



COVID-19 AND THE IMPACT ON LEASES

As the COVID-19 pandemic continues to impact businesses throughout the nation, many of our landlord and tenant clients are seeking input on basic lease-related issues. The effect of force majeure provisions in leases and the applicability of business interruption insurance are two of the most commonly asked questions.

1. Force Majeure.

A typical “force majeure” provision in a lease excuses each party from any delay in performance of that party’s obligation under the lease (other than the payment of money) to the extent that the delay is caused by (for example) strikes, riots, acts of God, shortages of labor or materials, war, terrorist acts or activities, governmental laws, regulations, or restrictions, or any other causes of any kind whatsoever which are beyond the control of such party.*

a. Is COVID-19 included?

COVID-19 is included within the scope of most force majeure provisions. Using the sample language above, COVID-19 (and/or the inability to open for business due to COVID-19) falls within one or more of acts of God, ...governmental laws, regulations, or restrictions, or any other causes of any kind whatsoever which are beyond the control of such party.

i. Does tenant have to pay rent?

Most force majeure clauses carve out from the force majeure definition the payment of money. As a result, under a typical force majeure provision, a tenant who could not be open for business due to governmental restrictions, such as a shelter in place order, would not be in default for breach of a “continuous operations” clause of a lease. However, a typical force majeure provision will not excuse that same tenant from the non-payment of rent (being an obligation that is performable by the payment of money).

ii. What are landlord’s options if tenant doesn’t pay rent?

If the tenant is not paying rent in accordance with the lease, the landlord has all rights and remedies provided under the lease.

1. Most leases include, among landlord’s remedies for a tenant default, the right to terminate the lease or terminate the tenant’s right to possess the premises. In electing whether or not to enforce those remedies, a landlord needs to consider whether, at the end of this pandemic, it prefers a leased space (even if it has not collected full rent for some period of time) or vacant, unleased premises. The answer may well differ on a project by project, tenant by tenant basis.
2. Some of our landlord clients intend to respond to requests for rent abatement, with a proposal to negotiate some deferral of rent in exchange for an extension of term, or a “payback” period, etc. and in connection with that, have prepared a form response to abatement-requesting tenants outlining information that the landlord will require before negotiating with that tenant. A generic version is included as [Appendix A](#).
3. Keep in mind that laws may change during this pandemic, and landlords may not have all of the rights and remedies that are set forth in their leases. For example, multiple municipalities and states have enacted moratoriums on eviction (both residential as well as commercial) and there are rumors that similar legislation may be enacted at the federal level (similar to the “freeze” that occurs upon a party filing bankruptcy).

* *Be sure to review each force majeure provision carefully. I recently reviewed a provision in a new landlord client’s existing lease and it did NOT exclude the payment of money. In that case, the tenant (which operated an entertainment venue in the premises) was excused indefinitely from the payment of rent, due to governmental restrictions that prohibited the tenant from being open.*

iii. What about force majeure as it affects Landlord's obligations?

The landlord lease obligation most likely to be delayed by COVID-19 is the construction/delivery obligation. This is a lease-specific issue, but most premises delivery provisions include a force majeure concept, pursuant to which the landlord is not penalized for late delivery to the extent resulting from force majeure.

1. Landlords need to confirm whether there is a limit on force majeure delays for construction. Sometimes a tenant will not agree to unlimited delays, and instead the parties negotiate a "cap" on force majeure delay days, after which penalties will kick in.
2. Be sure to confirm whether the landlord is obligated to notify the tenant of force majeure delays as they occur, at the risk of having waived those delays if it fails to do so.

2. Business Interruption Insurance.

a. What does business interruption insurance typically cover?

- i. Business interruption insurance generally covers a company's actual loss of business income (e.g., lost rent and similar lost revenues) to the extent that the loss of business income directly results from a casualty such as fire, tornado and the like, during the period of reconstruction and restoration. For business interruption coverage to apply, there must be a "direct physical loss" of the premises caused by a covered cause.
- ii. Most policies specifically exclude all coverage for damage or loss "resulting from" a virus. These exclusions began being added to policies between 2003 and 2006 in response to the SARS outbreak.
- iii. To the extent that a policy includes civil authority coverage (e.g., losses resulting from "shelter in place" orders), such coverage typically will still require physical damage or direct loss, either to the insured property or an adjacent property in close proximity and will be limited to 30 days of coverage.
- iv. Some landlords who have maintained more expensive policies may have applicable coverage through endorsements and the like. Prudent landlords will want to obtain an expert review of existing insurance policies to confirm whether coverage exists.

b. Other related issues.

The currently existing exclusions of COVID-19 from business interruption coverage are being contested as we speak.

- i. At least one suit on coverage for business interruption has been filed in Louisiana.
- ii. Legislative efforts to ban the virus exclusion are moving to the Senate in New Jersey and are under consideration in multiple other jurisdictions.

If you have any questions or need assistance with regard to lease related issues, please contact [Kitty Henry](#) or [Ian Fairchild](#), and with regard to insurance related issues, please contact [Mike Huddleston](#). Additional information regarding other aspects of COVID-19 and your business can be found at our website www.munsch.com.



