COMMERCIAL LEASE LAW INSIDER®

The Practical, Plain-English Newsletter for Owners, Managers, Attorneys, and Other Real Estate Professionals

SPECIAL REPORT: COVID-19 AND COMMERCIAL LEASES

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A WORD FROM OUR EXECUTIVE EDITOR

Since COVID-19 was declared a pandemic, the Insider *has published – and continues to publish – articles on how commercial property owners can use their existing leases to limit their legal liability and financial losses, and draft lease amendments that will help their tenants – and their own CRE businesses – survive the crisis. The lessons we learn during this pandemic will shape how future commercial leases are drafted. And you can rely on the* Insider *to continue to bring you model lease clauses that you can adapt and use to ensure your business is prepared for future challenges.*

How to Use Your Lease to Limit Coronavirus Disruption, Damage & Liability

The coronavirus has taken the world by surprise. And that includes commercial landlords and tenants. But there's a big difference between lack of warning and lack of preparation. And you may be more prepared than you realize. Thus, while it may be too late to incorporate coronavirus protections into your existing leases, there's still time to salvage the situation by relying on the provisions that your leases do contain.

We'll look at the three most pressing concerns the coronavirus is likely to pose and the lease clauses that you can use to address them and minimize coronavirus damage and disruption. Also, to assess how effective your lease is for coronavirus response, we'll give you a *Checklist: Ask 23 Questions to Assess Your Lease Coronavirus Response Rights.*

SCENARIO 1:
FULL OR PARTIAL BUILDING SHUTDOWN BY LANDLORD

The first risk is that you'll have to shut down part or all of your building, facility, or shopping center due to coronavirus. There are two likely scenarios:

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- The government orders the shutdown as part of a coronavirus quarantine or other public health response action, which has already happened in some parts of the country; or
- You have to initiate the shutdown as a result of staffing, supply, or service disruptions or shortages.

Needless to say, the resulting measures you implement to keep tenants out of the property would be a direct violation of tenants' quiet enjoyment, use, and other lease rights. The question then becomes whether tenants can withhold rent, terminate the lease, or invoke their other lease remedies. The answer depends on whether your lease includes provisions justifying your actions in shutting down or limiting access to the property.

Emergency Access Limitation Clause

First, check your lease to see if it allows you to take appropriate response actions during a public emergency. Many landlords began negotiating for the inclusion of such clauses in the aftermath of the 9/11 terrorist attacks and previous infectious illness outbreaks like SARS and H1N1. Where such clauses do exist, they typically allow the landlord to deny or restrict access to the premises to deal with the emergency.

Model Lease Clause

Landlord shall have the absolute right at all times, including an emergency situation, to limit, restrict, or prevent access to the Building in response to an actual, suspected, perceived, or publicly or privately announced health or security threat.

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Emergency Service Interruption Clause

Another key public emergency clause contained in some leases relieves the landlord of liability resulting from full or partial disruption of building services beyond its control.

Note, though, that public emergency rights clauses aren't a panacea. Landlords still must exercise those clauses reasonably and in good faith. This is an implied legal obligation that exists regardless of whether it's actually spelled out in the lease.

Force Majeure Clause

The other potential source of lease protection in the event of shutdowns or service disruptions is a force majeure clause excusing the landlord from performing its lease duties if a catastrophic event happens. The three key questions:

Does your lease have such a clause? Unlike the public emergency clauses discussed above, the force majeure clause is a boilerplate provision typically found in the back of many, if not most, commercial leases.

Is the coronavirus a force majeure event? Regrettably, the force majeure clause doesn't usually get the attention it deserves until a public emergency occurs. And that's where we are now. So, the first thing you need to look at is whether the coronavirus emergency counts as a "force majeure event." The definition typically includes natural disasters, acts of war, labor strikes, and *government actions.* That's good news if the shutdown is ordered by the government, but invoking the clause may be much more problematic if *you* initiate the shutdown, especially if you could and should have prevented the problem—for example, by making plans to deal with staff shortages and service and supplies disruptions.

What relief does the clause give you? A force majeure may either end or just suspend a landlord's duty to perform.

SCENARIO 2:

LIABILITY TO TENANT STEMMING FROM INFECTION IN BUILDING

Another legal risk is that tenants will bring claims against you for failing to take adequate infection control measures in the common areas, especially if their employees, visitors, clients, or customers come down with coronavirus. Theoretically, a landlord could be held liable for negligence resulting in illnesses that people on the premises contract. But these cases are extremely hard to win given the difficulty of showing the link between the alleged negligence and the victim's illness; this is doubly true for an illness about which so little is still understood like coronavirus.

However, tenants might have a stronger case in arguing that a landlord's inadequate coronavirus control constitutes a lease violation. The strength of these claims would probably turn on two key lease provisions dealing with indoor air quality (IAQ) issues.

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Coronavirus Disruption

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'As Is' Clause

Although coronavirus hasn't yet spawned any reported case rulings, we know from previous litigation that lease clauses requiring tenants to take the space "as is" cut the legs out from under tenant IAQ claims. And while coronavirus didn't exist at the time the lease was signed, the "as is" clause can shield landlords from tenant coronavirus claims based on the inadequacy of the HVAC and maintenance and cleaning systems.

Model Lease Clause

Tenant has fully investigated the condition of the Premises or waived its right to do so and is fully familiar with the physical condition of the Premises and every part thereof, including but not limited to the indoor air quality (IAQ) generally and the HVAC system, and Tenant accepts the same "as is."

