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COVID-19: Considerations for Commercial Tenants

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Many tenants are being required by governmental orders to temporarily close their locations or in the wake of declining business, they are wondering about their lease options and obligations. Tenants should initiate conversations with their landlord on the issues set out below and consider other aspects of the lease, current law, and their relationship with the landlord and other parties.

Lease Considerations

- Is there a force majeure provision in the lease? Does it apply to the tenant? Note that most leases don't specifically excuse the payment of rent or other financial payments by the tenant.
- Is there any argument of impracticability or frustration of purpose or impossibility of performance?
- Is there a continuous operations clause or prohibition on abandonment or vacation by the tenant?
- Is the landlord able to provide services required by the lease during the pandemic? Would the force majeure provision apply to any of the landlord's obligations?
- Does the lease allow abatement of rent if the landlord does not perform?
- Does the lease allow the tenant to terminate the lease?

State or Municipal Orders and Other Governmental Actions and Closures

- Does a governmental order require the tenant to close its location?
- Does a governmental order require the landlord to close the premises or larger property?
- Does a governmental order prevent the landlord from providing services under the lease?
- Is the landlord prevented from undertaking evictions or seeking other remedies either by temporary governmental order or due to closure of governmental offices?

Lender Considerations

- Has the tenant signed an estoppel or Subordination, Non-Disturbance, or Attornment Agreement ("SNDA") regarding this space? If so, does the document include a provision requiring the lender to consent to any changes to the lease or rent reductions?

Possible Solutions

- Should there be a temporary abatement of rent, or reduction in the amount of rent, during the economic downturn?
- Should there instead be a delay of payment of rent during the economic downturn until recovery is underway (rent deferral)? That is, the tenant does not pay rent during the economic downturn but pays higher amounts to compensate the landlord when the market recovers (perhaps payment as additional rent spread out during some period in the future).
- If there is a rent abatement, rent reduction, or delay in payment of rent, should this only apply to base rent/minimum rent, or should it also apply to common area charges/operating expenses?
- If there is an abatement of rent, should the term of the lease be extended by a similar amount of time as the rent is abated?

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