

Impact of COVID on Commercial Lease Clauses

Course Objective: The course material offers both the commercial tenant broker and landlord broker how various commercial lease clauses have been impacted due to COVID to provide and advocate for its commercial client. Some of the impact has been direct changes negotiated in a lease that can be negatively harmful to a tenant while other clauses may protect the tenant and be impactful to the landlord. This course offers negotiating leverage to retail, office and industrial real estate licenses.

I. Introduction to the Statute of Frauds and the foundation of lease contract

- a. Any term beyond one year, to be valid and enforceable, should be in writing and signed by both parties
- b. A commercial lease agreement is not standardized or uniform. All clauses are negotiable with the business language and terms
- c. A modern lease agreement is not only about space but is a service package that a landlord is committing to such as HVAC, parking, janitorial, repairs, etc.

II. Force Majeure

- a) Defining Force Majeure in a commercial lease as an exclusion of obligations due to Acts of God, war, civil commotion, flood, labor and material shortages
- b) This clause is now the main focus in a commercial lease to include public health emergency, pandemics, epidemics, other health crisis, government mandated quarantine.
- c) Instructor to include a pre-Covid sample of Force Majeure and post-Covid sample.
- d) This clause has been the focus of most commercial lease negotiations

III. Rent Abatement, Deferral and Non-Payment

- a. Granting of an abatement is for lease incentive purposes
- b. Deferral is placing rent owed at a later date but is still owed by tenant
- c. Non-payment is when a tenant stops paying rent
- d. During Covid, landlords may have offered a deferral and some tenants at sole discretion decided on non-payment. Best for tenants to call landlord for a discussion on rent assistance and not sole stop paying rent.
- e. Review articles or case study on LA Fitness and Caffè Nero.
- f. Post Covid language on non-payment of rent inserted by landlord that Pandemic rent is still due.
- g. How non-payment of rent could jeopardize a tenant's rights for non-disturbance, lease options or renewals
- h. Percent Rent: if consumer is buying on-line, what store does a sale get credited?
- i. Delivery of Space and rent delay affected by Covid. Covid delays space delivery and when does the rent commence? Landlords are inserting supply chain issues as an

acceptable delay without penalty.

IV. Holdover/Yield-Up/Surrender

- a. Impact of Covid to a tenant that is holdover status
- b. Tenant wants to negotiate exclusion of any consequential damages.

V. Co-Tenancy and Continuous Operations, Building Access, Hours of Operations

- a. Issues of Covid to retail tenant that has lease obligations to be open certain days and hours.
- b. Impact of government mandated stay
- c. Landlord may have a tenant that requires co-tenancy of an anchor tenant
- d. Sample concepts for temporary adjustments and flexibility, and temporary co-tenancy suspension/Force majeure that both tenant and landlord want to negotiate
- e. Abandonment language in an office or industrial lease can be triggered due to Covid if tenant is not operating.
- f. Building Access may be hampered by Covid and the right to operate
- g. Tenant and landlord need discussion in lease negotiations on how these issues will be handled if building is not accessible and therefore should not be a default of landlord or tenant.

VI. Additional Rent or Reimbursements

- a. Landlords had increased operating expenses and capital expenses due to Covid
- b. These practices are still continuing and increasing reimbursement obligations to office and retail tenants.
- c. Tenant wants to negotiate caps on operating costs and audit right and controllable opex.

VII. Business Interruption Insurance

- a. More landlords want tenants to carry business interruption insurance because of Covid
- b. If government mandates a shutdown, the tenant needs to have income.
- c. This lease requirement has become more ubiquitous than pre-Covid

VIII. Rules and Regs

- a. This section follows the signature page and may include all types of rules and regs
- b. Sample of a Rules and Regs clause pre-Covid
- c. After Covid, landlords added Covid-specific protocols include specific future changes to Covid protocols for office buildings and tenant rights to institute its own Covid protocols for visitors and employees
- d. Another option is a generic phrase that states that the tenant shall comply with all health and safety guidelines issues by federal, state or local authorities or rules changed by landlord for social distancing, sanitation and employee health screening.