

LEGAL UPDATES

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Commercial Leasing and COVID-19: An Exploration of *Force Majeure* Doctrine in the Context of a Public Health Crisis

Introduction

As the COVID-19 pandemic continues to spread, there is a growing anxiety among commercial tenants and landlords as they assess the ability of tenants to maintain normal business operations. As various cities and states begin implementing restrictions on the size of public gatherings and even the types of businesses that are permitted to operate, such concern and uncertainty has only increased. In light of these extraordinary circumstances many businesses have begun requiring non-essential employees to work from home; however, it is neither practical nor possible for every business to operate remotely. Businesses need their physical locations—their real estate—in order to function, but the unprecedented public health crisis has raised questions rarely asked in a more normal operating environment, particularly regarding commercial leases.

While the general rule for commercial leases is that a landlord may not prohibit a tenant from accessing the leased premises, it is important to note that a tenant's respective rights and obligations vary depending upon the specific terms of the lease. If the lease in question is a multi-tenant commercial lease, wherein the landlord is obligated to provide certain services—such as janitorial or security services—a landlord will have an obligation to take commercially reasonable efforts to protect the public health of its tenants and their guests/customers. Caselaw is clear that landlords owe a duty of reasonable care as to those parts of the property over which they have retained control.

Additionally, if a landlord knows, or in the exercise of ordinary care should know, of a possibly dangerous situation and fails to take such steps as an ordinarily prudent person, in view of existing circumstances, would have exercised to avoid injury to his or her tenant, the landlord may be liable. As such, a landlord of a multi-tenant building that has retained control over the common areas in order to provide certain services such as janitorial and/or security services would appear to have greater authority to restrict access to the leased premises. Alternatively, in a situation where there is a single tenant that is leasing an entire building pursuant to a net lease (i.e. tenant responsible for all repair and maintenance obligations), the landlord would likely have little to no authority to prohibit a tenant from accessing the leased premises.

COVID-19 – A *force majeure* event?

While the typical commercial lease may not specifically address pandemics like COVID-19, most commercial leases do include a *force majeure* provision that addresses situations in which one party is prevented or delayed from performing their contractual obligations due to unforeseeable events outside their reasonable control. Even if a lease does not specifically reference an outbreak of a disease as a *force majeure* event, commercial leases usually provide that any unexpected and unavoidable governmental action shall qualify as a *force majeure* event; therefore, if there is a government-mandated quarantine or restriction on a tenant's specific business operations in response to COVID-19, a landlord could potentially assert that such government action is a *force majeure* event that prohibits the landlord from providing the tenant with access to the leased property.

Absent a government-mandated quarantine or restriction on a tenant's specific business operations, it would be very difficult for a landlord to assert a *force majeure* event that justifies restricting a tenant's access to the leased premises. Such a situation would likely arise only if (i) the lease requires the landlord to provide janitorial, security, or other services to the common areas and (ii) the leased premises is located in a metropolitan area with numerous confirmed cases of COVID-19. Under this scenario, a landlord would need to prove that there is no commercially reasonable way for the landlord to safely provide such services without restricting the tenant's access. Since various alternatives exist to restricting a tenant's access to the site, this would be a high hurdle for any landlord to surmount. An example of such alternatives would include actions such as (i) increased cleaning of frequently touched surfaces, (ii) installing hand sanitizer stations in common areas, and (iii) displaying education materials informing tenants of proper handwashing techniques and cough etiquette.

Other tenant considerations

Even if the commercial lease does not include an express contractual *force majeure* provision, a tenant should not assume that the landlord is strictly prohibited from restricting their access to the

property. Given the aforementioned government-imposed mandates that several cities and states have already enacted, there is potential that a landlord could assert the doctrine of impossibility in situations where a specific government action has rendered it impossible for the landlord to provide the tenant with access to the leased premises. Additionally, tenants should carefully review the “permitted use” provision in their lease, as most commercial leases prohibit a tenant from using the leased premises in any manner that would violate applicable laws; therefore, if the leased premises is located within a city or state that has implemented a government-mandated quarantine or restriction on the tenant’s specific business operations, the tenant will likely be in breach of the lease if they disregard such mandate and continue to operate at the leased premises.

