

COVID-19: Impact on Commercial Landlords and Tenants

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Commercial real estate is not immune from the widespread effects of the coronavirus pandemic (COVID-19). Uncertainty confronts all players; and while retail, hospitality and leisure businesses are particularly hard-hit, many property types are facing government-ordered shutdowns and advisories, along with changing consumer spending patterns and decreased (or prohibited) travel. Landlords and tenants should evaluate their legal rights proactively—fully expecting that the current situation will not improve for some time.

This summary focuses on *force majeure* provisions in commercial leases; however, landlords and tenants should realize that commercial real estate will feel the effects of COVID-19 in many other ways not addressed in this alert.

Landlords and Tenants Should Review Their Leases

Landlords and tenants should thoroughly review their leases with legal counsel. This is vital. While the contract's terms will generally determine the parties' respective rights, obligations, and responsibilities, statutory and common law may impact how those rights may be interpreted and enforced.

What is "Force Majeure"?

Many commercial lease agreements contain *force majeure* provisions. Generally, these allow parties to suspend performance because certain unforeseeable circumstances, beyond that party's control, prevent or delay that party's performance. For example, faced with a major earthquake, a landlord might seek refuge in the *force majeure* provision when it is unable to timely complete a tenant build-out; while a tenant may attempt to avoid its obligation to continuously operate its retail business within the premises.

Force majeure derives from contract law, not common law. This means that the concept only applies if, and to the extent, stated in a lease.

Does the COVID-19 Pandemic Constitute an Event of Force Majeure?

A *force majeure* provision will identify covered events. Classic examples include hurricanes, tornadoes, and floods. Some provisions may cover work stoppages, labor strikes, and the unavailability of materials and services, actions taken by governmental authorities, wars, riots, and embargos. Such *force majeure* provisions vary widely in how specific they are, what kinds of events are specifically identified, and whether (and which) catch-all terms are used.

Many lease agreements do not specifically list pandemics, outbreaks, and widespread infectious diseases as *force majeure* events. Certain other *force majeure* events, if listed, may provide an independent defense to non-performance related to the COVID-19 pandemic where a business is closed or supply chain disrupted due to a government-mandated closure. Ultimately, the courts will decide whether a particular event listed in a *force majeure* clause will excuse performance. Parties should know, however, that courts have historically been reluctant to interpret a *force majeure* provision as applying to events outside the express scope of the *force majeure* provision negotiated by the parties.

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Do Force Majeure Provisions Excuse Tenants From Paying Rent?

Generally, *force majeure* provisions specifically exclude the tenant's obligation to pay rent; meaning that an event of *force majeure* does not excuse a tenant from its duty to pay rent timely. Commercial leases vary widely, though. Depending on the specific contract in question – along with the unique fact pattern and law of the jurisdiction – there may be exceptions.

What Happens if the Lease Does Not Cover COVID-19?

If a lease lacks a *force majeure* provision, or its provision does not cover pandemics, epidemics, or related circumstances, common law doctrines and equitable principles may provide a defense to performance. Events that make a party's performance impracticable or that substantially frustrate a party's purpose in entering the agreement may discharge that party's performance. In at least certain jurisdictions, however, merely making the originally-intended purpose more difficult or expensive may not qualify. Even if relief is available, it may only be temporary, or not a form that a party would desire, such as contract recession and restitution.

Whether these doctrines apply is fact-driven; and the facts surrounding COVID-19 are novel. As a result, the extent to which the doctrines of impossibility, impracticability, frustration of purpose, nuisance, or quiet enjoyment will offer protection to parties in the wake of COVID-19 is something that requires case-by-case analysis.

Notably, governmental response to the pandemic is still ramping up. Legislative and regulatory action may change the landscape considerably.

What Should Commercial Tenants and Landlords Do Now?

In the midst of this public health crisis, it is critical that all parties comply with restrictions, directives, and orders issued by government authorities. Doing so may strain business relationships and create unique economic challenges.

Here are some actions landlords and tenants can take now to help adjust to these new circumstances:

- Review your contracts. They will be the starting point for any discussion.
- Evaluate whether COVID-19 related mandates and guidance may create issues for current or future performance, particularly of non-monetary obligations.
- Develop plans for disruptions in business operations. These disruptions may be far-reaching and long-lasting.
- Practice proactive communication. Even if existing contracts are not clear, the parties may be able to agree how to handle this developing situation within the bounds of governmental mandates and guidance.
- Consider modifying rules and regulations, as appropriate. For example, certain facilities may wish to consider occupancy limitations on common areas to facilitate social distancing.

This is part of a series of our **COVID-19 alerts** providing clients with practical advice on measures they can take to navigate through these troubled times. Please contact the authors or your Miller Canfield attorney with further questions.

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This information is based on the facts and guidance available at the time of publication, and may be subject to change.