



## Don't let good intentions come back to haunt you: Protections for landlords to consider when granting temporary rent relief under commercial leases due to COVID-19

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COVID-19 has placed many landlords and tenants between the proverbial rock and hard place. Tenants are trapped among rent, TICAM and other monetary obligations under their leases, as well as public health orders mandating the closure of their businesses. Landlords are stuck between their debt service obligations and the unfortunate reality that many of their tenants are unable to generate enough cash flow to cover monthly payments due to circumstances outside of their control.

Requests for rent relief have become and are likely to continue to be commonplace in the near term. What are landlords to do when a tenant requests rent relief? Take a hard line by holding tenants to their rent obligations at the risk of making tenants' already bleak financial outlook even worse? Grant rent relief at their own financial peril? Or something in between?

The first question to consider is whether the lease already provides relief under the circumstances. As Bricker attorneys Justin Ristau, David Jackson and Matt Warnock explain [here](#), many real estate contracts (including leases) contain provisions, often but not always referred to as force majeure clauses, that excuse non-performance under certain uncontrollable circumstances, such as natural disasters or other "acts of God," labor disputes or government orders. Sometimes pandemics are specifically covered in force majeure clauses, and sometimes they are not. If your lease has a force majeure clause, it is essential to carefully read the entire provision. Even if a pandemic or government order is listed as a force majeure event, some leases exclude rent from the non-performance excused because of a force majeure event.

In addition to force majeure, some tenants may seek relief by arguing that the forced closure of their business has frustrated the essential purpose of the lease. This doctrine is not widely accepted in Ohio. *Donald Harris Law Firm v. Dwight-Killian*, 166 Ohio App.3d 786, 2006-Ohio-2347, 853 N.E.2d 364, ¶ 16 (6th Dist.). In any event, success likely would not produce the desired outcome. If proven, the frustration of purpose doctrine discharges a party from all obligations under a contract, *i.e.*, allows them to terminate the contract, but would not likely provide an avenue for obtaining temporary rent relief until businesses are permitted to fully reopen. Moreover, some Ohio courts require that the other party to the contract be the cause of the frustration of purpose—a scenario that does not apply in the present situation. *America's Floor Source, L.L.C. v. Joshua Homes*, 191 Ohio App.3d 493, 2010-Ohio-6296, 946 N.E.2d 799, ¶ 37 (10th Dist.).

Even if a lease does not contain a force majeure or other similar clause, some landlords will be inclined to grant full or partial relief from monthly rent payments out of goodwill, business prudence or a desire to comply with state recommendations. On April 1, 2020, Governor Mike DeWine signed Executive Order 2020-08D (the "Rent Order") requesting that commercial landlords suspend rent payments and provide for a moratorium on evictions for 90 days for "small business commercial tenants," a term the Rent Order does not define. The suspension of rent is not mandatory, and the Rent Order provides that "[n]othing in this Order shall be construed to negate the obligation of a small business commercial tenant to pay rent or restrict a landlord from recovering rent at a future time." The Rent Order also requests that lenders offer forbearance for commercial real estate borrowers for the same 90-day time period. The Ohio Supreme Court has issued [guidance](#) to local courts recommending the temporary continuance of eviction filings, pending eviction proceedings and the execution of foreclosure judgments. The bottom line: Even though landlords are not required to suspend rent payments, there does not appear to be an expedient mechanism to enforce leases or evict tenants in the near term. The State of Ohio is not asking landlords to forgive rent payments but to defer them until a later time. In other words, landlords may end up in the same place regardless of whether they grant rent relief or take a hard line—a tenant unable to pay rent occupying the space for at least the next 90 days.

In light of this reality, it may be prudent for many landlords to work with tenants who are currently unable to make their rent payments. Landlords and tenants can view the present circumstances as an opportunity to solidify their business relationship for the future with a mutually agreeable lease amendment rather than battle in court several months down the line.

Before agreeing to any lease amendments with tenants, however, landlords should review their loan documents to determine whether amending a lease without their lender's consent would violate the terms of the loan documents. This is especially critical if the landlord has a non-recourse loan and amending a lease without lender consent would qualify as a "bad boy" carve-out triggering full recourse under any applicable guaranty. If a lender's consent is required, the landlord would be wise to approach the lender before making any promises to tenants.