Lack of Representations or Warranties

The second layer of IAQ claims protection that your lease may contain is a provision expressly stating that the landlord makes no representations or warranties about the condition of the space or the IAQ in particular.

Model Clause

Landlord has made no express representations or warranties and disclaims any implied representations or warranties relating to the condition of the Premises and common areas, or any part thereof, including, but not limited to, the HVAC and other building systems, the IAQ within the Premises and common areas, and the environmental condition of the Premises and common areas. Tenant agrees that Landlord shall not be liable for any patent or latent defects therein.

The flip side to the above analysis is that your legal risks for lease-related coronavirus infection claims will be greater if you do, in fact, include warranties about the IAQ of the property and common areas and the fitness of your HVAC, cleaning, and maintenance systems.

SCENARIO 3:

TENANT CLOSES DOWN OR RESTRICTS OPERATIONS

The third scenario, which is especially problematic in a retail setting, is that coronavirus will force the tenant to shut down or curtail its operations. Here's a look at the key lease clauses that will determine your rights and remedies in this situation.

Force Majeure Clause

Force majeure clauses may run in both directions and excuse not only the landlord but a tenant's performance under the lease. The questions to ask if a tenant relies on the force majeure to justify a business closure or interruption are largely the same as the ones relevant to a landlord's shutdown of the property:

- Is there a force majeure clause in the lease?
- If so, does it cover the tenant?

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Coronavirus Disruption

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- Does the coronavirus emergency meet the lease definition of a "force majeure"?
- If the answer to all of the above questions is YES, which tenant duties does the force majeure clause excuse? Thus, for example, force majeure clauses excusing tenants may not apply to fundamental lease duties such as:
  - — Paying rent;
  - — Maintaining the required insurance; and/or
  - — Surrendering the premises at the end of the lease term.

Finally, consider whether the tenant follows the required notice provisions in invoking the force majeure clause.

Continuous Operation Clause

Shopping center and retail leases in which tenants pay a percentage of sales typically include a clause requiring the tenant to continue its operations and restricting its rights to close down. If your lease does include such a clause, the first thing you need to check is whether there's a carve-out for public emergencies and whether coronavirus qualifies as such an emergency. You also need to ensure that the tenant follows the lease notification and consent requirements and procedures.

Keep in mind that continuous operations clauses may not provide you with much practical protection if the tenant closing down doesn't have any assets or a parent or related entity with deep pockets. ♦

CHECKLIST

Ask 23 Questions to Assess Your Lease Coronavirus Response Rights

Do you have the right lease for effective coronavirus response? While the financial losses and dislocation that coronavirus is inflicting on you and your tenants cannot be understated, there's still ample opportunity to minimize the damage. But you'll need the right lease. That's because, to a large measure, the effectiveness of landlord coronavirus response will depend on what your leases do and do not say. So, it's highly advisable to take a look at your key leases to ensure they give you the protection and rights you'll need to get through the coronavirus emergency. Here's a checklist of 23 key questions to ask.

1. Does your lease give you the right to close down or limit building access during a public emergency?
2. If so, to what extent can you limit access—for example, do you have to allow tenants into the building to collect their files and laptops?
3. Does your lease limit your liability to loss or disruptions to building services caused by a public emergency like coronavirus?

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Coronavirus Disruption

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CHECKLIST *(continued)*

4. If so, what extent and what type of service disruptions does it cover?
5. Does your lease have a force majeure clause excusing your lease obligations in the event of an unforeseen event beyond your control?
6. If so, does the definition of "force majeure event" include a public health emergency like coronavirus?
7. Does the clause eliminate or merely postpone your lease obligations?
8. Does the force majeure clause also apply to the tenant?
9. If so, which tenant obligations does the force majeure excuse?
10. Does your lease allow tenants to close down in the event of a public emergency?
11. Are tenants allowed to limit their operating hours in the event of a public emergency?
12. What notification and consent requirements apply if tenants exercise their right to close down or limit operating hours?
13. Does the lease include a guaranty or recourse to a third party in the event a tenant goes dark due to coronavirus?
14. What are your lease obligations to keep the building and common areas healthy, sanitary, and safe?
15. What specific measures does the lease require you to take to ensure health and cleanliness?
16. Does the lease include representations and warranties about indoor air quality and/or the fitness of HVAC and building systems?
17. Does the lease give you the right to access the tenant's premises without permission to clean and disinfect?
18. Does the lease allow you to inspect the tenants' premises to assess infectious illness risks?
19. Does the lease allow for shutting down the building due to an "uninsured risk"?
20. Does the definition of "uninsured risk" cover coronavirus?
21. Does the lease require tenants to cooperate with public health authorities?
22. Does the lease require you to communicate with tenants in the event of a public emergency?
23. If so, does it specify what you must do to maintain communications?

DRAFTING TIPS

Get Eight Protections When Giving Tenants COVID-19 Rent Relief

While each lease is different, COVID-19 generally doesn't excuse tenants' duty to pay rent. But, in times of pandemic, having the lease on your side may not count for much. The simple fact is that for many landlords, strict enforcement of lease rent obligations is not a realistic option; it might even be illegal under the emergency decrees of some jurisdictions. That's why rent relief has become the order of the day in so many parts of the country. If you do grant your tenants some form of temporary rent relief, be sure you make a legally sound agreement that minimizes your financial losses and protects your legal interests. Here's how.

