

**COMMERCIAL LEASING:
CONSIDERATIONS AND
PRACTICAL TIPS IN THE AGE OF
COVID-19**

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CRITICAL PROVISIONS IN EXISTING LEASE AGREEMENTS

Force Majeure

Covenant to continuously operate in the premises (“go dark” clauses)

Insurance

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FORCE MAJEURE AND ACTS OF GOD

Your tenant has requested relief from the payment of rent...

Your landlord is delayed in completing tenant improvements...

Identify and review specific language and any notice requirements

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COVENANT TO REMAIN OPEN FOR BUSINESS

Exceptions for mandated closures?

Common law arguments for excusing performance?

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BUSINESS INTERRUPTION INSURANCE

Coverage typically requires a connection to “damage” to the property

Send prompt notice to:

- your carrier – characterize the “damage” as a virus tactile on surfaces, or the closure of the business as an act of governmental authority
- Your landlord – other rent abatement provisions may be limited by the availability of business interruption insurance

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NEGOTIATING RENT RELIEF – LAW VS LEVERAGE

Understanding the particular language in your lease can provide leverage in negotiating a rent relief agreement

Considering leveraging a rent relief agreement to obtain other concessions from the tenant

Consult with your lender before entering into any modifications

ABATEMENT

During the period of closure

DEFERRAL

For the period of closure
Extend term

REDUCTION

During the period of closure
Cover base CAM expenses

LEVERAGE

Increased pass-throughs for
CAM expenses
Narrow exclusive uses
Loosen co-tenancy
provisions

LEVERAGE

Tenant estoppels
Early exercise of extension
options
Additional security or
guaranties

LEVERAGE

Increased financials
Required application for
disaster aid
Required offering of
alternative sales

LIMITATIONS ON ACTIONS FOR POSSESSION

GOVERNOR'S EMERGENCY ORDER [AMENDED 10-16-2020]

“No court shall give any judgment for **possession** or repossession, or warrant for **restitution** of possession or repossession of residential, **commercial**, or industrial real property, if the tenant can demonstrate to the court, through documentation or other objectively verifiable means, that the tenant suffered a **Substantial Loss of Income**” ...

“**Substantial Loss of Income**” means ... substantial loss of income resulting from COVID-19 or the related proclamation of a state of emergency and catastrophic health emergency, including, without limitation, due to **lost or reduced business, required closure**, or temporary or permanent **loss of employees.**”

LIMITATIONS ON ACTIONS FOR POSSESSION

GOVERNOR'S EMERGENCY ORDER [AMENDED 10-16-2020]

Effect of Order

- Can still docket action for possession
 - Tenant has burden to demonstrate “Substantial Loss of Income”
 - Restitution is possible if Tenant fails to prove
- Can pursue money judgment against Tenant
- Can pursue actions against guarantors
- Dockets reflect more actions being instituted

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CRITICAL PROVISIONS IN FUTURE NEGOTIATIONS

Pre-negotiated tenant abatement or partial abatement of rent *separate from* force majeure

- Specific trigger events
- Prompt notice

Reduce liability risk – documentation and indemnification

Increased maintenance costs to landlords

Notice in the event of a mandatory closure (see boilerplate)

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INCREASED LIABILITY RISKS TO LANDLORDS

Common area sanitization

Enforcement of social distancing and mask-wearing

Update rules and regulations

Issues with burden of proof

Indemnification

What is reasonable?

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INCREASED COSTS TO LANDLORDS

Pass-through to tenants increased maintenance costs resulting directly from the pandemic

Increase cap, if any, on CAM *or* consider express carve-out from a cap on CAM increases for extraordinary circumstances

BOILERPLATE CONSIDERATIONS

NOTICE PROVISIONS IN SHUTDOWN/EMERGENCY

If the building that Tenant designates for receipt of notices and demands is closed (whether due to emergency, governmental order, or any other reason), then any notice address for Tenant at such building shall not be deemed a required notice address during such closure, and, unless Tenant has provided an alternative valid notice address to Landlord for use during such closure, any notices sent to Tenant during such closure may be sent via email to [insert email address] or in any other practical manner reasonably designed to ensure receipt by the intended recipient and shall be deemed given on the date when sent.

BOILERPLATE CONSIDERATIONS

ELECTRONIC SIGNATURES

This Amendment may be executed with electronic signatures in compliance with the Maryland Uniform Electronic Transactions Act (“UETA”), Maryland Code, Commercial Law Article §21-101 *et seq.*, or the U.S. federal E-SIGN Act of 2000, 15 UCCA §7001 *et seq.* This Amendment may be executed in counterparts, each of which shall be considered an original and all of which shall comprise one and the same document. Counterparts may be delivered via facsimile, e-mail (including pdf or any other format or medium) or by any other electronic transmission method, and any counterpart so delivered will be deemed to have been duly and validly delivered and will be valid and effective for all purposes.

QUESTIONS?

