



COVID-19 guidance for commercial landlords and tenants

By Justin Thompson and Nahal Adler

With the unprecedented impacts of COVID-19, many landlords and tenants are considering their options under existing leases to determine the best path forward and what actions to take if someone on the property has contracted the virus. COVID-19 disruptions and impacts stem from government orders mandating closures (by tenants, landlords, or both), imposing restrictions on workforce use that preclude adequate staffing, and/or enforcing orders resulting in a lack of customers or patrons for retail and restaurant tenants. As a result, many states and local jurisdictions, such as California, have taken action to prohibit certain evictions based on nonpayment of rent and to delay foreclosures by mortgage lenders.

Guidance for Tenants

- **Review the lease.** Are there any contractual provisions that excuse the nonpayment of rent? Many are looking to *force majeure* provisions, but these generally do not provide the type of relief that tenants are seeking as they do not cover the nonpayment of rent. However, a *force majeure* provision may excuse delays related to tenant improvements or other construction.
- **Eviction moratoriums.** Is there a local eviction moratorium in place, and, if so, does the tenant meet the threshold requirements to qualify? Typically, the ordinances require a substantial decrease in business income, for that decrease in income to be caused by COVID-19, and for that decrease in income to be documented. Significantly, moratoriums do not excuse tenants from their obligations to pay rent. Instead, they prohibit landlords from evicting tenants for nonpayment. In other words, the tenant will still be on the hook for paying the rent at some point down the line, and unless a landlord has agreed otherwise, this is just a deferral of the rent.
- **Implications of nonpayment of rent.** Assuming a tenant meets the standard required to avoid being evicted for nonpayment of rent, the tenant should be aware of other negative contractual implications for nonpayment of rent even if it will not be evicted for doing so. For example, a tenant may be deprived of its option to extend the lease because nonpayment is considered a default, or the tenant may still be liable for late fees.
- **Business interruption insurance.** Does the tenant have business interruption insurance? Tenants should confer with their insurance providers to determine if their insurance provides any coverage for COVID-19-related impacts. Although most of the time, there are exclusions from coverage for epidemics and frequently other details that render business interruption insurance inapplicable, it is still worth checking.

- **Communication with landlord.** Tenants should reach out to landlords as soon as possible to determine if a rent adjustment schedule is possible. This can take many forms, from a partial deferral of rent to a complete rent abatement. Any agreement or modification of the lease terms should be well documented.

Guidance for Landlords

- **Review the lease.** Are there any contractual provisions that excuse the nonpayment of rent? Generally, the tenant will not be excused from nonpayment of rent for COVID-19-related impacts, but each lease must be reviewed carefully. If a landlord is prohibited from evicting the tenant for nonpayment of rent, the landlord should also check to see if there are still late fees or other penalties associated with late payment under the lease. In addition, landlords should check the timing of notice requirements to determine how long a tenant has to make a rent payment or cure a default.
- **Loan documents.** Is the landlord bound by any loan documents or comparable financing arrangements that contain covenants or other provisions that could be impacted by the nonpayment of rent? Is third-party consent required pursuant to such documents before the landlord can agree to modify the rent schedule? The landlord needs to consider all of the implications that a change in its contractual relationship with the tenant might have.
- **Eviction moratoriums.** Is there a local eviction moratorium in place prohibiting eviction of the tenant, and, if so, does the tenant meet the threshold requirements to qualify? As discussed above, this does not relieve the tenant from its obligation to pay rent at some point down the line, and tenants are generally required to evidence their loss of business income to qualify.
- **Consider the market.** If a tenant is unable to pay rent, is it in the landlord's best interest to evict the tenant or to attempt to work out some sort of rent relief or rent adjustment to maintain the tenant? This may provide an opportunity to restructure the lease (e.g., landlords can agree to rent deferrals in exchange to extend the lease term or an increase in the amount of rent down the line).
- **COVID-19 exposure.** The Centers for Disease Control and Prevention (CDC) has [published guidance on keeping commercial establishments safe](#). The CDC has also developed multiple posters and notices that can be placed strategically around the property to alert tenants about steps they can take to minimize the presence of the virus. If a landlord becomes aware that someone on its property is carrying the virus, is sick, or is quarantined, the landlord should promptly notify the other tenants by posting notices and sending out electronic notifications. In addition, the landlord should obtain reliable information from public health agencies about actions it should take if someone in the building is sick.

We will continue to provide additional guidance to commercial landlords and tenants as new information becomes available. For more information about the content of this alert, please contact our [Coronavirus Response team](#), your Nixon Peabody attorney, or:

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