NEED FOR A WRITTEN LEASE AMENDMENT

Regardless of the type of arrangement you make, be sure to implement your rent relief agreement as a written lease amendment signed by both parties (as well as any guarantors) in accordance with the amendment provisions of the underlying lease. *Strategy:* Create a template for use with all tenants to ensure a degree of consistency of your rent relief agreements even if the business terms of a particular agreement vary by tenant. Like our *Model Amendment: Give Tenants Temporary Rent Relief During COVID-19 Pandemic,* your amendment should include eight clauses.

1. Rent Abatement or Rent Deferral?

For obvious reasons, temporarily deferring rather than forgiving some or all of the rent is the preferred form of relief for most landlords. But while deferral buys the tenant time, it also saddles it with heavy financial obligations when lease payments resume—for example, in the form of interest or additional rent on the back end, especially if the tenant is required to pay interest or penalties [Amendment, Sec. 1].

2. Tenant Use of Government Relief or Insurance Funds

One mutual advantage of deferring rather than abating rent is that the tenant may be able to take advantage of the new Coronavirus Aid, Relief, and Economic Security Act (CARES), specifically, the new Paycheck Protection Program (PPP), which lends money to businesses with 500 or fewer employees so they can pay their employees and rent. Best of all, PPP loans may be fully forgivable. *Result:* Landlords get the rent without saddling the tenant with new rent debts.

The tenant may also get insurance benefits under a business interruption policy. In any event, add language requiring the tenant to use any PPP or other government or insurance proceeds that later become available to repay the landlord and offset any rent relief provided [Amendment, Sec. 2].

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Eight Protections

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3. Duration of Rent Relief

Three to six months seems to be the standard duration of COVID-19 rent relief arrangements. In any case, be sure to specify a start and end date rather than tying duration to an unknown period—for example, for as long as the pandemic or "stay home" orders last. You can always extend or shorten the term later as things develop. Also ensure that any deferral period and repayment date fall before the scheduled lease expiration date in the event you want to make failure to repay grounds for termination, or make the tenant's agreement to extend the lease a condition of deferral [Amendment, Sec. 1].

4. Scope of Rent Relief

Provide relief only for basic rent, not additional rent, CAM, operating expenses, taxes, electricity charges, etc. And provide relief only for the rent installment that's attributable to the named month. In other words, say the relief doesn't include prior delinquent monthly installments of rent that come due during the named relief month. *Example:* Relief of May 2020 rent doesn't cover the unpaid January 2020 rent that's payable in May [Amendment, Sec. 1].

5. Remedies & Acceleration

Specify that the full amount of relieved rent becomes immediately due and payable in the event of:

- The tenant's default under the relief agreement or underlying lease;
- The tenant's assignment or sublease of all or any part of the premises (except for a sublet or assignment not requiring the landlord's consent under the lease);
- Any earlier termination of the lease; and
- The tenant's receipt of government assistance funding pertaining to payment of the rent [Amendment, Sec. 2].

6. Waiver of Tenant COVID-19 Claims

Have the tenant waive all rights, defenses, and entitlements related to COVID-19 —for example, force majeure, impossibility of performance, frustration of purpose, denial of access, casualty, constructive eviction, loss of quiet enjoyment, and statutory remedies such as a government-mandated rent holiday [Amendment, Sec. 3].

7. Confidentiality

The last thing you want is for tenants to compare notes with other tenants about the rent relief they got from you—or even disclose that they got rent relief at all. So, require tenants to keep the terms of the agreement, and the mere fact of its existence, confidential [Amendment, Sec. 5].

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MODEL AMENDMENT

Give Tenants Temporary Rent Relief During COVID-19 Pandemic

Although you can also abate some or all of the rent, deferral of rent payment obligations is the more common method of providing rent relief during the current COVID-19 crisis. To implement such an agreement, you need to enter into a written lease amendment like the Model Amendment below, which you can modify with the advice of counsel based on the terms of your particular arrangement and the laws of your jurisdiction.

LEASE AMENDMENT

LANDLORD: _____ TENANT: _____

GUARANTOR: _____

PREMISES: _____ DATED: _____

1. **Deferment of Rent:** In connection with Tenant's lease (as modified herein) of the Premises from Landlord (the "Lease"), for the period commencing on [*insert date*] and ending on [*insert date*], Landlord agrees to defer Tenant's obligation to pay Landlord only the [*insert #*] monthly installments of Basic Rent attributable solely to [*insert months*], 2020. In addition to the Fixed or Basic Rent and Additional Rent due from Tenant for the period [*insert date*], 2020, to [*insert date*], 2020 (inclusive), on the first day of each and every month during that period, Tenant shall pay Landlord an extra $[*insert amt.*], [*optional:* with additional payments due from Tenant to Landlord of $[*insert amt.*] on the first of the corresponding month,] as Additional Rent to satisfy the $[*insert amt.*] in Basic Rent that was deferred for the months of [*insert months*] of 2020.

2. **Default and Acceleration:** Tenant agrees that the remaining payments required under Section 1 shall be immediately due and payable in a single lump sum upon the occurrence of any of the following events:
   (i) Any default by Tenant under the Lease or this Lease Amendment; and/or
   (ii) An assignment of the Lease or a sublease of all or any portion of the Premises by Tenant (except for an assignment or sublet pursuant to the terms of the Lease for which Landlord's consent is not required); and/or
   (iii) Any earlier termination of the Lease pursuant to the terms of the Lease; and/or
   (iv) The receipt by Tenant of any governmental assistance funding or insurance benefits pertaining to the payment of rent. Tenant shall promptly notify Landlord upon receipt of any governmental assistance funding or insurance benefits.