Some common scenarios and questions

The application of *force majeure* doctrine is highly dependent upon the specific contract or lease language in question, as well as the jurisdiction in which a dispute occurs. As the COVID-19 directives are published and the circumstances unfold, our team is fielding several unique questions asking us to consider how *force majeure* provisions in leases will apply in specific commercial contexts. Below, we have summarized some common scenarios and questions.

I’m a landlord who operates a strip center with various retailers, including a coffee shop and clothing retailer. Business has slowed down in the center, so can I stop maintaining the common areas, like the parking lot, during the pandemic?

The landlord would still be obligated to maintain the common areas in the center even if there is a slowdown in traffic; however, if the landlord is unable to perform certain maintenance obligations, e.g. landscaping, etc., because third-party vendors are affected by the government-mandated shutdown this could constitute a *force majeure* event.

I’m a fast-casual restaurant owner and the rental payment in my lease is based in part on the amount of sales I make in a month. I have to cease operations based on government restrictions. Can I stop paying rent?

Before you stop paying rent altogether, look carefully at your lease as there may be guaranteed base rent amount or an alternative calculation.

I’m a tenant who operates a restaurant business and the local government has imposed a ban on dine-in service. Can I stop paying my rent?

The likely answer is no. *Force majeure* provisions don’t often cover the payment of rent or other monetary obligations, like paying utilities or renewing a casualty insurance policy.

I'm a tenant who operates a cross-fit gym and all gyms in town have been ordered to close, but there's a continuous operation clause in my lease. Can the landlord evict me?

The landlord can certainly send you a notice claiming you've defaulted by failing to operate your gym, but the governmental ban was an event beyond your control. Ultimately, your lease and perhaps local law will control the outcome.

I'm a landlord, and my tenant operates a large IT company in my downtown high-rise. The president of the company has informed me that because of the self-quarantine/social distancing directives, she's transitioned her entire workforce to work-from-home and its going so well so she's terminating the company's lease "based on force majeure events." Can the tenant terminate the lease?

A tenant can attempt to terminate the lease, but it may be advisable, after reviewing the applicable termination provisions and consulting with counsel, to send your tenant a notice (complying with the notice provisions in the lease) warning the tenant that it will be in default of the lease once it fails to pay rent, among other things.

I operate a rolled ice cream stall in a shopping mall food court and I just received a notice from my landlord that it is shutting down the entire food court due to COVID-19 concerns. The government hasn't specifically banned mall or restaurant operations where the mall is located. Can the landlord deprive me access to operate my business?

In the event this happens, you should immediately consult your lease and an attorney to discuss your options as some state laws may deem this a constructive eviction, but on the other hand, your lease could permit the mall operator considerable leeway to close common areas.

I'm a landlord and I'm building a new wing on my tenant's hospital. I signed the general contractor's contract and my tenant has to make monthly tenant improvement deposits along with its rent payments until construction is complete. The general contractor just informed me all the electricians walked off the job. What do I do?

Your attorney can help you navigate the various agreements and decide how to proceed but remember to consult the *force majeure* provisions in the general contractor's contract, the lease, and any additional tenant improvement agreement.

How do I mitigate my business losses as COVID-19 guidelines and government mandates force employees and customers to stay home? Can I make an insurance claim?

Perhaps the most direct way to mitigate risk is to consult your lease, your insurance policy, and your attorney for help navigating what to do next.

I'm a landlord and I own a multitenant building where one of the businesses is a large brokerage firm where employees are required to travel frequently. Can I require the tenant mandate a self-quarantine for its employees who have traveled recently or require the tenant to monitor the temperatures of its employees?

This is a novel issue and both the lease and mandates handed down on a local and federal level will impact the appropriate response. Your attorney can help you consider your rights within the lease and law and assist you in crafting a reasonable policy.

Conclusion

Just as the CDC recommends that we all wash our hands and limit physical contact, best legal practice is to consult your lease, your insurance policy, and your attorney for help navigating how to handle concerns, especially when each day brings new directives on a local or national level.

Perhaps one of your most effective tools, in addition to your counsel, is to communicate with your landlord or tenant, as applicable. Ask what their plan is to cope with COVID-19 and in return, share your carefully considered intentions. When you have that conversation, be cognizant of default provisions in your lease (or loan documents) and consider asking your attorney to sit in on the conversation.

If you have questions about your lease, please feel free to reach out to a member of our Retail Team.

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and employment, retailing, and supply chain management, among others.