

# IMPACTS OF COVID-19 ON COMMERCIAL LEASING

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**The novel coronavirus (COVID-19) outbreak and response has prompted governmental bodies throughout the nation to issue orders and regulations postponing or canceling routine legal proceedings. In many jurisdictions, this includes moratoria on evictions and foreclosures of residential and commercial properties. Commercial landlords and tenants should keep apprised of and heed these orders and regulations; simultaneously, they should keep in mind their respective rights and obligations to each other under their leases and to other involved stakeholders, such as lenders and insurers.**

## **Local, State, and Federal COVID-19 Orders Staying Eviction Proceedings.**

Landlords and tenants should be aware of the rapidly changing local, state and federal laws and orders impacting their rights during the COVID-19 outbreak and response. In the Dallas area, for example, several orders restrict eviction proceedings (covering both commercial and residential properties) until sometime in May 2020. Dallas Cty., Office of Cty. Judge Clay Jenkins, Amended Order, Stay Home Stay Safe (Mar. 31, 2020); [Collin Cty. Justice Courts, Standing Order Regarding Coronavirus \(COVID-19\) Mitigation to All Collin Cty. Justice Courts, Court Order No. 01 \(Mar. 20, 2020\)](#). These orders do not prohibit the filing of eviction proceedings, but instead stay hearings and trials where the eviction claims would be adjudicated, as well as stay the service of writs of possession, which are the writs a sheriff or constable would serve on a tenant, following a landlord's obtaining a favorable judgment, to physically evict them from the premises.

In other parts of Texas and the country, similar restrictions on evictions are in place. In Houston, the Harris County Justice Courts have taken the same approach as Dallas and Collin Counties, postponing eviction proceedings (in accordance with the Texas Supreme Court's order discussed below) through April 19. Harris Cty. Justice Courts, First Amended Order Regarding Court Proceedings Pending COVID-19 State of Emergency (Mar. 23, 2020). Travis County has postponed all residential and commercial eviction proceedings until May 9, and has ordered no writs of possession may issue until May 13. [Travis Cty. Justice Courts, Standing Order Regarding Coronavirus Disease \(COVID-19\) Mitigation to All Travis County Justices of the Peace \(Mar. 17, 2020\)](#).

Additionally, the Texas Supreme Court has barred all residential evictions through April 19, with some limited exceptions. [Fourth Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9042 \(Tex. Mar. 19, 2020\)](#). It has also tolled all filing and service deadlines in the state from March 13 until June 1. [Eighth Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9051 \(Tex. Apr. 1, 2020\)](#). In Texas, a landlord may elect to file suit against a residential tenant or seek a tenant's eviction during the moratorium, but service of process will not be made and a court cannot consider the eviction complaint until its jurisdiction's moratorium has lifted.

In New York, the governor has issued a ninety-day (90-day) moratorium on all residential and commercial eviction proceedings, Office of the Governor, E.O. 202.8 (Mar. 20, 2020), while San Francisco's mayor has issued a thirty-day (30-day) moratorium on eviction of certain commercial tenants, [Office of the Mayor of San Francisco, Mayor London Breed Announces a Moratorium on Commercial Evictions for Small and Medium-Sized Business in San Francisco \(Mar. 17, 2020\)](#). Federally, the United States Department of Housing and Urban Development has issued a ninety-day (90-day) moratorium on foreclosures and evictions of persons from residential properties secured by FHA-insured Single Family mortgages. [U.S. Dep't of Housing and Urb. Dev., Mortgagee Letter 2020-04 \(Mar. 18, 2020\)](#). This moratorium applies to initiating foreclosures in the first instance and to proceedings already initiated to foreclose properties. The Coronavirus Aid, Relief, and Economic Security (CARES) Act extends these protections for sixty (60-days) after March 18, restricts landlords from charging late fees over the same period, and provides forbearance on loan payments for up to 180 days if the borrower has experienced a hardship due to COVID-19.