3. **Tenant Waiver of Coronavirus Claims:** The deferment of Basic Rent contained in this Lease Amendment is the sole and exclusive remedy of Tenant against Landlord in connection with the coronavirus pandemic, and Tenant hereby waives and releases all other defenses, rights, and entitlements at law, in equity, under the Lease or pursuant to statute to which Tenant may now or hereafter be entitled against Landlord in connection with the coronavirus pandemic.

4. **Incorporation of Lease Terms:** Unless otherwise defined herein, all terms commencing with a capital letter used in this Lease Amendment shall have the meanings ascribed to them in the Lease. Tenant represents and warrants that as of the date hereof, Landlord is not in breach or default in the fulfillment or performance of any term of the Lease.

5. **Confidentiality:** Tenant shall keep the terms of this Lease Amendment, and the fact of its existence, strictly confidential.

6. **Guarantor Ratification:** Guarantor hereby ratifies and confirms that its guaranty agreement in favor of Landlord shall continue to be binding upon Guarantor.

7. **Email Signatures and Notification:** For purposes of this Lease Amendment and in accordance with social distancing guidelines issued by public health agencies in response to the coronavirus pandemic, the parties deem emailed signatures and notifications, and their delivery electronically, to be legally binding and enforceable.

LANDLORD'S SIGNATURE: _____ DATE: _____

TENANT'S SIGNATURE: _____ DATE: _____

GUARANTOR'S SIGNATURE: _____ DATE: _____

Eight Protections

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8. Email Signatures & Notification

In this time of social distancing, be sure to specify that signatures and required notifications under the agreement may be provided electronically via email, except where the eviction or other property laws of the jurisdiction require otherwise (note that many states have temporarily relaxed personal notification requirements for the pandemic) [Amendment, Sec. 7].

Get Necessary Third-Party Approvals

Once you negotiate an agreement with the tenant, be sure to check the following documents to see if they expressly grant third parties the right to consent to lease amendments, budget changes, or other revisions triggered by the relief agreement:

- Loan documents;
- Partnership/LLC agreements;
- Other lease-related documents, such as franchisor riders, guaranties, sublease consents, tenant financing consents and subordination agreements; and
- Leases with other tenants at the property. ♦

BEST PRACTICES

14 Things You Must Do Right Now to Manage COVID-19 Infection Liability Risks

One of the great unknowns of the COVID-19 coronavirus pandemic for landlords is the potential liability for infection, including class actions by clusters of employees, tenant employees, visitors, and other persons who claim they got the virus at your property. The key to defending yourself against such a claim would be to show you took reasonable steps to control COVID-19 infection risks at your property. But what reasonable steps must you take?

Here's a checklist of 14 best practices for infection control based on CDC and other public health guidelines and experience of previous pandemics, including the H1N1 flu of 2009.

1. COVID-19 Hazard Assessment

First, do a walk-through of the property to identify tasks and conditions involving risk of exposure. Suggested approach: Assess the hazards posed to different people at the site depending on their jobs or function, using four levels of risk classification:

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Best Practices

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Table 1. COVID-19 Exposure Risk Classifications

Risk Classification	Individuals Included in Classification
Very High	Those with frequent and close contact (within six feet of), with people who have COVID-19 or healthcare workers who treat COVID-19 patients
High	Those with contact but on a less frequent and close basis, such as medical transport drivers or hospital support staff or administrative personnel
Medium	Those with frequent and/or close contact with other people, including those who may have COVID-19, like retail clerks
Lower	Those who aren't required or expected to have frequent and/or close contact with other people

Unless your property is used for medical purposes or frequented by medical personnel, the vast majority of the individuals present at the site are likely to fall into the Medium and Lower classifications. We'll explain the significance of that as we go along, starting with the next required measure.

2. Engineering Controls

Engineering controls for COVID-19 hazards may include mechanical ventilation, physical barriers, and other measures that physically protect against exposure. Once you do your COVID-19 hazard assessment, make sure you have the right engineering controls in place to protect the people at your site based on their risk classification. For most landlords—that is, those with no people in Very High or High classifications, the required engineering controls will be rather modest, if they're needed at all.

Table 2. Engineering Controls for COVID-19 Exposure

Risk Classification	Engineering Controls that May Be Necessary
Very High & High	Mechanical ventilation, air-handling systems, airborne infection isolation rooms
Medium	Physical barriers like clear plastic sneeze guards, if feasible
Lower	None

3. Social Distancing

The next layer of protection—measures 3 through 12—is made up of administrative controls that make the site safer by adjusting procedures and how people

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Best Practices

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behave when they're at the site, starting with social distancing—that is, ensuring that people are keeping at least 6 feet apart via:

- Posting signs;
- Distributing clear building rules to tenants and staff;
- If possible, ensuring the space is physically designed so people can do what they need to without getting too close; and
- If physical separation isn't feasible, for example, inside elevators, limiting occupancy of tight areas to one person at a time.

4. Keeping Sick, Symptomatic & High-Risk People Home

Ensure that employees, tenants, and others who are ill, have symptoms, or otherwise pose a high risk—for example, those with infected spouses at home or who've traveled to high-risk areas or been directly exposed to people with COVID-19 in the past two weeks—self-isolate and work from home for at least 14 days in accordance with CDC guidance.

PRACTICAL POINTER: Be careful about screening building entrants. One infection control measure of dubious value is implementing screening techniques like lobby body temperature checks or questionnaires to keep people with COVID-19 infection out of the building. Leaving aside the privacy considerations, such measures go beyond what CDC guidelines and best practices from previous pandemics like the H1N1 flu of 2009. And in assuming a duty that may not otherwise exist, landlords heighten their liability in the event screening goes awry or discontinues and infected people get into the building.

