

TENANT TRENDS FOR POST-COVID LEASES

The unpredictable nature of the current pandemic has caused commercial tenants to take a much closer look at their lease provisions, with some predictable results.

By Peter Hamberger

The economic impact of the novel coronavirus forced retail, restaurant and commercial tenants across the country to scour their leases...only to find that leases rarely provided an obvious right of relief for this unique scenario. Tenants contacted their landlords to attempt to negotiate amendments and to temporarily defer or abate rent obligations. In the wake of these many amendments, the third and fourth quarters of 2020 brought a steady flow of lease negotiations by tenants who were careful to consider both the existing and potential impacts of national pandemics.

With the coronavirus vaccine's widespread distribution imminent, it is worth analyzing which tenant-driven trends may be here to stay. Naturally, tenants will continue to more carefully negotiate the provision of janitorial services, density and other "new normal" considerations. Landlords' newfound creativity for rent options (e.g. reduced rent during reduced occupancy for restaurants), is likely too specific to impact leasing going forward.

My colleagues in the real estate department of Ballard Spahr and I expect the following three trends to continue:

Force Majeure

Force Majeure is not a universally implied concept in contract law, but must be explicitly agreed to between the parties in the lease. It is usually included in leases using standard language and, pre-pandemic, was rarely negotiated. The concept of Force Majeure means a party may be relieved of certain obligations under the lease if an unforeseeable event renders that party's performance impossible (not merely difficult). The high bars of impossibility and un-foreseeability mean that leases generally enumerate causes and examples of Force Majeure.

In negotiations of new leases in the COVID-19 era, tenants consistently request that epidemics and pandemics be expressly included in any definition of Force Majeure, either as stand-alone concepts or as declared by a governmental entity. While Force Majeure almost never relieves a tenant of its obligation to pay rent, a tenant may be able to use its protections to avoid an event of default pursuant to other negotiated obligations, such as minimum hours of operation or required timing for repairs and improvements.

We expect tenants to: (1) pay much closer attention to the Force Majeure language in general; (2) request that pandemics and epidemics are ex-

pressly included in the definition; and (3) negotiate which obligations are impacted by Force Majeure in the lease.

"Hard" Outside Completion Dates

Most leases anticipate that the premises will be tendered to the tenant "as-is," subject to the initial build-out, often called the "work." The lease will usually provide a required outside completion date for the work. For work that will be constructed by the tenant, the tenant must generally begin paying rent on an outside date regardless of whether the work is complete.

For work that will be constructed by the landlord, the tenant will generally not be obligated to pay rent before the work is completed and the premises delivered, but that is not necessarily helpful to a tenant needing to commence operations at a certain time. The outside date is typically a "soft" date (e.g., 90 days after receipt of all necessary permits) and subject to extension for Force Majeure. The coronavirus often led to an unpredictably lengthy lack of materials and labor, which meant severely delayed completion of the work, while outside completion dates were extended by Force Majeure. This meant parties were at a stalemate, wherein prem-

ises were left vacant, landlords were unable to collect rents, tenants were unable to accrue abatement benefits and all parties began to appreciate the potential longevity of Force Majeure delays.

While landlords have long insisted on "hard" outside dates for rent commencement, many more tenants are requesting hard outside completion dates for landlord work, regardless of Force Majeure (e.g., "notwithstanding the foregoing, tenant shall receive one day of abated base rent for each day Landlord fails to complete the Work after February 1, 2021"). We expect this trend will continue.

Flexibility

Government-mandated shutdowns and occupancy restrictions forced landlords and tenants to confront the rigidity of leases. Most restaurant and retail leases provide for a purposely narrow permitted use (e.g., "full-service restaurant offering contemporary American cuisine"). The COVID-19 restrictions forced tenants to offer new services like carryout, use the premises for related uses and/or provide space for pop-up collaborations.

Many of these new uses were necessary for tenants' survival, but prohibited by the leases and thus required landlord consent by amendment or

license. The need for flexibility has led tenants to confront rigid use and occupancy restrictions in their leases, with the primary trends being for tenants to negotiate for: (1) simple updates allowing for flexibility without amendment

(e.g. "or any other retail use as permitted by landlord in writing"); (2) pre-approved alternate uses or subleasing rights in the event that use and/or occupancy is limited or prohibited; and (3) contingent exceptions to tenant obligations. We expect this nebulous trend in particular to continue to be negotiated and to evolve.

Going forward, we expect to see savvy tenants in the wake of COVID-19 more carefully negotiate permitted use provisions, closely analyze all timing and deadline provisions, request express contingency and flexibility requiring only landlord's consent and to generally scrutinize each lease with a new perspective on the rhetorical question: what's the worst that can happen?

Peter Hamberger, Associate, Ballard Spahr in Denver



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THE PANDEMIC BRINGS INCREASED DEMAND FOR SOME SPACES, COMPANIES
Few would argue the devastating effects COVID-19 has had on the world. However, even in times of crisis, demand has emerged for certain product types and services.
By Nellie Day

PLANNING AND DEVELOPMENT ARE TWO SIDES OF THE SAME COIN
Developments take time, investment, approval and tons of planning to create a viable project that can enhance an area.
By Steven L. Gardner

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