

WHAT DOES COVID-19 MEAN FOR MY LEASE



Business has been interrupted across the United States as a result of COVID-19, and the full impact of this pandemic will not be known for a long time to come. However, it is immediately apparent that many tenants are struggling to pay rent and are uncertain about their futures, and many landlords are working to adapt to ever-changing on-site operational requirements while grappling with economic uncertainty. The sudden and broad-sweeping changes that have resulted from the pandemic have led landlords and tenants to re-examine the terms of their leases in an effort to understand whether the pandemic impacts the obligations of the parties thereunder. There are no blanket answers as to whether the COVID-19 pandemic changes the obligations of parties under a lease. Every situation must be analyzed in connection with the terms of the specific lease, the law of the applicable jurisdiction and the specific facts and circumstances at play. Here are some issues to consider:

Force Majeure. Force majeure clauses may excuse or suspend performance of lease obligations in the event of unforeseen or uncontrollable events. The specific language of a force majeure clause is critically important to its application. Though there are variations by jurisdiction, courts generally apply narrow readings to force majeure provisions, such that a clause must unambiguously cover an unforeseeable triggering event in order for performance to be excused. The party seeking to apply the force majeure clause must show a causal connection between the triggering event and the inability to perform. Even if a force majeure event exists, the parties must make good faith efforts to perform. Most force majeure clauses in leases do not excuse or suspend payment obligations.

When applying these general force majeure principles

to the COVID-19 pandemic, applicability is subject to interpretation and the specific facts of a given case. For example, even if the list of triggering events in the lease does not include a pandemic, it is possible that the pandemic could be captured as an “act of God” or “another act beyond the reasonable control of the parties.” Furthermore, if the lease was signed during the pandemic or close to the commencement of the pandemic, it is possible that a court would determine that the triggering event was, in fact, foreseeable and, therefore, that the pandemic is not subject to the force majeure clause. Demonstrating causation with regard to COVID-19 is not a slam dunk, since intervening factors making performance difficult do not necessarily result in an inability to perform.

Impossibility. The doctrine of impossibility is a concept under common law that may result in excused performance where performance is made impossible by an intervening event, the nonoccurrence of which was an underlying assumption of the contract. For example, landlords and tenants may claim that local government orders that closed non-essential businesses, including construction, made it impossible for a landlord to timely complete the tenant’s build-out.

Frustration of Purpose. Frustration of purpose is another common law doctrine that could result in excused performance when an intervening event destroys the principal purpose of the contract. For instance, if a landlord leased space to a tenant for a specific event and the event was canceled in connection with pandemic closure orders, then the tenant may have a defense to its obligations under the lease.

Practical Steps. From the start of the pandemic, landlords and tenants have adopted creative approaches to addressing the economic uncertainty of the crisis. In some cases, lease amendments are appropriate to document mutually agreeable rent deferrals, abatements, term extensions and delivery date modifications. In other cases, landlords have provided tenants with assistance in tapping emergency resources. Parties are encouraged to reach out to their respective legal counsel to review the terms of their leases, provide any notices required by the terms of the lease and take steps to mitigate damages. We will be feeling the effects of the COVID-19 pandemic for a long time to come, and it is important to have an understanding of the lease obligations and legal arguments that relate to a party’s leasing strategy. [B](#)

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