5. Letting/Requiring Employees Work Remotely

Another dimension of social distancing is allowing employees who aren't sick to do their jobs from home as a precautionary measure and requiring tenants to do the same thing with their own staff. Prioritize core work that needs to be done at the site and determine where this core work can be safely and productively performed from—that is, at a safe distance from others at the site.

6. Hand Washing, Hand Washing, Hand Washing

Require people at the site to wash their hands frequently. Provide soap and water or hand sanitizers and post instructions on proper hand washing technique in restrooms.

7. Cough & Sneeze Etiquette

Make sure all building occupants follow "etiquette" by properly covering their mouths when they sneeze or cough.

8. Staggering Shifts

If possible, stagger work shifts to reduce the number of employees present at the site and encourage/require tenants to do the same.

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Best Practices

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9. Regular Cleaning & Disinfection

Ensure the site is cleaned with authorized disinfectants between shifts and as often as necessary to prevent infection, in accordance with public health guidelines. Pay particular attention to high-contact items such as door handles, faucet handles, keyboards, and shared equipment.

10. Method for Reporting COVID-19 Exposure Concerns

Establish a system for employees and tenants to inform building management or representatives of concerns about potential exposure to COVID-19.

11. Means of Communication

Ensure information about COVID-19 in the area and at the site is being communicated to all employees and tenants.

12. COVID-19 Information & Education

Distribute a notice to all of your employees, tenants, and site occupants to ensure they know:

- What COVID-19 is;
- How it spreads;
- The risks of exposure and infection;
- How to protect themselves from those risks;
- How to recognize the signs and symptoms of COVID-19; and
- What to do if they experience symptoms.

13. PPE

The final line of defense is making sure that those exposed to COVID-19 have and properly use, inspect, and clean appropriate personal protective equipment (PPE) based on your risk classifications.

Table 3. PPE for COVID-19 Exposure

Risk Classification	Appropriate PPE
Very High & High	• Gloves + gown + face shield or goggles + either: — A face mask; or — A respirator • Medical/surgical gowns, fluid-resistant coveralls, aprons, or other disposable or reusable clothing
Medium	Combination of gloves, gown, face mask, and/or face shield or goggles depending on job degree of exposure
Lower	Gloves (which may be extended to include face masks in accordance with public health guidance if COVID-19 situation gets worse)

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Best Practices

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14. Monitoring Your Control Measures

The COVID-19 situation is evolving rapidly and you need to monitor public health agencies and ensure your prevention measures are up to date with the latest guidance. Thus, for example, some public health agencies are now advising that people wear face masks any time they leave their home. And, of course, you'll also need to revise your measures on the basis of developments at your own site, such as tenant or health official complaints or other indications that corrections are needed. ♦

Q&A

Does COVID-19 Business Disruption Excuse Tenants' Lease Duty to Pay Rent?

Q If a major disaster that's totally unforeseen and beyond anybody's control, like a hurricane or perhaps the worldwide outbreak of a virulent virus, interferes with a tenant's ability to use leased property for its intended business purpose, does the tenant still have to pay rent?

A For so many commercial landlords and tenants, this has clearly become the question of the moment. As fate would have it, a new case posing this very question has just been decided. And while the case comes from Louisiana and involves Texas law and hurricanes, its general principles apply in other locations and to other disasters, including the current coronavirus pandemic.

Disaster Strikes a Tenant

The case began when Hurricane Harvey swept through Houston and did horrifying damage to life and property. One of the victims was a restaurant tenant that had to shut down its operations temporarily as a result of major flooding. The tenant completed the repairs and tried to re-open about two months later. But the disaster wasn't over for the tenant. The downtown theater district in which the restaurant was located was still a mess and remained a ghost town. As a result, the tenant incurred substantial business losses and stopped paying rent.

Tenant Claims Hurricane as Excuse Not to Pay Rent

Naturally, the landlord still had operating costs to pay and demanded over $500,000 in unpaid rent interest and late fees. The tenant acknowledged not paying rent but claimed the hurricane was an excuse not to perform its obligations under the lease. *Spoiler alert:* The tenant lost.

No Force Majeure Clause, No Excuse

The tenant's first argument was based on act of God—that is, "an occurrence caused directly and exclusively by the violence of nature, without human

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Q&A

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intervention or cause, and which could not have been prevented with reasonable foresight or care."

The clear consensus among the courts of Texas is that Hurricane Harvey qualified as an act of God. And in a few states, that might have gotten the tenant off the hook. The tenant's problem is that in most states, including Texas, the act of God isn't an automatic excuse for not performing contract obligations; it applies only if the parties expressly provide for it, typically by including a so-called "force majeure" clause in the contract.

But the lease in this case didn't have a force majeure clause. And even if it did, it wouldn't have applied because the tenant's nonpayment actually began two months before Hurricane Harvey.

No Frustration of Purpose

Next, the tenant tried frustration of purpose, a.k.a., "commercial impracticability," which excuses performance on the basis of an unforeseen event that nullifies the parties' assumptions about what would happen when they signed the lease and makes performance impossible, including the destruction or deterioration of a thing necessary for performance, the death or incapacity of a person necessary for performance, or a change in law that makes performance illegal.

