.

Also, those institutions will:

-
    - Provide borrowers a streamlined process to request a forbearance for Covid-19 related reasons, supported with available documentation;
    - Confirm approval of and terms of forbearance program; and
    - Provide borrowers the opportunity to request additional relief, as practicable, upon a continued showing of hardship due to Covid-19.

- **Moratorium on Initiating Foreclosure Sales or Evictions.** For at least 60 days, financial institutions will not initiate

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

foreclosure sales or evictions, consistent with applicable guidelines.

- **Relief from Fees and Charges.** For at least 90 days, financial institutions will waive or refund at least the mortgage-related late fees and other fees for customers who have requested assistance.
- **No Negative Credit Impacts Resulting from Relief.** Financial institutions will not report derogatory tradelines (e.g., late payments) to credit reporting agencies, consistent with applicable guidelines, for borrowers taking advantage of Covid-19-related relief.

Is there a suspension of Judicial Foreclosures in California?

The Executive Orders issued by the California Governor permitted local governments to suspend judicial foreclosures of mortgaged properties for homeowners affected by Covid-19 through May 31, 2020. To comply with the Executive Order, the Judicial Council of California amended the laws of mortgage foreclosures as follows:

- Until 90 days after the Governor declares the state of emergency lifted, or until this rule is amended or repealed, all lawsuits for foreclosure on a mortgage or deed of trust, including any action for a deficiency judgment, are stayed, and courts may take no action and issue no decisions or judgments in the case, unless necessary to further public health and safety.
- Any statute of limitations for filing such foreclosure or deficiency lawsuits is tolled. The period for taking any legal action to foreclose or for a deficiency judgment, including rights of redemption from a foreclosure sale, is extended.

What are the provisions for Loan Forbearances on Federally Backed Loans under the CARES Act?

Starting from March 27, 2020, and until the termination of the state of emergency by the President or December 31, 2020, whichever comes sooner, borrowers with federally backed mortgage loans (Fannie May, Freddie Mac, FHA, VA, USDA) experiencing financial

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

hardships due, directly or indirectly, to the Covid-19 emergency may request forbearances on their federally backed mortgage loans, regardless of delinquency status, by (a) submitting a request to the borrower's servicer and (b) affirming that the borrower is experiencing financial hardship during the Covid-19 emergency.

Upon a request by a borrower, such forbearance shall be granted for up to 180 days, and shall be extended for an additional period of up to 180 days at the request of the borrower, provided that, at the borrower's request, either the initial or extended period of forbearance may be shortened.

During a period of forbearance, no fees, penalties, or interest beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract, shall accrue on the borrower's account.

What are the provisions for Loan Forbearances for Multifamily Properties with Federally Backed Loans under the CARES Act?

Multifamily borrowers with federally backed multifamily mortgage loans experiencing financial hardships due, directly or indirectly, to the Covid–19 emergency may request forbearances on loan payments if the borrowers were current on their payments as of February 1, 2020. Such borrowers may submit oral or written requests for forbearances to the borrowers' servicer, affirming that the multifamily borrower is experiencing financial hardship during the Covid–19 emergency.

Based on documented financial hardships, lenders may provide the forbearances for up to 30 days, and extend the forbearances for up to 2 additional 30 day periods upon requests from the borrowers provided that, the borrowers' requests for extensions are made during the covered period, and, at least 15 days before the end of the prior forbearance period. Multifamily borrowers shall have the option to discontinue the forbearances at any time.

Multifamily borrowers who receive forbearances under this section may not, for the duration of the forbearance:

- evict or initiate the eviction of tenants from dwelling units located in or on the applicable properties solely for

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

nonpayment of rent or other fees or charges; or

- charge any late fees, penalties, or other charges to tenants for late payment of rent.
- may not require tenants to vacate dwelling units located in or on the applicable properties before the date that is 30 days after the date on which borrowers provide the tenants with notices to vacate; and
- may not issue notices to vacate until after the expiration of the forbearance period.

Does the federal CARES Act impose a moratorium on Mortgage Foreclosures?

Except for vacant or abandoned property, servicers of federally backed mortgage loans may not initiate any judicial or non-judicial foreclosures, move for foreclosure judgments or orders of sale, or execute foreclosure-related evictions or foreclosure sales for at least 60-days beginning on March 27, 2020.

What Lessons Should I Take Away from This Discussion?

- Landlords usually hold the cards by being able to evict tenants, though they risk empty premises. However, tenants are currently in control due to the various governmental moratoriums on eviction and rent increases/collection.
- Resolving issues without lawsuits will benefit all parties in terms of avoiding litigation costs, but only if the negotiations and lease changes fully address all legal issues between landlord and tenant, landlord and lenders, etc., and are clearly drafted and recorded.
- Prepare for litigation because some disputes will go to court.
- Courts will likely be sympathetic to tenants during this time.

DISCLAIMER: The information contained herein is intended for informational purposes only and should not be construed as professional counsel or legal advice. Seek legal counsel for advice with respect to any legal matter. The information in this document may not reflect the most current developments as the subject

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

matter is extremely fluid and may change daily. The content and interpretation of the issues addressed herein are subject to change.

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

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons