

COVID-19 Implications for Commercial Leases

EXECUTIVE SUMMARY¹

The implications of COVID-19 on business are fluid and ever-evolving. A lease document creates a long-term relationship between a tenant and landlord, and at different times each party will require the other to act reasonably, irrespective of what the lease may say. In today's environment, CBRE believes it is in both parties' interest to know the obligations under a lease and come together to discuss any hardships created by COVID-19. We hope this document can serve as the foundation for achieving mutually agreeable outcomes.

KEY LEASE PROVISIONS RELATING TO RENT ABATEMENT

In most commercial leases, the ability of a tenant to receive a rent abatement after the delivery of space is limited to specific circumstances and interpreted narrowly by courts. Often, the key provisions affecting rent abatement in a typical commercial lease are:

- A. Interruption of Essential Services. The "Services" article of a commercial lease typically lists the essential services to be provided by a landlord and may give the tenant a right to rent abatement if those services are not provided for a period of time. This clause should be reviewed carefully to see if it includes access as an essential service since that may be disrupted during the COVID-19 pandemic. Many leases do not specifically list access as a service and, as a result, it is open to debate whether access would be considered an implied essential service. The provisions and remedies relating to a stoppage of services often have different outcomes based on the cause of the interruption of services. For example, if there is a stoppage of essential services for reasons within a landlord's control, many leases provide for rent abatement after a limited period of time. If there is a stoppage of essential services for reasons outside a landlord's control (e.g., due to force majeure as described below), some leases may provide for rent abatement after a longer period of time. Legal notice provisions related to a stoppage of services should be closely reviewed.
- B. Casualty. Casualty clauses govern what happens if there is damage to the building that makes it inaccessible or unusable in whole or in part. While these clauses may result in a reduction of rent or other remedy in favor of the tenant, these clauses are generally confined to circumstances in which the premises are physically damaged or destroyed. While atypical, in some instances lack of access may be tied to a casualty event and the tenant may be entitled to rent abatement. Since this is a novel circumstance, it has not yet been determined whether contamination constitutes physical damage.
- C. Condemnation. Condemnation clauses address what happens if the government takes control of the premises in some way. If the government mandated a building closure, the language describing the government's actions should be carefully read to see if it is broad enough to cover closures due to COVID-19. In most instances, however, this would, at best, be considered a temporary taking. In such instances, most leases would not provide for rent abatement and require a tenant to look to the government for any compensation.

- D. Force Majeure. Force majeure clauses cover situations where a party's obligations may be delayed or excused because of circumstances beyond that party's control. Force majeure clauses typically include a list of items that are agreed to be outside the control of the parties, such as government restrictions and regulations. In most cases, force majeure does not relieve a tenant from paying rent.

ISSUES FOR OCCUPIERS AND OWNERS TO CONSIDER

Property owners and occupiers will want to consider the following key issues to determine the applicability of the above lease provisions to the COVID-19 situation:

- A. Access to the Premises: Is the tenant's suite (premises) available for use? Can the tenant access the premises? If the tenant has access to the premises and it is not damaged, but the tenant has elected not to use it, then the tenant will likely **not** be entitled to rent abatement even though the tenant has made a reasonable decision to temporarily abandon the premises.
- B. Governmental Action: Has the tenant's decision not to occupy the space been caused by government action (e.g., curfew or shelter-in-place order)? The tenant and landlord should consider the scope and duration of government action in any discussion about rent abatement.
- C. Essential Services: Is the landlord providing all required services to the tenant (e.g., utilities and HVAC, cleaning, and security services)? Most landlords are opting to keep buildings open, clean and secure in order to meet their basic obligations to the tenants and protect their asset.
- D. Damage: Has there been damage to the premises? Physical damage is often required to trigger certain insurance coverage and lease casualty clauses. It is unclear whether potential contamination constitutes "damage."

CBRE MESSAGE FOR OCCUPIERS AND OWNERS

All of us are operating in an environment unlike any we've experienced before. CBRE wants to encourage and facilitate a productive dialogue between occupiers and owners around relevant lease provisions, an understanding of each other's current circumstances and potential business resolutions. Working together, we can chart a mutually agreeable path forward.

¹ *Note that this document is not intended to constitute legal advice, and CBRE clients should consult with their own attorneys for any discussion of their obligations under a lease.*