But the court didn't buy the argument that Hurricane Harvey damage to the downtown district frustrated the purpose of the lease by destroying the tenant's profitability. There was no evidence that going into the lease, the parties assumed that the tenant would be profitable and wouldn't suffer any disruption. Nor was there any evidence supporting the tenant's assertion that its revenue losses after the hurricane made it *impossible* to pay rent [Bayou Place Ltd. Pship. v. Alleppo's Grill, Inc., 2020 U.S. Dist. LEXIS 43960].

Three Takeaways for COVID-19

Collecting rent is hard enough during normal times. The task will become even more challenging when tenants start losing revenues as a result of COVID-19 disruption. Many of these tenants will claim COVID-19 as an excuse not to pay rent, just as the tenant in *Bayou Place* case did with Hurricane Harvey. And while each case is different and rules vary slightly from state to state, there are three things landlords and tenants can take from the case:

1. Act of God isn't an automatic excuse and applies only if the lease includes an express force majeure clause;
2. Act of God and force majeure clauses don't excuse rent non-payments occurring before the COVID-19 business disruptions began; and
3. Lost revenues and erosion of profitability isn't enough to prove frustration of purpose. ♦

BEYOND THE BOILERPLATE

How to Negotiate the Force Majeure Clause

It's among the least appreciated parts of the lease. But while rent, renewal, and other business terms command most of the attention, the so-called force majeure clause takes center stage when disasters occur. It's at that point that both landlords and tenants recognize the importance of the clause and kick themselves for using generic boilerplate language rather than making the effort to negotiate a force majeure clause that makes sense for their particular situation.

Force Majeure Basics

You-know-what happens. And that's why force majeure (Latin for "superior force") clauses exist. The clause excuses a party to a lease from performing its duties if a catastrophic event beyond its control happens. It's like an insurance policy you get but hope to never use; but when it does come into play, the drafting of the terms becomes a five-, six-, or seven-figure issue.

If you don't believe it, just ask One World Trade Center. Its pre-9/11 lease included what was then a standard clause listing "acts of war" as a force majeure event. One of the building's largest tenants, a securities firm, relied on the clause in a bid to recover the "front-loaded" rent it paid just before the terrorist attacks of Sept. 11, 2001. But the court said no dice, finding that terrorist attacks didn't count as "acts of war." These were "sophisticated commercial tenants" that "bargained away their right to hold the lessor liable for nonperformance in the face of the tragic, unanticipated events which destroyed the building," the court concluded [One World Trade Ctr. LLC v. Cantor Fitzgerald Sec., 2004 NY Slip Op 24444].

What would happen if there was no force majeure clause in the lease? Answer: The tenant would be subject to the vagaries of the common law rules of impracticability and frustration of purpose.

Impracticability: When a party is excused of its responsibilities because performance has been made impracticable—that is, excessively burdensome—by a supervening event that it didn't cause, foresee, or guard against in the lease.

Frustration of purpose: When a party is excused because a supervening event fundamentally changes the nature of the lease and makes the party's performance worthless to the other.

The force majeure clause allows the parties to take control and tailor a relief solution that works better for them.

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Force Majeure Clause

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EIGHT ISSUES TO CONSIDER

Although the phrase "negotiate a force majeure clause" is a bit of an oxymoron, those who rely on the boilerplate do so at their own peril. So, take the time to negotiate your own terms. And while bargaining power will go a long way in determining the outcome, there are eight key questions you must consider to come away with the right clause.

1. Which Parties Does the Clause Protect?

The first question is which party should get relief for a force majeure event—the landlord, the tenant, or both. Force majeure protection typically runs in both directions, but it can be limited to just one side, leaving the other party to rely on the common law impracticability and frustration rules [Clause, Sec. 1].

2. Which Duties Does the Clause Excuse?

The next thing to determine is which lease duties are subject to the clause. There are certain duties landlords should try to carve out and require tenants to perform regardless of external events, including the obligation to:

- Pay rent;
- Surrender the premises at the end of the lease; and
- Maintain required insurance.

The tenant may also want to carve out some of your obligations, like the duty to return the security deposit at the end of the term [Clause, Sec. 1].

3. What Constitutes a Force Majeure Event (Listed Events)?

The definition may be the most important part of the force majeure clause. When force majeure relieves the tenant of lease responsibilities, you want to keep the scope as narrow as possible. Conversely, you want the broadest possible clause when it applies to your own lease obligations. In either situation, recognize that courts interpret these clauses very narrowly, as illustrated by the *Cantor Fitzgerald* case above. Accordingly, modifiers like "unforeseen," "tragic," and "natural" may limit the scope of the clause. A broader definition would include any act, event, or circumstance beyond the party's control and that wasn't caused by its own negligence or failure to exercise reasonable diligence. List examples of force majeure events, which typically include major risks like:

- Flood, earthquakes, hurricane, tornado, fire, explosion, volcanic eruption, epidemic, etc., whether natural or man-made;
- Acts of war, armed conflict, embargo, revolution, sabotage, riot, terrorism, bioterrorism, ecocide, or threat thereof;
- Strike, lockout, or other industrial disturbances; and
- Government acts, court orders, laws, regulations, statutes, ordinances, rules, regulations, or other actions taken after the lease goes into effect [Clause, Sec. 2(a)].

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Force Majeure Clause

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4. What Constitutes a Force Majeure Event (Catch-all Phrase)?

Because it's impossible to anticipate every contingency, force majeure definitions usually end with a catch-all phrase purporting to include everything not specifically listed—for example, "or any other events not within the reasonable control of the party affected." The problem is that courts may not give effect to these catch-alls.