Assuming the landlord's loan documents permit lease amendments or lender consent is obtained, it is important to properly document any rent deferral in an amendment to the lease. Landlords and tenants should also examine the lease in its entirety to determine if any other provisions should be amended. The parties should consider the following potential issues:

1. **Deferral and repayment.** Will the deferred rent be spread out over the remainder of the term or will the tenant make one or more lump-sum, catch-up payments? If the latter, will the catch-up payment(s) be due at the end of the term or sooner? Will interest be charged on the deferred payments? Some landlords may opt not to charge interest if the tenant repays the deferred rent within a certain time period. Regardless of the structure chosen, the tenant's obligations to repay the deferred rent must be stated clearly.
2. **TICAM charges.** Will the rent deferral apply to the tenant's proportionate share of taxes, insurance or common area maintenance expenses? If so, then the amendment should avoid confusion by expressly saying so. With a gross lease, the landlord should consider requiring the tenant to pay some portion of the monthly rent to cover the landlord's own taxes, insurance and maintenance expenses during the deferral period.
3. **Tenant's duties to maintain the leased premises.** What duties does the lease impose for the tenant's maintenance of the

leased premises? Are there duties beyond the duty not to commit waste? Can the tenant fulfill these duties during the mandatory closure? If the landlord must take over these maintenance duties during the deferral period, be sure to provide for the tenant's repayment for associated expenses later in the term.

4. **Delivery date and other timing provisions.** If the lease is early in its term, the parties should consider if any government orders will impact completion of tenant improvements due to availability of supplies and labor, delays in the issuance of government approvals and other circumstances that could impact the timing of delivery of the leased premises. Extensions may be necessary to ensure each party's obligations are fulfilled.
5. **Co-tenancy and new construction contingencies.** Some leases provide for a reduction in a tenant's rent if a certain percentage of other spaces in the development are not occupied and operating for business (sometimes referred to as a "co-tenancy contingency"). In new developments, some leases may also provide that the tenant's rent will be reduced until a certain percentage of the spaces in the development are occupied and operating for business (sometimes referred to as a "new construction contingency"). A landlord would be reasonable to ask for a waiver of these contingencies in exchange for rent relief. A tenant would likely want to keep these provisions in one form or another but should expect to compromise, such as by excluding pandemic-related closures from the calculation of whether the required percentage of spaces are occupied and operating for business under a co-tenancy contingency, reducing the percentage of new tenants required for satisfaction of a new construction contingency or including the period of deferral in any minimum time period for a new construction contingency.
6. **Extension of the term.** Especially if the lease is late in the term, the parties may look at a rent relief amendment as an opportunity to extend or renew the term of the lease to bolster the parties' relationship and add value to the leased premises.
7. **Guarantor's consent:** If the lease is guaranteed, as many commercial leases are, then it is important to obtain the guarantor's consent to any material modifications in the terms of the lease. Rent would certainly be considered a material term under most leases. This is especially true when rent is deferred rather than abated, because it could increase the amount for which the guarantor could be liable in the event of default. If the landlord fails to obtain the guarantor's consent to a material modification, then the guarantor may be discharged from liability. *Voelker-Belz Co. v. Johnson*, 2004-Ohio-6719, ¶ 11 (10th Dist.).
8. **Non-waiver of other defaults and release** Landlords should be sure to make clear that any relief being provided does not constitute a waiver of any other potential defaults under the lease and to reserve all rights under the lease. Since the landlord is giving up the right to receive rent, it also would be reasonable to require a release for all potential landlord breaches up to the date of the amendment as a condition to providing relief.

Landlords may also wish to assist tenants in obtaining federal relief under the recently enacted CARES Act, which includes SBA loans that can be used for payment of rent. For a full analysis of these SBA loans, please see this [article](#) written by Bricker attorney Timothy Wieher.

This list of lease amendments and other considerations is not meant to be exhaustive or to fit every circumstance. Landlords and tenants should consult an attorney with the specifics of their situations to ensure that the necessary provisions are properly documented and protections are put in place. In these unprecedented times, landlords and tenants may reap greater long-term benefits by cooperating with one another, even at the expense of short-term losses.

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