

Handling Commercial Leases During Covid-19

by Marcus T. Brown
April, 2020

Like many other players in the economy, commercial landlords and commercial tenants face unprecedented challenges during the ongoing pandemic and its upcoming aftermath. I have been working on these issues as of late and thought it would helpful to share a general framework I've developed for evaluating how to proceed, both from the landlord perspective and the tenant viewpoint.

1. Consult with Counsel before Withholding Rent or Sending Default Notices

It is critical to consult with counsel before a tenant unilaterally withholds rent and before a landlord sends a default notice. Depending on the lease terms, unilaterally withholding rent may lead to unintended consequences, such as early lease termination by the landlord and losing an option to extend the term of the lease.

For landlords, tenant defaults should not be handled as usual because the market has suddenly changed. Landlords and property managers should think carefully before sending a standard pay/quit notice, particularly for retail premises. Such notices may undermine the landlord's ability to keep leases in effect, or renegotiate them, so that premises do not sit vacant and make a difficult situation worse. Landlords must also take care to comply with any local ordinances or orders that have been issued related to Covid-19 and commercial leasing, such as exist in San Francisco. Most of these local protections stop evictions for the time being, but they may also mandate specific notice procedures or require deferment of rent.

2. Invoke and Comply with any Local Covid-19 Order/Ordinance

Many cities/counties, including San Francisco, have issued or will be issuing ordinances or orders that provide protections for commercial tenants, in addition to residential tenants. Tenants should review how to take advantage of any protections available under the ordinance. Although all of these local provisions of which I am aware prohibit new evictions, they may or may not protect the tenant from the consequences under the lease of unilaterally withholding rent, depending on how the ordinance/order is drafted. Here again, it is important to consult with counsel. Landlords and property managers likewise need to be aware of and understand the local provisions for compliance purposes.

3. Request and Consider Providing Rent Relief

If their business has been hurt by Covid-19, tenants should generally speaking request rent relief from the landlord. Tenants should take care, however, to not repudiate their payment obligations under the lease. For landlords, many may be well served by proactively negotiating workouts with their tenants as the best strategy for maximizing revenue, occupancy, and property value during the economic fallout from Covid-19.

4. Specific Issues

Commercial landlord-tenant counsel are likely to evaluate and if appropriate raise a number of specific issues in determining the parties' rights and obligations and in negotiations and litigation. My current

checklist includes the following items for specific review: whether there may be insurance coverage under the tenant or landlord's policies; any contingent early termination rights under the lease; whether the landlord has closed the property or the common area serving the premises; the lease's condemnation clause, damage/destruction clause, legal/regulatory compliance clauses, insurance clause, indemnification/hold harmless clause, force majeure clause, and quiet enjoyment clause; and whether the defenses of frustration, impossibility, or impracticability may apply.

Because Covid-19 was unforeseeable, leases, insurance policies, local ordinances and orders, and the particulars of the landlord and tenant's businesses must be carefully reviewed to determine how best to proceed. The above framework is a starting point. Please contact me if I might be of assistance to a commercial landlord or commercial tenant in California during this difficult time.

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