Explanation: In interpreting a legal document, courts follow a principle of construction called *expressio unius est exclusio alterius,* meaning when one or more things of a class are expressly mentioned others of the same class are excluded. When applied to force majeure, it means the clause is seen as covering *only* the events listed in the lease.

EXAMPLE: A "liability insurance crisis" prevents a tenant from getting the insurance the lease requires. The tenant claims force majeure, citing the catch-all "other similar causes beyond the control of such party" language in the lease. But the court finds no force majeure because insurance market disruption wasn't one of the listed events and was different in kind and nature from the events that were listed [Kel Kim Corp. v. Central Markets, Inc., 70 N.Y.2d 900].

There are two things you can do to combat the *expressio unius est exclusio alterius* effect and enhance the enforceability of a catch-all phrase:

- Include the phrase "including but not limited to" or "including, without limitation" before listing examples of force majeure events [Clause, Sec. 2(a)]; and
- Include the phrase "whether similar or dissimilar in kind and nature to any of the foregoing" at the end of the catch-all language [Clause, Sec. 2(a)(viii)].

5. What Doesn't Constitute a Force Majeure Event?

A landlord doesn't want tenants to be able to claim force majeure for all forms of adversity, especially if the tenant had a part in causing or could reasonably have prevented it with proper care and diligence. List examples of excluded events, which may include:

- Breakdown or failure of machinery or equipment that the tenant caused or could and should have prevented;
- Non-availability of equipment, supplies, personnel, or other resources for which the tenant could have made reasonable provision;
- Economic events like market failures or the liability insurance market crisis cited by the tenant in the *Kel Kim* case above;
- Non-availability or lack of funds due to circumstances within the tenant's control; and
- Denial, revocation, withdrawal, expiration, or failure to obtain government or other regulatory approval that the tenant could have obtained, maintained, or extended or didn't get because it didn't follow the required procedures or meet the required terms and conditions [Clause, Sec. 2(b)].

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Force Majeure Clause

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6. What Notice Must the Tenant Provide?

Next, establish a process for exercising force majeure rights, especially when the tenant is the party claiming relief from lease obligations. The starting point is notification. Make the tenant's force majeure rights contingent on its obligation to:

- Notify you that a force majeure event has occurred within a stated deadline, such as 24 hours [Clause, Sec. 3];
- Provide you with follow-up information about how long it expects the event to last and how it will affect its lease performance as soon as possible thereafter, such as within three days of initial notification [Clause, Sec. 5];
- Allow you to inspect the site of the claimed force majeure [Clause, Sec. 4]; and
- Provide you with periodic progress reports on the situation [Clause, Sec. 8].

7. What Must Tenant Do to Mitigate the Damage?

Require the tenant to use "commercially reasonable efforts" to minimize damages and resume performance of its lease obligations when a force majeure event occurs [Clause, Sec. 7].

8. What Kind of Relief Does the Tenant Get?

Indicate whether the occurrence of a force majeure event discharges or simply delays the tenant's duty to perform the lease obligation. If it's the latter, specify exactly how much extra time the tenant gets. Otherwise, the tenant may try to extend the delay indefinitely. Also require the tenant to pay the additional costs you incur as a result of the delay. Last but not least, reserve your right to terminate the lease if the delay lasts more than a stated amount of time, such as 120 days [Clause, Sec. 9]. ♦

MODEL LEASE CLAUSE

Provide Relief from Lease Duties If Force Majeure Events Prevent Performance

The Model Lease Clause below reflects the most common situation in which both sides get the benefit of force majeure relief. The lease language must be balanced and the scope of relief precisely defined. If you have the bargaining power, negotiate for a one-way clause covering your own but not the tenant's lease obligations, in which case you'll want the broadest possible language. Second choice: Let the tenant have only narrow force majeure relief and bar it from applying to the duty to pay rent. Ask your attorney to adapt the clause to suit your situation.

FORCE MAJEURE

1. **Force Majeure:** Neither Landlord nor Tenant shall be liable for any delay or failure in performing its Lease duties if and to the extent such delay or failure in performance is a result of Force Majeure, except for the performance of the Tenant's obligation to: (i) pay rent or meet any other payment obligation that has accrued prior to the Force Majeure event; (ii) return the premises at the end of the Lease in accordance with the conditions set out in Sections X and Y of the Lease; (iii) maintain the insurance coverage required by Section Z; and [*list others*].

2. **Force Majeure Definition:**

   (a) "Force Majeure" means any act, event, or circumstance that is not reasonably within the control of, does not result from the negligence of, and would not have been avoided or overcome by the exercise of reasonable prudence or diligence by the party claiming Force Majeure (Affected Party), and may include, without limitation, the following:

   i. Fire, flood, atmospheric disturbance, lightning, storm, hurricane, cyclone, typhoon, tidal wave, tornado, earthquake, explosion, volcanic eruption, landslide, soil erosion, subsidence, washout, epidemic, and other natural and manmade disaster;

   ii. Acts of war (whether declared or undeclared), invasion, armed conflict, embargo, revolution, sabotage, terrorism, bioterrorism, ecocide or threat thereof, riot, civil war, blockade, insurrection, acts of public enemies, or civil disturbances;

   iii. Power outage, loss of services, evacuation, rebuilding and occupancy issues, and other events, circumstances, or conditions resulting from any of the above Force Majeure events;

   iv. Strike, lockout, or other labor or industrial disturbances, provided, however, that nothing herein shall be deemed as requiring any of the parties to relinquish their discretion to settle any strikes, lockouts, or other industrial disturbances they experience or yield to demands made on it when it considers such action inadvisable;

