

## COVID-19 IMPLICATIONS FOR LANDLORD-TENANT RELATIONSHIPS

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In light of COVID-19 and the evolving climate resulting therefrom, Commercial and Residential Landlords are being presented with difficult decisions necessitating quick response. Everyone agrees health and safety is the priority; however, both landlords and tenants are asking what their rights and obligations are as a result of this pandemic. We've heard the term **force majeure** used over the past week as it relates to enforcement of contracts, leaving both landlords and tenants wondering if COVID-19 is a force majeure event that reduces or even eliminates their respective rights and obligations under the lease.

**Force majeure** clauses are found primarily in non-residential leases and only occasionally in residential leases. Generally speaking, **force majeure** clauses excuse a party from certain contractual obligations when an unforeseen circumstance or event outside of their control makes performance impossible. **Force majeure** clauses attempt to provide the parties with certainty if/when an unforeseeable unknown event occurs. Many **force majeure** clauses specifically define the triggering events while others vaguely refer to unforeseeable events or are silent.

At present, there is uncertainty as to whether COVID-19 is an event if **force majeure**; however, actions taken by the state and local officials to shut down businesses and encourage or mandate shelter-at-home protocols arguably trigger the effect of typical **force majeure clauses**, especially if health-related disasters, like disease or pandemic, are called out specifically.

As a first step in determining if COVID-19 is a triggering event, the landlord and tenant must review the express terms of the lease to determine if a **force majeure** clause appears. Next, the parties must determine the scope and language of the clause -- does it specifically include or exclude health-related events or is it silent on that issue? Of course, if there is no such clause at all, a different analysis must be made.

Assume a clause exists and would be triggered by the current pandemic. In its simplest form, the express terms of a **force majeure** clauses in residential and commercial leases will dictate the parties' rights and obligations. Further depending upon the circumstances and the level of specificity of the meaning or definition of "**force majeure**" as used in an express clause within a lease, principles of equity may be invoked. Simply because a **force majeure** clause appears in the lease which seems applicable does not necessarily mean either party is excused from its lease obligations.

Courts may choose to exercise their equitable powers in determining whether this pandemic implicates a **force majeure** clause containing or impliedly containing an "act of God" clause which, once invoked, creates an impossibility of performance, a determination that performance is unreasonable, that the contract is voidable

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due to frustration of purpose, etc. Courts focus on the foreseeability of the event and the connection between the event and the non-performance. An otherwise-defaulting party will have difficulty invoking the **force majeure** to excuse its contractual obligations. In short, with respect to COVID-19, an interpretation of a **force majeure** clause must be made to determine whether the party seeking to be excused is simply attempting to use the **force majeure** to get out of a contract that party no longer wishes to perform.

For leases without **force majeure** clauses, common law doctrines of impossibility, impracticability and/or frustration of purpose may still apply to excuse contractual obligations. Simple economic struggle will not be a triggering event; however, economic struggle resulting from unforeseeable events may be sufficient.

On March 18, 2020, the Pennsylvania Supreme Court ordered a temporary moratorium on residential nonpayment evictions in the Commonwealth until April 3, 2020. The Order specifies this moratorium was enacted because of the economic impact COVID-19 is having on residents. At present, neither the Court's Order nor the Landlord-Tenant Act excuses tenants from their rental obligations; however, it is more than likely that this Order will be updated and revised as the pandemic spreads.

Although the Order does not provide for any current rental abatement, if a Landlord is unable to provide tenants with the full intended benefit of the Lease, the monthly Rent should be appropriately adjusted.

Congress is also considering relief for the housing providers in addition to renter assistance. Housing providers are experiencing the same health, safety and economic concerns as renters, such as an inability to pay their mortgage, employee payroll and benefits, insurance premiums and tax obligations in the current environment. Congress has been asked to provide much needed relief to both landlords and tenants in the midst of this pandemic; therefore, subsequent updates on this topic are likely.

**Force Majeure** clauses are typically only enforced as expressly agreed by the parties, but the pandemic may continue to affect this general statement. Since the PA Supreme Court is already entering equitable orders related to residential nonpayment of rent evictions at the beginnings of the pandemic, it is safe to say the Order will be updated and further extended as the pandemic evolves, possibly even affirmatively ordering a rent holiday, partial or full abatement or deferrals.

Many Pennsylvania businesses have been ordered to cease operations as they are not classified as life sustaining; therefore, commercial landlords and tenants are faced with additional concerns. The current list of business deemed to be life-sustaining is listed here.

Commercial leases are controlled by contract law in Pennsylvania; consequently, the express terms of the lease will provide the primary source of guidance. While landlords should retain an open dialogue with tenants, they must also be careful to not promise accommodations they are not able or willing to provide.

We expect landlords to be empathetic during this pandemic, but we do not believe landlords have a unilateral

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obligation to “foot the bill” for these problems they did not create. Further, if landlords and tenants have any verbal communications regarding rent accommodations, landlords and their agents must be extremely careful to specify that the parties will not be bound by the negotiations and will only be bound when a subsequent agreement is reduced to written form and signed by all parties. Force majeure clauses may be applicable to COVID-19 because of the governmental and court orders forcing closure beyond the control of the landlord or tenant; therefore, landlords must carefully comply with any notice or other procedural requirements set forth in the applicable lease.

