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Landlord! Before You Amend That Commercial Lease, Things to Consider

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With lenders telling landlords to work with their tenants through the state-wide shutdown of businesses, and many tenants demanding rental relief, landlords should consider the following before amending:

Tenant's Failure or Refusal to Pay Rent

- Force majeure provisions – is there one and does it actually apply? Many don't.
- Can the tenant really rely on arguments of impracticability or frustration of purpose?
- Is unilateral abatement or reduction of rent prohibited under the lease? Does that matter?
- Can rights and remedies even be considered with various moratoria on penalties and evictions?
- Has the tenant applied for available SBA loans or other support through the CARES Act?

Ongoing Obligations to Pay Operating Expenses and Maintain Leased Space and Common Areas

- Is the lease gross or triple net? Who is responsible for interior maintenance?
- Which party has the duty to protect against damage to temporarily unoccupied space?
- How are responsibilities divided for proper protocols to prevent the spread of COVID-19?
- Is base rent being reduced or abated but triple net expenses/additional rent being paid?

Delivery Date Obligations, Renewals and Options

- How are deadlines for completion of build-out by either party addressed?
- How are risks of Building Permit and Certificate of Occupancy issuances addressed?
- How are deadlines for use of Tenant Improvement Allowances handled?
- How are fair market value determinations for lease extensions

handled?

Right to Use and Occupy Premises and Common Areas

- Has the tenant agreed to limited access to the common areas or the leased premises?
- Has the tenant agreed to waive claims against the landlord generally in return for relief?
- Do the excused interruption provisions apply or give the landlord broad rights?
- Is the tenant prohibited from invoking termination rights for interruptions in access or services?

Prohibition Against “Going-Dark” and/or Failure to Maintain Operating Hours

- Have the parties agreed to modified hours of operation provisions?
- Have the parties modified go dark or co-tenant provisions in the lease?
- Do other tenants have to consent to such modifications? Do these modifications trip certain rights or remedies for other tenants in the commercial center?

Lender Issues

- Is lender consent required under the loan documents for the lease modification?
- Do the lease modifications create a risk of other loan covenant defaults?

Landlord's Responsibilities in Addressing a Tenant Who Has Tested Positive for COVID-19

- Is the landlord properly handling quarantine, cleaning, delivery and construction issues in compliance with the ADA, OSHA and other regulatory requirements?

These are but some of the issues that are arising in commercial leases. Many other nuances need to be considered before engaging in negotiations that could trigger unintended consequences with other agreements and relationships.

We encourage you to visit Holland & Hart's Coronavirus Resource Site, a consolidated informational resource offering practical guidelines and proactive solutions to help companies protect their business interests and their workforce. The dynamic Resource Site is regularly refreshed with new topics and updates as the COVID-19 outbreak and the legal and regulatory responses continue to evolve. Sign up to receive updates and for upcoming webinars.

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