

# Insights

## COVID-19 Issues for Commercial Landlords

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April 6, 2020

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The novel Coronavirus (COVID-19) pandemic is impacting and will continue to impact commercial landlords in their leasing, management and operation of commercial real estate. This Alert outlines certain key issues commercial landlords may face in the wake of the COVID-19 pandemic and suggests initial steps to address such issues. Please note this Alert relates to commercial properties and is not intended to apply to residential properties and the unique issues residential landlords will face due to the COVID-19 pandemic. The Krieg DeVault Real Estate and Environmental Practice Group will provide a separate Alert analyzing residential real estate issues resulting from the COVID-19 pandemic.

### Tenant's Limitation or Closure of Operations

Many commercial tenants are limiting or outright closing operations in accordance with governmental orders or for the health and safety of their employees. In response to such limitation or closure of operations, tenants are seeking rent abatement or other alternative payment arrangements or claiming they are not obligated to pay or are able to delay payment of rent due to (1) the COVID-19 pandemic being a *force majeure* or (2) the common law doctrine of impossibility.

*Force majeure* clauses are included in many leases and other commercial contracts to excuse or delay performance by a party in the event of an act of God, disaster, impossibility of performance or other unforeseen circumstance beyond the control of said party seeking to invoke *force majeure*. Pursuant to Indiana law, the scope and effect of a *force majeure* clause depends on the specific language used in the contract. Accordingly, whether the COVID-19 pandemic is a *force majeure* requires a review of the lease or contract at issue.

It is unlikely the term "pandemic" will be specifically listed in the *force majeure* provision of a commercial lease or other commercial contract. Litigation will likely occur in the wake of the COVID-19 pandemic as parties will argue whether a pandemic can be characterized as an act of God or other triggering event of *force majeure*. Regardless, *force majeure* provisions rarely excuse the performance of purely monetary obligations, such as tenant's obligation to pay rent. As such, landlords are in a strong negotiating position against claims of *force majeure* for nonpayment of rent. However, landlords should be more open to alternative arrangements if a tenant invokes

*force majeure* to excuse a delay in the performance of certain obligations such as tenant build out requirements or continuous operation requirements.

Not all leases contain a *force majeure* clause. In the absence of such a clause or in an effort to supplement the *force majeure* argument, tenants are claiming rent payment be forgiven under the common law doctrine of impossibility. The standard of impossibility of performance is high under Indiana law. The defense requires that performance under the contract not be merely difficult, but absolutely impossible because of an act of God, an act of the law, or the loss or destruction of the subject matter of the contract (*Ross Clinic, Inc. v. Tabion*, 419 N.E.2d 219 (Ind. Ct. App. 1981)).

### **Landlord's Obligations**

The COVID-19 pandemic may delay commercial landlords in meeting certain obligations under leases, such as missing a delivery deadline for the build out of a tenant's premises. The failure to meet a premises delivery deadline under a lease or work letter may be particularly concerning to a landlord since such failure typically results in a day-for-day rent abatement and can sometimes result in multiple days of abatement for each day the premises is not delivered to tenant. The *force majeure* and doctrine of impossibility analysis from above also applies to landlord's obligations under a lease.

Landlords should review their leases with counsel, particularly those leases where landlord may be delayed in meeting certain obligations due to the COVID-19 pandemic, and be proactive in communicating with tenants about such delays and how such delays will be excused under the *force majeure* provision of the lease or the doctrine of impossibility.

### **Insurance Considerations**

Landlords should timely contact their insurance providers and review their insurance policies to determine if any insurance coverage is available due to the COVID-19 pandemic. It is also important for landlords to contact their insurance providers in order to give timely notice which may be required to preserve claims under applicable insurance policies.

We have received inquiries regarding whether business interruption insurance may cover losses incurred due to the COVID-19 pandemic. The ultimate answer for each landlord will depend on the applicable insurance policy and any endorsements which may apply to such policy, but generally landlords will not be able to recover under business interruption insurance policies because such policies require physical damage to the place of business before recovery is available. Regardless, it is still prudent for landlords to review any insurance policies and to contact their insurance provider to determine what coverage, if any, may be available. Furthermore, there may be legislative or judicial remedies enacted which could impact coverage. Please continue to check Krieg DeVault's **COVID-19 Resource Center** for additional developments in this area.

For additional information regarding insurance coverage for COVID-19, please see the **following client alert** from March 30.

### **Next Steps**

In response to the issues raised in this alert, landlords should consider doing the following:

1. Review leases, loan agreements and other relevant agreements which may be impacted by the COVID-19 pandemic.
2. Contact their mortgage lender to determine what deferment or other relief which may be extended. Prior to asking for relief, landlords should review their loan agreements with counsel to understand what constitutes an "event of default" or "material adverse change" under the relevant loan agreements and whether there are short term remedies already available under such agreements.
3. Consider alternative rent payment arrangements with tenants. A common arrangement we have seen in the last two weeks is deferment of base rent for a defined period (for example, three (3) months) with such deferred rent being amortized over the remainder of 2020 or over the twelve (12) month period commencing with the end of the base rent deferment period. Tenant will still be responsible for CAM or other additional rent as defined in the lease.
4. Review all insurance policies and contact their insurance provider to determine what coverage, if any, may be available.

Krieg DeVault is committed to helping you and your business during these unprecedented times. With your needs in mind, we have established a **COVID-19 Resource Center** to assist you through this process.

The Krieg DeVault Real Estate & Environmental Practice Group is closely monitoring how COVID-19 pandemic developments are impacting the real estate industry. If you have any further questions or concerns about the content of this Alert or any other real estate issues, please feel free to contact **David A. Adams, Christopher Engel**, or a member of Krieg DeVault's **Real Estate & Environmental Practice Group**.

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