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Real Estate Guidance During the Coronavirus Pandemic



As the coronavirus (COVID-19) continues to spread, we are facing stressful and rapidly changing times trying to combat the pandemic—the president invoked the Stafford Act and declared a national emergency; Center for Disease Control guidelines discourage gatherings of more than 10 people; bars and restaurants are closed; and all Bay Area counties issued shelter-in-place or shelter-at-home orders. The regulatory landscape and daily reality are ever-changing.

Our advice to clients is evolving with these changes and generally hinges on issue-specific language. Below is a list of real estate issues that employers, developers, landlords, tenants, and lenders may need to address in the wake of COVID-19.

Take Care of Employees and Keep a Safe Workplace

One of the immediate responses is to prioritize taking care of employees and keeping a safe workplace. Some shelter-in-place orders require everyone to work remotely and many employers have allowed employees to work remotely. Protocols should be in place for reporting travel by employees, and hygiene and sanitization practices for their workplaces. Our Labor & Employment practice attorneys have [written several updates on these topics](#).

Landlords and Tenants Need to Work Together

- **Communication.** Landlords and tenants need to communicate and keep each other informed. This also applies to any user of a co-location or shared space. Most commercial leases, occupancy agreements, and building rules and regulations do not expressly require landlords, tenants, and other occupants to notify the other of an infectious disease. Parties should be careful not to withhold information that may endanger the health of other tenants and incur liability for themselves, but to balance the privacy rights of individuals against the health and safety all parties. And, if there is a shelter-in-place order, emergency building rules will need to be developed regarding access, closure, and security. Residential and commercial landlords that develop new building rules or change services should notify tenants prior to implementation.
- **Leases and Rules and Regulations.** The first step should be to review lease provisions. The following are some common topics that are likely to be discussed:
 - *Rent Concessions.* Financial stress will result in tenant requests for rent relief. Rent concessions, rent reductions, and rent deferrals will likely be the most immediate requests. For retail tenants that can remain open, some may simply request to pay percentage rent. There is no bright-line guidance for having these conversations. Landlords and tenants will need to find individualized solutions and negotiate lease amendments.
 - *Force Majeure.* "Acts of God," also known as "events of force majeure" or simply events beyond the control of parties, are common contract provisions. Landlords and tenants will discuss whether COVID-19 is a force majeure event that will excuse payment of rent or performance under a lease.
 - *Government Order.* First, there were orders to restrict the number of people in one place. Shelter-in-place orders or similar orders are now in effect in all Bay Area counties. While some have asked whether the order excuses payment of rent or other obligations under a lease, it is unlikely that leases provide for rent abatement or reduction in an intervening event like a shelter-in-place or other similar order. This is uncharted territory. We advise all landlords and property management companies to stay apprised of [local government orders](#) as we expect more jurisdictions to follow suit.
 - *Lease Covenants.* Other lease covenants that may need to be addressed include the "going dark" or abandonment clauses, continuous operations provisions, co-tenancy requirements, and tenant maintenance obligations. Force majeure provisions will likely apply.
- **Building Contracts.** COVID-19 may also affect third-party contracts through reduced services or extended deadlines for performance under tenant improvement contracts, janitorial contracts, security contracts, or parking management contracts. Contractors may curtail their employees' work at the property for their safety. The contracts may provide for delay or similar damages for failure timely to perform. Force majeure may excuse performance. Again, these answers will be specific to each individual contract. We advise clients to review building contracts to determine their rights and remedies.
- **Lenders, Borrowers, and Capital Partners.** Just as financial stress may result in a discussion on rent concessions, borrowers and lenders will likely discuss the following topics:
 - *Mortgage Payments.* If payment of rent is compromised, there may not be enough cash flow for debt service. Again, depending on the contract language, force majeure or intervening government action may excuse mortgage payments. Like the discussion on rent concessions, there have been discussions on mortgage payment deferrals, interest rate reductions, maturity date extensions, or interest only payments suspending amortized principal payments. Politicians are requesting that financial institutions implement a moratorium on foreclosures and related evictions as discussed below.
 - *Loan Covenants.* Lenders and borrowers should review loan documents for specific provisions on debt coverage ratios or debt service coverage ratios, resizing of loans, cash traps for loan defaults, and other monetary and non-monetary defaults.
 - *Construction.* Many developers and contractors have asked whether construction may continue. The answer may depend on the applicable shelter-in-place orders that are varied and nuanced. Most orders have exemptions for essential activities. The [shelter-in-place orders for counties around the](#)

[Bay Area](#) allow for construction of housing as an exempted essential activity. Even if construction is allowed, supply chains may be affected by COVID-19. It is likely that construction budgets, schedules, and deadlines will need to be revisited.

- *Title Insurance*. Review and make clear in the escrow instructions that title insurers will provide gap coverage in recording. Title insurance companies have taken different positions on insuring the gap due to an inability to record with the closure of county recorder's offices. Some county recorders' offices are allowing electronic recording while they are closed.
- *Guaranties and Bonds*. Recourse obligations in guaranties and bonds may be triggered by a breach of the loan documents. Lenders and borrowers should review any bonds or letters of credit and determine whether any events of default are triggered.
- *Waterfalls*. The parties should review operating or LLC agreements for waterfall distributions and capital call provisions. Before proceeding, they should also confirm what actions require members' approval.
- **Insurance**. Review insurance policies and insurance requirements under leases and loan documents. Coverages that should be the focus of attention include the following:
 - *Business Interruption Insurance*. Business interruption coverage may cover expenses but there could be an exclusion under policies for a "contagion." States are trying to mandate coverage for business interruption, so there could be a claim that business interruption insurance should cover government intervention.
 - *Rental Loss Insurance*. Like business interruption coverage, a landlord could make a claim under rental loss insurance coverage, but it may similarly be subject to exclusions and conditions for such coverage.
- **Government Intervention**. Federal and state governments have intervened to provide assistance, and we expect more aid will come. Some of the government actions include the following:
 - *Residential Tenant Protection*. The governor of California has requested a halt to residential evictions statewide, and cities in California and New York City have imposed moratoriums on residential evictions for those affected by COVID-19.
 - *Moratorium on Mortgage Payments*. The governor of New York has announced a relief plan waiving mortgage payments for 90 days and late payments based on financial hardship, as well as a grace period for loan modifications.
 - *Moratorium on Commercial Evictions*. San Francisco is placing a moratorium on commercial evictions of small- and medium-sized business. Some states are expected to follow with proposals for similar moratoriums statewide.
 - *Moratorium on Foreclosures*. Some legislators are urging a moratorium on foreclosures of residential and commercial properties. The governor of New York has announced postponing foreclosures, and the U.S. Department of Housing and Urban Development has released guidance urging mortgage servicers to halt pending foreclosures and refrain from initiating new foreclosures for 60 days for borrowers with single-family mortgages insured by the FHA. The governor of California has *requested* financial institutions to implement a moratorium on residential and commercial foreclosures. Though the legality of the state's request is an open question, courts have upheld temporary moratoriums on foreclosure in the past.
 - *Aid*. Federal, state, and local agencies are providing funding to aid businesses, owners, and renters during this crisis.

There is no playbook for what is going on now. Extraordinary times will require extraordinary measures and effort, some of which will succeed and some of which will not. Responses will likely require a collective effort by the entire real estate industry to come together and be part of the solution.

Authors

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