   v. Acts after the date hereof of a government entity, agency, nation, port, or other authority having jurisdiction, including the issuance or promulgation of any court order, law, statute, ordinance, rule, regulation, or directive, the effect of which would prevent, delay, or make unlawful a party's performance hereunder, or would require such party to take measures which are unreasonable in the circumstances to comply with said act;

   vi. Expropriation, requisition, confiscation, or nationalization, embargo, export or import restriction, or restriction of production, rationing, or allocation of same, whether imposed by law, decree or regulation by insistence, request, or instructions of any governmental authority or organization owned or controlled by any government, or by any person purporting to represent a governmental authority, to whose jurisdiction any of the parties is subject;

   vii. Subject to Section 2(b)(iv) below, inability to obtain, or suspension, termination, adverse modification, interruption, or inability to renew, any servitude, right of way, easement, permit, license, consent, authorization, or approval of any governmental entity, agency, national, port, or other local authority having or asserting jurisdiction; or

   viii. Any other act, event, or circumstance that is not reasonably within the control of, does not result from the negligence of, and would not have been avoided or overcome by the exercise of reasonable prudence or diligence by, the Affected Party claiming Force Majeure, whether similar or dissimilar in kind and nature to any of the foregoing events.

   (b) Force Majeure does not include:

   i. Economic depression, recession, slump, inflation, deflation, shortage, surplus, currency fluctuation, or other adverse economic conditions;

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FORCE MAJEURE (continued)

ii. The breakdown or failure of equipment or machinery operated by a person to the extent caused by: (A) normal wear and tear which should have been avoided by the exercise of reasonable care and diligence; (B) the failure to comply with the manufacturer's recommended maintenance and operating procedure; or (C) the non-availability at appropriate locations of standby equipment or spare parts in circumstances where reasonable prudence and foresight would have required that such equipment or spare parts be made available;

iii. The non-availability or lack of funds or failure to pay money when due, except for failure to pay money caused by Force Majeure affecting all reasonable means of payment, in which event, on the cessation of such Force Majeure, the affected party shall pay, in addition to the amounts due hereunder, interest on such amounts due at the Base Rate calculated from the due date to the date of payment; or

iv. The withdrawal, denial, or expiration of or failure to obtain any approval or consent of any national or local governmental authority, agency, or entity acting for or on behalf thereof, to the extent: (A) the Affected Party can apply for and obtain, maintain, or extend or could have reasonably applied for and obtained, maintained, or extended, any such approval or consent; or (B) caused by the Affected Party's failure to observe the terms and conditions of any existing approval or consent or other requirement of law.

3. **Initial Notice:** Upon the occurrence of a Force Majeure event that may delay or prevent the performance by the Landlord or Tenant of any of its obligations hereunder, the Affected Party shall give initial written or oral notice thereof to the other party (Non-Affected Party) within 24 hours promptly, which shall be confirmed in writing if the original notice is provided orally.

4. **Verification:** Upon receiving initial notification from the Affected Party, the Non-Affected Party may ask the Affected Party to allow representatives of the Non-Affected Party to inspect the scene of the event which gave rise to the claim of Force Majeure, and, provided that such request is made within two (2) days after the initial notice, the Affected Party must agree to the request and use all reasonable efforts to ensure that representatives of the Non-Affected Party have access to the scene. Inspections carried out in accordance with this provision will be at the [*Affected/Non-Affected*] Party's sole expense.

5. **Subsequent Notice:** (a) Within three (3) days after providing initial notice in accordance with Section 3 above, the Affected Party shall provide to the Non-Affected Party written confirmation notice listing:

   i. A description of the Force Majeure event;

   ii. A listing of the Lease obligations the Force Majeure event is expected to prevent or delay the Affected Party from performing;

   iii. A good faith estimate of the likely duration of the Force Majeure event and of the delay or reduction in performance and to the extent known or ascertainable, the estimated extent of such reduction in performance; and

   iv. The particulars of the program to be implemented and any corrective measures already undertaken to ensure full resumption of normal performance hereunder.

6. **Default:** To the extent the Affected Party fails to provide the initial notice required by Section 3 or the subsequent notice required by Section 5, or fails to use reasonable efforts to ensure access to the site for the inspection provided for in Section 4, in accordance with the time limitations listed in the respective clauses, it shall not be excused for any failure or delay in performance resulting from the Force Majeure event.

7. **Mitigation:** The Affected Party shall use all commercially reasonable efforts to resume normal performance of its obligations under this Lease as soon as reasonably possible. To the extent that the Affected Party fails to use commercially reasonable efforts to overcome or mitigate the effects of Force Majeure events, it shall not be excused for any delay or failure in performance that would have been avoided by using such commercially reasonable efforts.

8. **Progress Reports:** During the period in which the Affected Party's performance of Lease obligations is prevented, delayed, or reduced as a result of a Force Majeure event, it shall continue to perform its other Lease obligations that are not affected by the Force Majeure event and provide the Non-Affected Party weekly progress reports containing:

   i. A description of the measures the Affected Party has undertaken and is planning to undertake to ensure full resumption of normal performance hereunder; and

   ii. A good faith estimate of the likely date of resumption of normal performance.

9. **Termination for Extended Force Majeure:** In the event that a delay or reduction of the Affected Party's performance resulting from a Force Majeure event lasts for more than [*list time, e.g., 120 days*], the Non-Affected Party shall have the right to terminate this Lease upon [*list time, e.g., 2 days'*] notice.