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Rent Relief Requests and Special Considerations for Coworking Space Agreements

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The COVID-19 pandemic and the resulting shelter-in-place orders have resulted in an influx of inquiries from tenants seeking relief from payment obligations under their leases. Various governmental orders have provided some relief, but this relief is not automatic, and in many cases, is not enough. Landlords have responded in many different ways, and Cooley's real estate team has been tracking these responses.

Government orders do not provide rent forgiveness; it is best to negotiate a deal with the landlord.

Several governmental orders provide eviction relief, but this results in rent deferral rather than rent forgiveness. These orders also often times require tenants to meet certain criteria (for example, San Francisco companies must have had $25 million or less in gross revenue in 2019) and to affirmatively seek this relief from the landlord. Even if a tenant does not qualify, or if a particular region does not have an applicable order for relief, landlords have been responding in different ways. Before reaching out to the landlord, tenants must consider their best-case scenario. Asking for a termination of the lease will not be as well met as requesting a combination of abatement and rent deferral. Indeed, landlords have shown to be more concerned with keeping long-term tenants and may be more open to rent abatement (where the rent is amortized over the term) and rent deferral than termination. Some landlords have also waived operating expenses and parking fees in response to the shelter-in-place orders as non-essential tenants have not been occupying their premises. In general, larger institutional landlords have been more proactive and willing to provide rent relief than smaller mom and pop type landlords, and retail landlords are realizing they need to be flexible with their tenants to remain in business. Most landlords, regardless of size and type, however, have been requiring that tenants provide financial statements as part of their negotiations, to prove that they are financially impacted by the pandemic.

As a general matter, the lease itself does not offer much relief unless an outright termination right was negotiated.

Tenants often ask if there is any relief under their lease that they can rely on. The short answer is that it depends on the language in the lease, but many times the conclusion is that there isn't. Unless a tenant has negotiated an outright termination right, which is not very common and often requires an expensive payout or termination fee to the landlord of six months' rent or more, depending on the lease term, the ability to get out of a lease is very limited. Force majeure and condemnation clauses have potential to provide some relief, but are often crafted in such a way that they do not apply to a pandemic. For example, a force majeure clause often doesn't excuse tenants for nonperformance, and in the event that it does, the obligation to pay rent is likely not excused. Wording is everything for these clauses, so getting it reviewed by a real estate attorney is highly advisable.

Many leases do, however, require tenants to carry business interruption insurance, and we recommend tenants make claims under these policies as soon as possible. While we are seeing many of these claims being rejected, we foresee this issue being heavily litigated and it is important for tenants to make a claim sooner rather than later, so that they have provided the required notice.

Special considerations for coworking space agreements, biotech companies and tenants currently negotiating new leases.

- Companies in coworking spaces are also largely impacted by the COVID-19 pandemic. These coworking arrangements are not leases, but rather service agreements, so an argument for relief is more straightforward. Contact our real estate team if you need an assessment of your rights.
- Biotech and life sciences companies may be faced with questions on whether they are essential services, and thus not entitled to the abatement relief under the various governmental orders. This is a nuanced interpretation and will depend on the type of lease. An office lease for a life sciences company is a different analysis than a laboratory lease, the latter further depending on the type of activities permitted or conducted at the laboratory.
- Tenants who are currently negotiating new leases are in a uniquely advantageous position. Even if there is a signed letter of

intent and the company is deep into lease negotiations, there is no obligation to sign the lease. Tenants should therefore consider asking for discounts on rental rates as we expect fair market rates to drop significantly. They should also push to have pandemic related language included in the lease to avoid some of the pitfalls we are seeing in current leases. Leases that have recently been signed may be impacted by construction delays and delays as a result of holding over.

- Much construction has been significantly delayed, so move-in dates under existing leases are likely to be significantly delayed and many companies will be holding over as a result, or will be impacted by the holdover of the prior tenants. This is likely to lead to a domino effect and result in disruptions in scheduled occupancies. Tenants should be prepared for this and try to negotiate forgiveness of holdover rental rates.

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