This patchwork of executive orders, local regulations and federal guidance makes clear that landlords, including commercial property owners, have limited rights to evict tenants who do not pay rent or honor other obligations *for the time being*. Local orders and regulations should be checked and evaluated before initiating an eviction proceeding. This does not mean commercial landlords have no means to protect their rights (or that tenants should assume as much). So far, there are no blanket orders or legislation waiving requirements for rental payments to be made or other landlord statutory rights (such as commercial lockouts for failure to pay rent). As such, landlords and tenants should evaluate their lease agreements, and related documents, to further understand their rights, liabilities and options for moving forward in this challenging situation.

## **Contractual Rights and Remedies**

Commercial landlords and tenants should look to their leases and any amendments, guaranties, and addenda for guidance about their legal rights and remedies. Both parties should understand what is necessary to perfect and protect their legal rights under the lease. Landlords and tenants should then make sure that they follow all contractual requirements necessary to preserve their respective rights and remedies.

#### *Notice Requirements*

Often, commercial lease agreements will impose certain notice requirements before a party, either the landlord or the tenant, may be officially declared in default of its respective obligations under the lease. For example, prior to declaring a tenant in default of its obligations under the lease for failure to pay rent, the lease may require the landlord to provide written notice and an opportunity to cure to the tenant over a certain period of time (e.g., five days or 10 days or the like). The same may be true for any landlord defaults, which may require the tenant to provide a similar written notice and opportunity to cure to the landlord. Notably, commercial leases may build in a longer cure period for landlord defaults (such as 30 days), which are often concerning non-monetary obligations of the landlord. Likewise, non-monetary defaults for a tenant (e.g., maintaining continuous operations in the lease premises) may have a longer lead time for notice and cure periods. Thus, it is critical that landlords and tenants sit down and carefully read their leases to understand what notices are required, time frames for same and where and how such notices are required to be transmitted under the lease (e.g., overnight mail or certified mail, etc.).

#### *Security Agreements*

Commercial leases may also articulate specific procedures for perfecting and foreclosing a security interest associated with the leased property. Similarly, Texas Property Code § 54.021 provides the landlord a lien on personal property within the leased premises in order to secure unpaid rent. Other jurisdictions may afford similar statutory rights. Thus, landlords must comply with the statutory and/or contractual requirements governing these interests in order to timely perfect so that they may foreclose their interests in such collateral now, or at a later time. Further, landlords must ensure they are aware of subordination agreements in the lease file as well as any other filed UCC-1 financing statements perfect other secured parties' interest(s) in tenant personal property that may be senior to the landlord's interest. Landlords should evaluate if they have filed their own UCC-1 financing statements to ensure that their contractual interests are perfected in accordance with the lease and applicable law relative to other third party claimants.

#### *Force Majeure and Impossibility*

The lease agreement also might contain *force majeure* or "act of god" provisions that may provide either or both parties a defense to performance under the lease. If the lease has a *force majeure* clause, the specific contract terms will govern, as applicable and based upon the specific wording of the clause, the allocation of the risks associated with COVID-19 and the related government limitations on business operations. Whether the outbreak of COVID-19 will be a *force majeure* under any given lease agreement will depend entirely on how the clause is worded, including whether the clause lists an "epidemic" or "pandemic" or government action as *force majeure* events. Overall, whether the clause is broadly or narrowly drafted and whether it has a "catch all" provision for events that are not specifically listed in the

agreement as *force majeure* events will be important considerations for determining rights and remedies under any *force majeure* clause in the lease.

Importantly, the lease *force majeure* clause may have carve outs for the payment of rent or other monetary obligations. Non-monetary obligations (e.g., continuous operations or required operations during business hours) could be excused under the contract while the agreement may still require rent payments regardless. Further, the contract may require that a party declaring a *force majeure* as an excuse to performance provide notice of the *force majeure* within a certain amount of time. Thus, to take advantage of any *force majeure* clause, any required notice must be timely provided to avoid a forfeiture of the defense to performance provided under the lease.

