

# Lease Provisions to Explore Amid COVID-19

## An Evolving Situation

With an onslaught of rapidly changing information, economic and legislative activity, and governmental intervention, we understand that the impact of the COVID-19 pandemic on your business may be significant. We understand these challenges may include complete or partial loss of use (whether by governmental mandate, landlord action, or corporate directive); loss of income; service disruptions; construction and delivery delays; holdover; and increased health-safety and sanitation costs. We realize that in the wake of these challenges, many of you are wondering if and how your financial obligations under your leases might be alleviated, either by the lease language itself or through your insurance policies. The determination of these solutions is further complicated by the rapidly evolving body of pending and proposed legislation, economic relief programs and governmental actions.

In our view, tenants should consider keeping meticulous records of any issues related to COVID-19 such as complete or partial loss of use (noting dates, durations, and cause of closure) or notices from landlords of actual or potential exposure to COVID-19 within the building (including dates of discovery, notice, and closure, and any remedial actions taken). Such documentation may prove helpful during discussions with your landlords and advisors, and in connection with any filing of insurance or legal claims or applications for emergency funding.

These issues are lease and fact-specific and are also subject to interpretation under individual state law and certain federal laws; and as such, consulting with your attorneys, insurers, tax consultants, risk managers, and other advisors will help you to best understand and protect your rights.

## Exploring Your Options

As you begin to explore the possibility of relief under your lease, you should consult with your legal and risk advisors to assess if your lease contains provisions that may delay or excuse performance and/or payment such as force majeure, interruption of service, or denial of access. Further, subtenants and licensees—whether with coworking companies or otherwise—have special concerns: What protective provisions of the master lease are incorporated into their agreements? Is there a recognition agreement such that if the tenant defaults, they have continued rights to occupy the space?

In addition to rights under the lease, it is imperative to review your insurance policy to explore what coverage might apply:

### **I. Force majeure or Impossibility of performance.**

These are similar concepts that may provide for the excuse or suspension of the performance of contractual obligations due to an intervening event which makes performance impossible or impracticable. Many leases expressly exclude financial obligations from these provisions, meaning that the parties will have a continuing, uninterrupted obligation to make payments such as rent; maintain insurance; fund allowances; and other agreed sums as and when due in accordance with the lease.

**II. Interruption of services.** This provision may entitle a tenant to a rental abatement or a right to terminate the lease in the event that the landlord fails to provide certain required services or facilities in accordance with the lease. If a rental abatement is provided for, there are often protective carve-outs for landlords, such as interruptions caused by force majeure or other events beyond the landlord's reasonable control.

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The scope may be limited to the landlord's obligation to provide certain essential services such as utilities or, in a more broad construction, extend to the provision of access to the building and premises. The rental abatement might only attach after a certain period following notice to the landlord of the qualifying interruption and usually continues until the service is restored. Termination rights, if included, may afford the landlord a longer period to cure the default.

**III. Business interruption insurance.** In general terms, business interruption coverage is an add-on to a commercial policy that protects a tenant against economic losses (such as lost income, operating costs, and the cost of temporary space) due to physical damage of insured property (such as following a fire or other casualty).

The potential applicability of business interruption insurance to losses arising from COVID-19 may well be one of the most scrutinized areas in the days ahead, involving careful parsing of individual policy language, intense debate not only over the economic costs and benefits of such an interpretation and the ramifications for future insurance contracts, but also with respect to constitutional concerns over state interference in private contracts.

As such, questions concerning the applicability of business interruption insurance in the COVID-19 context should be addressed with your risk manager and insurer.

**IV. SNDAs/recognition agreements.** With the co-working industry facing headwinds, tenants who are located in co-working spaces might want to review any available protections they have to remain in place (or to enter a direct lease) should their landlord, the co-working firm, default.

**V. Operating costs.** The building cleaning and sanitation costs resulting from COVID-19 are likely to be significant, and indeed may remain elevated as cleaning standards and requirements are reviewed and reshaped going forward. A full understanding of both the lease structure (net vs. base year) and the definition of operating costs, will be helpful to ensure any pass-throughs are appropriate and correctly allocated.

**VI. Abandonment/continuous use.** Abandonment and continuous use clauses stipulate that the tenant must not abandon or vacate the premises during the term,

or require the tenant to operate continuously in the space throughout the term.

A lease may define what constitutes abandonment (for example, a tenant's failure to operate in the premises for a 30-day period, coupled with failure to pay rent and insure), while other times, the language is far less clear. Continuous use clauses may specify certain days and hours in which the tenant is required to operate.

**VII. Security deposit.** It may be helpful to review the specific conditions under which the landlord is entitled to draw down on a security deposit, and time periods for cure.

**VIII. Holdover.** It may be helpful to review the specific conditions which trigger a holdover, whether there is any holdover as-of-right, and potential liability for penalty-rate rent and damages.

**IX. Default.** It may be helpful to review the specific conditions which trigger an event of default, including monetary non-performance, abandonment or failure of continuous use, and time periods for cure.

**X. Termination/contraction options.** The lease may provide for as-of-right options to terminate early or reduce space.

## Engage Your Real Estate Partner

As always, we are here to work with and for you. We are ready to review your current portfolio, discuss changing space needs, and engage with your landlords. While negotiated rent concessions are surely on the minds of many, it is important to note that landlords who carry debt service on their buildings would likely need to review the terms of their loan documents, and potentially engage in conversations with their lenders. Finally, we are carefully considering the necessary shape and scope of lease terms for new deals in a post COVID-19 world.

Beyond acting as your trusted real estate advisors, we hope that you and your families, friends, and colleagues are feeling and faring well. As we navigate through this period of uncertainty, please know that we at Cushman & Wakefield remain steadfast and ready to help you however we can. We will overcome this challenge together.