

Ten Key Leasing Considerations Resulting from the COVID-19 Pandemic

Coronavirus Legal Advisory

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As businesses adjust to the complications presented by the COVID-19 pandemic, landlords and tenants must now take even greater care when entering into leases. Tenants may demand greater flexibility in leases should a public health emergency interrupt their businesses and impact profitability, and landlords may be more discriminating in whom they lease space to, including considering whether tenants are likely to survive financially during a pandemic or another health crisis. We outline below ten important issues landlords and tenants will need to consider when negotiating future leases in a post-COVID-19 environment.

Knowing Your Landlord and Tenant

Trust between landlords and tenants will be more important than ever as businesses navigate the COVID-19 pandemic and plan for future public health crises. It is imperative that parties to leases be comfortable working together to confront extrinsically produced issues, such as quarantine measures, and be able to communicate honestly. The fluidity of pandemics and related governmental responses will require landlords and tenants to cooperate with each other regularly to monitor and comply with changes in the law. Landlords will need to scrutinize prospective tenants more carefully—such as by examining financial and business strength and the tenant’s business model. Tenants will need to be confident that landlords and property managers are willing to work with them on key issues during a health crisis, including rent relief or deferment, and are very experienced with and capable of adapting their buildings and operations in the event of future crises.

Operational Excellence

Going forward, landlords will need to deliver, and tenants will require, operational excellence in buildings.

Building density restrictions have taken on new significance. As individual states withdraw some of their emergency public health orders, new mandates are being instituted to prevent a second wave of infections. One example is found in Massachusetts, where office spaces will be restricted to 25% of their maximum occupancy level for the near term. Six feet of distancing among personnel will have to be enforced unless it creates a safety hazard, and common areas will have to be reconfigured or closed to maintain social distancing. In New York, offices will be restricted to 50% of maximum occupancy as businesses slowly reopen for

the near term. Tenants may need to reconfigure or renovate their premises to comply with state and local directives.

While occupancy restrictions are not new, the pandemic has ushered in the need for new contingency planning for businesses. More and more states are recommending or mandating that businesses prepare response plans for current and future public health emergencies. Massachusetts and Rhode Island are requiring businesses to develop their own COVID-19 control plans outlining how they will prevent workplace viral spread. These plans do not have to be submitted to state authorities but must be kept on the premises, and the plans must take into account preventive measures, such as facial coverings and social distancing. Future leases should ensure that landlords and tenants alike develop, implement, and make available to each other their contingency plans.

HVAC Specifications

Certain facilities, such as data centers and agricultural spaces, traditionally require particular and special building infrastructure. Now, every business will be concerned with how well a building's heating, ventilation, and air conditioning (HVAC) system can ventilate air. According to the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE), operation of HVAC systems can reduce the spread of infection aerosols. Prospective tenants may request that third parties inspect a building's HVAC system to ensure its capacity to ventilate properly. Tenants may require regular cleaning of HVAC infrastructure and perpetual HVAC operations through emergency generators, if possible. Robust HVAC specifications may become the new norm.

Cleaning Specifications

The COVID-19 pandemic has made hygiene a paramount concern. "Deep cleaning" of all touch points in the common areas, restrooms, elevators, and premises will be a priority. Tenants will require periodic extensive cleaning within their premises. Separate service-level agreements and detailed cleaning specifications may need to be drafted between tenants and landlords to outline cleaning and sanitization procedures. In exchange for these services, landlords will want assurances from tenants that the tenants are making diligent efforts to mitigate infections. These assurances may be stricter than those already mandated by local and state governments.

Elevators

As businesses reopen, many states are issuing strict directives or guidelines regarding the use of elevators in offices and similar facilities. Massachusetts, for example, is requiring that elevators not be used by more than four people at a time and that masks be worn if multiple individuals use an elevator simultaneously. Some landlords may provide for stricter maximum occupancy standards for elevators. Tenants will need assurances that frequent deep cleaning of elevators will be provided, that elevators are large enough for proper social distancing, and that there are sufficient elevators to accommodate the new maximum occupancy thresholds.

Lease Term

Flexibility in leases is more important than ever for tenants. Amid the pandemic, tenants and landlords have had to conduct ad hoc negotiations concerning lease terms and deferment of rent payments.

Given the uncertainty of how long the pandemic will persist, tenants will be looking for shorter lease terms as well as contraction and expansion rights that will allow them greater flexibility and the option to decrease or increase the amount of rentable space they can occupy at a future date or on the occurrence of an unforeseen event. Typically, landlords adjust rent accordingly if these rights are exercised. Negotiating these options in a lease will be crucial as the global pandemic persists. Tenants cannot know with certainty whether there will be future spikes in infections that will lead to business closures or an economic slowdown.

Tenants must also look toward having more exit strategy options in case public health emergencies significantly impact revenue. For retailers and service-oriented establishments, having a bailout clause in a lease is an ideal way to terminate a lease. These clauses allow tenants to terminate the lease term if their sales revenue dips below a certain threshold. Another example relevant to retailers is a lease co-tenancy clause. This provision applies to tenants sharing a space with other tenants, and it allows them to leave the space if a sufficient number of other tenants terminate their leases. Break clauses afford flexibility to both tenants and landlords, permitting either party to terminate the lease prior to expiration of the term.

Subleasing and Assignment

While subleasing and assignment provisions are typically included in commercial leases, tenants will require broad sublease and assignment rights given the near-term economic uncertainty. Landlords will likely try to limit tenants' sublet and assignment rights due to the economic invariability and uncertainty of certain subtenants and landlord concern over multiple moves in buildings during a pandemic.

Operating Expenses

The COVID-19 pandemic has required landlords to increase cleaning services in buildings and to implement additional safeguards, including installing plastic shields in the lobbies, purchasing personal protective equipment for employees, and procuring additional insurance related to pandemics. The parties will need to negotiate who should bear the burden of such increased operating expenses.

Interruption of Services

Typically, the interruption of services provision in a lease provides tenants with little or no rent relief or abatement unless the landlord has committed negligence that causes interruption of building services. Given certain circumstances raised by the COVID-19 pandemic—including building closures, closures of nonessential businesses, or occupancy limits—tenants have been deprived of the full use and occupancy of their premises. Going forward, tenants will seek rent relief on the occurrence of building closures, limitations in services, or limited occupancies, whether imposed by the government or by landlords' or tenants' best business practices. Naturally, landlords will be reluctant to offer any rent abatement in these instances and will require tenants to carry business interruption insurance with express coverage for public health emergency-related business interruptions.

Force Majeure

Typically, force majeure provisions in leases do not excuse performance but provide for delays in performance of landlord and tenant obligations, with the exception of tenants' obligation to pay rent. In many instances, the force majeure provision allows landlords and tenants alike the ability to invoke force majeure during construction of improvements. The recent shutdowns of businesses have prompted tenants to try to invoke force majeure clauses to excuse their nonperformance, including failure to pay rent. Going forward, tenants will require that force majeure clauses expressly include as force majeure events pandemics, epidemics, disease, public health emergencies, governmental responses to these emergencies, and civil disturbances related to these conditions. Following the COVID-19 viral outbreak and the scrutiny of force majeure provisions by landlords and tenants alike, landlords will likely continue to insist that payment of rent is never excused due to force majeure, and tenants will likely seek rent relief for certain force majeure events, such as pandemic-related causes.

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