If the lease agreement does not have a *force majeure* clause, the common law defense of impossibility may still apply to excuse performance. However, this doctrine will not necessarily excuse performance simply based upon financial hardship alone and may only excuse performance during the existence of the problematic circumstances.[\[1\]](#)

### **Work Outs**

It will be critical for landlords and tenants to evaluate their options if and when performance under lease agreements (or other contracts) become a problem. Given the circumstances, landlords must balance their obligations to lenders and insurers against tenants' needs for abatement or forbearance. Similarly, tenants should be proactive in discussing issues and options with landlords, such as rent deferment plans. In any event, active communication about performance concerns will go a long way to preserving the relationships and interests of landlords and tenants, and good documentation of such work-out agreements will be critical.

If tenants can pay their rent, they should endeavor to do so to remain in compliance with the lease. If tenants are seeing hurdles to performance now or in the near future, they should start the conversation with their landlords right away on what arrangement they might reach. Landlords should likewise be reaching out to their tenants to open the line of communication sooner rather than later. Landlords who may be receiving partial rental payments will likely want to provide carefully crafted written responses to tenants to clarify that acceptance of partial amounts is not a waiver to entitlement to the full amount due under the lease on any given monthly payment.

### **Relief for Small Businesses**

On March 27, Congress passed the CARES Act to provide payroll, benefits, mortgage and rent, and utilities assistance (among other things) for qualifying businesses. Businesses borrowing under the CARES Act's Paycheck Protection Program (PPP) can borrow up to \$10 million, or 2.5 times their average total payroll costs per month, whichever is less.

Amounts borrowed under the PPP do not require collateral or a guarantee, and they are subject to loan forgiveness if certain criteria are met. Loan forgiveness will not, however, exceed the principal amount of

the loan. Qualifying loans made between February 15 and June 30 are eligible for PPP treatment. This [article](#) explains the CARES Act in further detail.

Tenants should also consider the federal government's Economic Injury Disaster Loan (EIDL) program, which is facilitated by the Small Business Administration and provides for loan assistance of up to \$2 million for eligible businesses. The loans may be used to overcome "substantial economic injury" caused by the COVID-19 outbreak and response. These loans can be used to pay fixed debts, payroll, accounts payable, rent and other bills a small business cannot pay due to the economic impact of COVID-19.

Loans under the EIDL program offer repayment terms up to 30 years at an interest rate of 3.75% with specific terms based on the specific facts and circumstances of the small business's situation. Small businesses are not eligible for this loan assistance, however, if they have access to non-government funds or lines of credit. And though a pre-existing EIDL loan may be refinanced to receive PPP treatment, EIDL loans are not themselves subject to loan forgiveness.

Real estate developers and landlords also may benefit from provisions in the CARES Act that permit them to claim bonus depreciation for costs associated with improving facilities. Under existing law, property owners were required to depreciate such improvements over the 39-year life of the building. Under the CARES Act, certain improvements could be depreciable over 5-15 years, which would allow the owner to report additional depreciation over years 2018 and 2019.

## Conclusion

Difficulties lie ahead for commercial landlords and tenants, to be sure, but both parties can take steps to soften the blow of the COVID-19 outbreak. Extensive communication and proper documentation will be key to the parties' mutual success, and consideration of options like rent modifications or loan assistance may help to facilitate the parties' joint goals of keeping their businesses afloat, for the short and long term.

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[1] For more on *force majeure*, click on the following links: [Force Majeure – The Biggest Buzz Term of Litigation in a COVID-19 World \(Mar. 20, 2020\)](#); [COVID-19 Business Legal Alert: Navigating the New Norm \(Mar. 26, 2020\)](#); [COVID-19 – Impact on Texas, Know Your Legal Rights \(Mar. 25, 2020\)](#).

If you have questions or would like to discuss further, please contact [Karen Hart](#) or [T.J. Hales](#).

## Related Practices

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Real Estate Law



## Practice Area Contact

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