Tenants will likely attempt to use a **force majeure** clause, assuming one to exist in the lease, or seek equitable relief, to excuse their rental obligations; however, most commercial leases preclude the use of force majeure clauses to abate rent and/or terminate the lease even if the tenant is unable to access the leased premises and operate. The terms of each lease and the local jurisdiction’s administrative Orders will affect this. Moreover, if the tenant does not actually vacate the leased premises, Courts will also have to take into account whether it is equitable on either a short-term or long-term basis for the landlord to continue to provide shelter and to incur costs without any compensation, notwithstanding the current prohibition on residential evictions for non-payment.

Mandated closures, like those resulting from Governor Wolf’s recent Order, may require landlords to shut their facilities, which prevents tenants from accessing their premises, making performance impossible whether or not there is a force majeure clause. In cases where the lease does not expressly include a force majeure clause, the concept of impossibility of performance may further provide some protection to landlords as well as tenants.

**Force majeure** clauses in most commercial leases preclude commercial tenants from withholding rent following an “act of god.” It is inevitable that a commercial tenant will seek rental abatement/deferrals/rent holiday if it is unable to occupy and operate. While the applicable lease may not require the landlord to engage in negotiations, it may be in the commercial landlord’s best interest to get creative and provide short-term relief to struggling tenants rather than suffer the alternative of losing tenants for the long-term and incurring substantial litigation expenses attempting to enforce the lease as written to compel occupancy and/or collect rent. Creative options for negotiations include but are not limited to, temporary rent reductions, payment of percentage rent only (if a retail store remains open; note, however, that the retail stores which do remain open are often grocery stores, which one would expect will be doing substantial business and should not have a problem paying rent), CAM-only monthly payments, application of security deposit to unpaid rent, rent deferrals, temporary rent forgiveness, lengthening the lease term by a time equivalent to the rent deferral period or requiring personal guarantees of future rent payment.

Because nearly everything about COVID-19 remains uncertain and consistently evolving, neither landlords nor tenant should make an assumption that COVID-19 will be declared an event of **force majeure**. It is of the utmost importance for landlords and tenant to comply with any and all force majeure provisions in the lease, including but not limited to the notice provisions, which may be critical to protecting their respective rights

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once this pandemic ends. Understanding the rights and obligations of your lease is key to long-term success.

Further, all commercial landlords need to consult their insurance advisors and review the specific terms of their policies, including but not limited to business interruption insurance and rent loss insurance as implicated by this pandemic. Landlords should also recommend that each tenant consult with its insurers regarding the same. Certain states are considering passing legislation expressly prohibiting insurers from denying claims relating to the pandemic, but that hasn't occurred yet.

We urge all landlords, both nonresidential and residential, to assure that there is a pandemic plan and potentially engage counsel to review all leases for the following purposes: creating an addendum applicable to all tenants in the event of default; review of all **force majeure** clauses and updating them to include diseases, epidemics, and/or quarantines; review any other applicable contracts with tenants, residents, and suppliers to ensure they understand their rights in the instance of a force majeure.

Many landlords are currently experiencing vacant retail centers, malls and buildings. One may think your job gets easier because there are few (or no) tenants in your building, but nothing could be further from the truth. In fact, even if your building is completely vacant for now, there is still plenty of work that needs to be done. Please make sure that your team considers the following:

- ▶ Make sure your HVAC system is running properly.
- ▶ It's ok to reduce regular thermostat settings (perhaps 55 degrees for heating and 80 degrees for cooling), but don't turn off completely - just don't turn them off completely!
- ▶ Make sure your outside air and exhaust fans are running to keep the air circulating.
- ▶ Make sure someone is putting water in the "p-traps" - particularly in sinks and floor drains - to keep sewer gases from backing up into the space.
- ▶ Make sure someone from your team is walking every inch of the building every workday.
- ▶ He/she should be looking for potential issues - like leaks, unsecured doors, equipment left running, etc.
- ▶ Make sure exterior doors and, where operable, exterior windows are locked.
- ▶ Work with your tenants to shut off equipment that is not in use. Remember that equipment (like a copier) is still drawing power even when it is in the power-saving mode.
- ▶ Water that is sitting still in the plumbing system will develop biofilms - which can cause disease (including Legionella, pseudomonas, and mycobacterium).
- ▶ Make sure someone is running the water through the system every day.
- ▶ Consider working with an industrial hygienist to test the potable water before letting tenants back into the building. The very last thing you want - after going through COVID19 - is to have an outbreak of Legionella when the tenants return!
- ▶ Consider posting a sign with your contact information on exterior doors in case someone needs access to the building.
- ▶ If the building is truly vacant, consider posting security guards on-site to deter vandalism and theft. Or, consider installing remote access cameras so you can keep an eye on common areas and the exterior.

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- ▶ Make sure the roof access is secured - to keep people from accessing the roof and from accessing the building from the roof.
- ▶ Consider closing the miniblinds - or at least putting them down and angling them to minimize solar gain (which will reduce energy consumption).
- ▶ Review your insurance policy and notify your insurance provider. Even if the closure is only temporary, there might be insurance requirements to consider.
- ▶ Make sure building systems (pumps, motors, elevators, etc.) are exercised/run on a schedule. When these pieces of equipment sit idle, they can degrade quickly.

We suggest that you and your teams, colleagues and tenants sign up to receive up-to-the-minute text alerts from the city communications system by texting the word COVIDPHL to 888-777.

Finally, the CDC (Center for Disease Control & Prevention) has provided advice and guidelines for Landlords in the pandemic, specifically that Landlords keep Tenants informed on best practices. Click [here](#) for a suggested sample

If you have any questions, please contact Kierstin Lange at [kmlange@zarwin.com](mailto:kmlange@zarwin.com) from Zarwin Baum Devito Kaplan Schaer & Toddy PC.

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