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Appendix A

APPENDIX A

Date

Name

Title

Company

Address

City, State Zip

RE: TENANT LEASE MODIFICATION/DEFERMENT REQUEST

Dear Mr/Mrs _____,

We are in receipt of a request from your company regarding a modification/deferment of your rent obligations as a result of the COVID-19 pandemic currently affecting the United States. We understand the necessity of your request, as this is a trying time for everyone. As your landlord, our goals are to provide you with a facility to successfully operate your business during this time and to assist both you and your fellow tenants to successfully navigate this unprecedented event. In order to assist us in understanding how the current disruption is affecting your business, please fill out the attached and provide us with the requested information. We will promptly review your request and provide you with a response following completion our review. In the interim, stay healthy and know that we are all working together to come through this crisis.

Sincerely,

TENANT LEASE MODIFICATION/DEFERMENT REQUEST CHECKLIST

Tenant hereby submits the following information to Landlord:

1. _____ Year to date financial statements, including most recent income statement, cash flow statement and balance sheet. Please include detailed monthly income and expense statements showing all line items.
2. _____ Operating budget for the current fiscal year.
3. _____ Audited financial statements for the prior two fiscal years, including income statements, cash flow statements and balance sheets. Please include all notes to financial statements.
4. _____ Last two years' filed federal income tax, state income tax, state sales tax (if any) and state franchise tax returns (if any).
5. _____ Prior year and year to date financial statements for each lease guarantor and each partner/shareholder owning 10% or more of Tenant.
6. _____ List and backgrounds of senior executives and family members who are directly or indirectly receiving any compensation, along with the salaries of such individuals for the current and prior two years.
7. _____ Contact information for all creditors from whom Tenant is requesting modification and a description of the nature and dollar value of the modification being requested.
8. _____ Contact information for Tenant's primary lender(s).
9. _____ Latest business plan describing Tenant's actions to restore itself to profitability and cash flow projections for the next 24 months.
10. _____ List of all financial obligations on which Tenant is currently in default, including contact information, dollar amounts and nature of the obligations.
11. _____ A written statement describing Tenant's specific request of Landlord.
12. _____ Contact information for Tenant's accountant and CPA firm responsible for preparation of Tenant's financial statements.

Tenant hereby submits the following organizational information to Landlord (depending on how you have structured your organization, please provide the relevant information as indicated below):

[For an LLC]

- LLC Agreement/Organizational documents
- List of Members and Backgrounds
- Financial Information of Members of the LLC, 2018, 2019 (Federal tax returns, audited financial statements, or other acceptable documentation)
- A certificate of good standing for the entity

[For a Corporation]

- Articles of Incorporation
- By-Laws
- List of Shareholders and Backgrounds
- Financial Information of Shareholders, 2018, 2019 (Federal tax returns, audited financial statements, or other acceptable documentation)
- A certificate of good standing for the entity

[For a Partnership]

- Partnership Agreement
- List of Partners and Backgrounds
- Financial Information of Partners, 2018, 2019 (Federal tax returns, audited financial statements, or other acceptable documentation)
- A certificate of good standing for the entity

[For a Guarantor]

- Financial Information of Guarantor, 2018, 2019 (Federal tax returns, audited financial statements, or other acceptable documentation)

Acknowledgment, Representation and Warranty

The undersigned, as a duly authorized representative of _____, as the tenant ("Tenant") under that certain lease dated _____ (the "Lease") by and between Tenant and _____ as landlord ("Landlord"), with respect to space at _____ (the "Property") does, by submitting this form to Landlord, hereby certify, acknowledge, represent and warrant the following:

(a) All information is being submitted by Tenant at Tenant's option in connection with Tenant's request that Landlord consider a requested modification of the terms of the Lease;

(b) All information provided to Landlord is complete and accurate in all material respects;

(c) Landlord has Tenant's permission to contact Tenant's accountants, lenders and creditors to discuss Tenant's financial condition;

(d) By its acceptance of the above information, Landlord has expressed its willingness to consider Tenant's request. However, Landlord is under no obligation whatsoever to restructure the terms of the Lease and there is no implied oral or written expectation that by providing this information or having any past, present or future conversation with a property manager, or any person associated with the Landlord, that any economic consideration will be given;

(e) No Lease modification or other agreement will be binding on Tenant or Landlord absent a final, written agreement accepted and fully executed by Tenant, Landlord and any other party required by Landlord;

(f) Tenant acknowledges that as of the date hereof, Landlord is not in default of any of its obligations under the terms of the Lease. Tenant, on behalf of itself, its officers, directors, partners, owners, shareholders, employees and agents hereby release Landlord and its officers, directors, partners, owners, shareholders, employees and agents for any claims related to the Lease. The undersigned hereby acknowledges and agrees that the terms of the Lease remain in full force and effect and that Landlord has not waived, and in reviewing the Information shall not waive, any of Landlord's rights under the terms of the Lease.

(g) Tenant represents it has had no dealings with a real estate broker and agrees to indemnify Landlord from any potential or future claims for compensation from any real estate broker that may arise from a Lease modification or deferment.

(h) Tenant agrees to keep all aspects of the discussions related to this matter strictly confidential. Violation of confidentiality will nullify and void any agreement that may otherwise be reached;

(i) The undersigned does further acknowledge that Landlord will rely on the accuracy of the information provided by Tenant, to its detriment, to the extent it elects to modify the terms of the Lease; and

(j) The person signing below is authorized by Tenant to further discuss this matter with the Landlord or the Landlord's agent.

Executed this ____ day of _____, by the undersigned duly authorized representative.

By: _____ (Tenant)

By: _____ (Signatory)

Phone number: _____

Print name: _____

E-mail address: _____

Title: _____

Date: _____