

Lease Provisions To Consider in the Age of COVID-19

As landlords and tenants try to adapt to the “new normal” of the COVID-19 world, they are discovering that in many instances their existing lease documents are inadequate to address the unique concerns raised by the coronavirus. For parties that may be entering into new leases or amending existing leases in this post-pandemic environment, below is a discussion of some provisions worth considering in your new lease document.

FORCE MAJEURE

One area that has received considerable discussion over the last several months is the question of what constitutes force majeure. As businesses shut down and tenants became unable to pay their monthly rent, both landlords and tenants began scouring lease documents to determine whether a pandemic or governmental shutdown qualifies as a force majeure event. Most lease documents do not include express language identifying pandemic, epidemic, or other nationwide medical emergency as an express force majeure event. In the absence of such express language, some have sought to rely on general catch-all clauses that provide force majeure includes “similar matters beyond the control” of the party in question.

In interpreting force majeure clauses, most courts have tended to read them quite narrowly. If pandemic, medical emergency, or other similar concept is not set out expressly, courts often will not extrapolate force majeure to include such events based solely on the general catch-all clause.

In drafting any new lease, or if the opportunity arises in the context of a new lease amendment, the parties should consider clarifying force majeure provisions to expressly include pandemics and similar events. Calling out the current COVID-19 situation may also be useful, but care should be taken not to become overly restrictive in the definition of what constitutes a pandemic or medical emergency.

ENHANCED CLEANING SPECIFICATIONS

One element seen as critical to the return to work in the era of COVID-19 is enhanced cleaning of the building. Landlords may seek to make their buildings more accommodating to tenants by increasing the scope and frequency with which various elements of the property are cleaned. For example, “high touch” areas such as door knobs, light switches, elevator buttons, restroom, etc. may need to be cleaned repeatedly throughout the day in order to ensure safety. Lease documents should articulate, with specificity where possible, the scope and procedure that the parties will undertake with respect to such enhanced cleaning, and who will bear the cost.

A related question involves who should be liable should the enhanced cleaning protocol fail. If a landlord undertakes enhanced cleaning of the common areas, but tenants and their employees fall ill anyway, should the landlord be liable? Perhaps not. General indemnities, which often exist in lease documents, may cast a broad net and thus ensnare a well-meaning landlord who, despite its reasonable efforts, is unable to prevent an outbreak of illness.

ACCESS SCREENING AND TESTING

Best practices may require testing of all incoming individuals for fever or other signs of illness before entering a building, and limiting the number of people who may occupy an elevator at one time. If a landlord has committed to providing security for the building in its lease documents, does this now include the necessity to take the temperature of all tenants and their employees who wish to enter the building and policing elevator usage? Does this raise concerns about personal privacy or even potential exposure to HIPPA? Again, much conflict will be saved if lease documents are drafted to make clear who, if anyone, will be responsible for undertaking these kinds of measures



Adam M. Silverman

Member

asilverman@cozen.com
Phone: (215) 665-2161
Fax: (866) 433-3991

Related Practice Areas

- Real Estate
- Real Estate Lease Restructuring

Industry Sectors

- Real Estate & Construction

and what standards are to be applied. As with enhanced cleaning protocols, the party undertaking such responsibilities should be provided some protection from liability if, despite its reasonable efforts, people within the building fall ill.

UPGRADES TO PHYSICAL PLANT

Another protocol that may be implemented to assure the safety of building occupants during the pandemic involves upgrades to the HVAC systems and other physical plant of a building. For example, high tech HEPA filters may be added to an existing HVAC system to remove microscopic particles from the air. Air flow may be increased to assure a more abundant supply of fresh air moving through the building. Glass or Plexiglass barriers may be erected between work stations, security posts, and other areas to improve isolation and social distancing.

If a landlord undertakes such improvements to the building, do they constitute capital expenditures? And, if so, are they permitted to be passed through to a tenant as an operating expense? What if the improvements are made at the request of a tenant — may the costs be passed through then? These issues will need to be addressed, and the costs associated with them properly allocated, in any lease document.

FLEXIBILITY OF TENANT'S SPACE

The COVID-19 crisis has fundamentally changed, at least in the short term, how tenants think about the usefulness of their space. On the one hand, tenants may have most, if not all, of their employees working remotely for some period of time, thus making much of the premises unused. This could put pressure on a tenant to reduce its footprint because its space is underutilized. On the other hand, when employees do return to the office, the original office layout may be unworkable since individuals will be required to practice social distancing. In that instance, the same number of employees might require more open space and a larger office footprint in order to make the layout of the new office environment feasible.

From a tenant's standpoint, having flexibility to expand or contract its space as needed on a more flexible basis would be highly advantageous, although this could be challenging for a landlord to accommodate. Additionally, if a tenant is limited to deploying a smaller number of people per square foot in an office environment, that tenant may demand lower per square foot rents for the less efficient space. This is likely to have a downward pressure on rents, particularly in high density office properties.
