
Back to Business: Leases and Loan Documents

Video Transcript

As companies consider returning to full operation in the wake of the COVID-19, they will need to adapt to the new realities imposed by this global pandemic. Today, as part of our ongoing series, Back to Business Considerations in the Wake of COVID, I'll explore issues related to how reopening will impact not only the operators of businesses, but also their landlords and lenders. As businesses start to reopen there's going to be material short-term and, in some cases, long-term changes as those businesses operate in a new environment. This applies not only to the operators of businesses, but also to their landlords and lenders. Thus, before any changes are implemented, landlords, tenants, and property managers should review their leases, and lenders and borrowers should review their loan documents in order to show compliance with those agreements. Agreements should also be reviewed with an eye to relocating provisions that, in addition to a force majeure clause, may have fourth parties modifying their operations' stability to reduce costs. While every situation is different, and while the number of potential pitfalls and opportunities is large, consider these types of issues that may arise under leases and/or loan documents.

Specific Operational Provisions. Many leases contain restrictions on a tenant's operations that could impact things like employee and visitor access, testing, and/or social distancing and how they are to be accomplished. Similarly, retail and restaurant leases may contain specific language detailing how the business must operate. For example, a restaurant lease may require the operation of a bar or waiter service, but those operations may be precluded or prohibited by social distancing requirements. And restaurant leases may impose limits on takeout services that are incompatible with the current climate.

Finally, co-tenancy requirements and shopping center leases that are no longer viable, at least not in the short term, may impact the rights and obligations of landlords and tenants.

Common Area Operational Requirements. Will proposed changes in common area operations be permitted? In particular, landlord obligations that provide common area amenities such as health clubs and valet parking should be reviewed.

Identification and Insurance Provisions. These provisions should be reviewed to ensure the changes in operations do not shift or expand liabilities in unanticipated ways. For example, does an office landlord take on additional potential liability by screening visitors in the building lobby? Could a party be required to obtain insurance against pandemic-related consequences but not be able to obtain that insurance at a commercially reasonable rate?

Reconfiguration and Alteration Provisions. As tenants propose reconfiguring or altering your spaces to be able to maintain social distancing and satisfy related concerns, landlord and lender approval rights over those actions should be reviewed.

Compliance with Laws. Leases typically require landlords and tenants, and loan documents typically require borrowers, to comply with applicable laws. Among the laws that may be required to be complied with are new government-mandated notice requirements and/or social distancing requirements.

Opportunities to Release Expenses. For example, if parking use is reduced because employees are working in shifts, there may be an opportunity to save money by giving back optional parking rights.

Operating Expense Past Supervisions. Landlords, tenants, and property managers should review these provisions to determine how changes and operations may affect how these charges are calculated. Among other things, if a tenant's base year

is the current year 2020, artificially reduced operating expenses for this year can have an impact on a long-term basis. Relatedly, to the extent that a landlord is providing and requiring things like masks and gloves, do they have the ability to pass through those costs to tenants? Also, what would be the impact of staggered working hours on operating costs?

And finally, will the concept of after-hour services and charges related thereto still be relevant? As you can see, Venable is actively monitoring these issues, and we're working with clients on a daily basis to evaluate and respond to not only these issues, but other emerging business, legal, and operational challenges posed by the pandemic. Visit [Venable.com/COVID-19](https://www.venable.com/COVID-19) to learn more about our services and connect with members of our team. Thank you and stay safe.

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