

CORONAVIRUS CRISIS: DIFFICULT DECISIONS AHEAD FOR LANDLORDS AND TENANTS

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As of this writing, our world is battling a global pandemic of unprecedented proportion. Already many articles have been written about the applicability of the force majeure lease clause and other potential escape hatches for each party. The outcomes of these disputes may be resolved by the courts in months and years to come, and will likely depend on specific language in those clauses. Rather than address those various opinions and predictions, we think that more practical and sensible approaches should be considered by landlords and tenants at this time. Here are some suggestions:

1. Communication is Key: This unusual situation creates the perfect opportunity for landlords and tenants to work together to minimize pain and both parties to survive. Frequent and forthright communications are essential. Each party should regularly assess and communicate with the

other what is happening which might impact their ability to perform under the lease. A thoughtful and practiced SIOR industrial or office broker can play an important role.

2. Keep the Landlord/Tenant Relationship Intact: A bad situation will become worse if one party seeks to invoke lease provisions and take advantage of the other party. Accordingly, the parties should consider creative approaches to “minimizing the pain” including rent deferral or “holidays” until things settle down; rent reduction with specific terms and time periods; CAM only payments; and applying security deposits to rent payments without replenishment requirement, all can be considered.

3. Consider the Social Distancing Guidelines’ Impact on Tenant Obligations and Government Approvals: Multiple states, including Illinois, have issued shelter-in-place orders, and many workers are working remotely or not at all. Not only does this adversely impact tenants’ abilities to perform their lease obligations, but it also results in government office staff cutbacks that will likely create future delays in approval processes (architectural and

engineering approvals, new build-outs, construction). Case in point: Days before this article was drafted, your broker co-author was confronted with the following clause in the LOI negotiations on a large new industrial lease:

“Subject to a fully executed lease no later than April 15, landlord shall deliver the premises no later than August 1, 2020, provided no force majeure or pandemic related delay has occurred.”

It remains to be seen how this language makes it into the final lease document, but with a pandemic already in place, the delivery of premises on time is neither likely nor binding.

4. Understand Insurance/Impossibility of Performance Language: Discussions of these topics are beyond the scope of this article. However, it behooves the parties to understand the scope of their insurance coverage and communicate with their insurance carriers at an early stage in this process to minimize confusion over these terms.