

Coronavirus and Commercial Real Estate Leases

This Alert is part one in a series of articles intended to examine the effect of the novel coronavirus (COVID-19) outbreak in the United States and its effect on commercial real estate assets whose tenant occupants are experiencing complete or partial shutdown of their business operations resulting from the preventative social distancing measures imposed in the wake of the wide-spread infectious disease and owners who are temporarily closing buildings. Commercial landlords and tenants alike should review their lease documents and, if necessary, seek legal advice to determine their rights and obligations based on the particular circumstances of the suspension in use of the space. Please note this Alert is not intended to apply to properties containing residential leases. We will be providing a separate analysis of the ramifications of the COVID-19 pandemic with respect to both construction agreements and financing documents for real property.

Force Majeure Lease Clauses

Force majeure clauses in leases address events that are beyond the parties' control, such as the outbreak of war, natural disasters, or other acts of God. The clauses typically provide that, to the extent the force majeure event renders performance impossible or results in a delay in performance, the affected party's obligations to perform under a particular lease may be excused or suspended.

Is Coronavirus a Force Majeure Event?

One must examine the force majeure clause to determine if the COVID-19 outbreak qualifies as a force majeure event. Generally speaking, courts of most jurisdictions have historically interpreted force majeure clauses narrowly and will only excuse performance if the force majeure clause specifies the event that actually prevents a party's performance. Does the definition of force majeure expressly include words "pandemic," "epidemic," "disease," "public health emergency," or other similar language? If such language is present, the COVID-19 outbreak is likely to constitute a force majeure event. In the absence of such language, the force majeure clause is not likely to be interpreted to cover the COVID-19 outbreak.

Is a Government Imposed Shutdown a Force Majeure Event?

If a space has been involuntarily shut down by mandatory governmental order, as we are seeing in many areas in response to the COVID-19 outbreak, a similar examination of the force majeure provision must be made to determine if such act qualifies as a force majeure event. Typically, "governmental restriction," "regulation," or similar phrases are included within a standard force majeure lease provision and constitute force majeure events.

Effects of Such Force Majeure Events

If these events qualify as force majeure events under a lease, a landlord's obligation to provide access to the leased premises would be suspended during such applicable period, and the inability of a tenant to gain access would not be construed as a constructive eviction. These events would also likely result in a suspension of a tenant's obligation to continuously operate its premises, as well as the obligations of both the landlord and tenant to maintain and perform repairs to the premises. Note that the events for which relief is provided tend to be obligations relating to performance, not payment. (Note also, that even if these events do not qualify as force majeure events under a lease, a party may be excused from performance pursuant to other provisions in the lease. For example, a tenant who shuts down its operations in response to a government directive would likely be viewed as complying with a requirement under the lease to conduct its business in compliance with applicable laws.)



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Impact on Tenant's Obligation to Pay Rent

A tenant's obligation to pay rent is usually characterized in the lease, and is recognized under many state laws, as an independent obligation, or one that must be performed without set off, abatement or deduction regardless of any alleged default by the landlord. Force majeure provisions often expressly exclude payment obligations of the parties. Unless the tenant has negotiated specific rent offset rights arising from events such as a pandemic or epidemic, or government ordered closure of its business, the historically narrow interpretation given force majeure provisions by courts make it unlikely that force majeure provisions will excuse the tenant from its obligation to pay rent or that the lease would otherwise permit any reduction or abatement in rent by the tenant.
