



FAQ: How Will COVID-19 and its Economic Impact Affect Landlords and Tenants?

The COVID-19 coronavirus is threatening the United States economy and markets around the world. Supply chains risk significant disruption, and several industries are experiencing reduced demand and losing revenue. Recent market losses also threaten confidence and demand in the economy. Federal, state and municipal authorities are increasingly issuing legislation, emergency orders, and regulations restricting or even temporarily closing businesses and premises. In some cases, these authorities are also placing temporary prohibitions on evictions or enforcing eviction orders. In addition, several courts around the country are restricting or limiting access to their systems temporarily postponing access to the judicial system to resolve eviction and other civil matters.

As everyone's health remains our top concern, below are FAQs for landlords and tenants as we begin to work through what could become challenging economic conditions.

What steps should landlords and tenants immediately take to protect themselves from disruption?

- Review the terms of your leases, understand your rights and obligations.
- Communicate early and often with each other to work through potential disruptions in services or defaults under the lease.
- Review insurance policies and understand any applicable coverage.
- Look at your loan documents and covenants and work preemptively to deal with any concerns that may be raised by your lender.
- Review applicable federal, state or municipal legislation, emergency orders or regulations that may impact your premises.

Q. What impact will economic changes have on commercial landlords and tenants?

A. The landlord-tenant relationship will be impacted by the virus. While the breadth and depth of this impact of the virus on this relationship is unknown, landlords and tenants should communicate early and often to discuss this impact, mitigation of losses, and amicable resolutions to anticipated breaches or defaults under the lease. Landlords will need to consider whether to close facilities and, if so, for how long. Landlords should review their obligations under their loan documents and work preemptively to address issues that may arise as a result of closures.

Tenants may be required by governmental authorities to reduce occupancy levels, modify or cease operation of their businesses. These closures and interruptions in business operation may trigger lease covenant defaults, and landlords and tenants should work together to avoid unnecessary conflict over their decisions. As closures or business interruption ensue, both landlords and tenants risk cash flow disturbances, loan and lease defaults and, potentially, economic viability. Collaboration and active communication will assist in mitigating losses and potentially costly expenses associated with litigation.

Q. What should landlords do in preparation for impacts from the global pandemic?

A. Triage and communication are key. Just like people, the most vulnerable tenants will be those most severely impacted by the COVID-19 outbreak, including those already in default. Landlords need to understand the impact COVID-19 has on each of their tenants just as tenants should be mindful of the impact on their landlords. Waiting until tenants are in default under their lease or asking for abated rent is not the best course of action. Instead, especially during this time of uncertainty, each party needs to work with the other to evaluate the financial implications of the virus and, if possible, work in tandem, before serious issues arise, to formulate a plan moving forward.

Q. What should tenants do if they are concerned about their ability to continue making lease payments in the coming weeks and months?

A. Tenants should be proactive, communicate early, and get ahead of potential covenant and payment defaults. Every landlord is different, so predicting a response is futile. However, under current conditions, parties will likely find themselves in a better position working through issues early rather than allowing conditions to deteriorate without any communication. Working together and addressing potential issues before they arise will help landlords and tenants weather the storm and develop creative solutions. Tenants should be sure to document agreements either with an amendment to the lease or another form of written agreement that expressly modifies the lease.

Q. Does business interruption insurance cover closures due to COVID-19?

A. In the event of a building closure, the obvious place to look for insurance coverage would be in the business interruption section of your commercial property policy. Currently, most policies' business interruption coverage does not cover claims related to the coronavirus and carriers are not offering such a policy for purchase. Commercial property policies have a virus and bacteria exclusion that prohibits an issue like coronavirus being considered a covered cause of loss. The best plan for tenants right now is to stay abreast of communications from their landlord, to follow their COVID-19 preparedness plans and policies and to stay in touch with their insurance providers in the event a policy that will provide coverage for such a claim becomes available.

Q. Does the inability to comply with the terms of a lease due to COVID-19 virus excuse performance (such as an obligation to continuously operate in the premises or pay percentage rent) under a *force majeure* clause?

A. While leases generally provide for the tenant's quiet enjoyment of the premises, some leases may give landlords the ability to close a facility temporarily in the event of an emergency. Meanwhile, leases may also require a tenant (especially restaurant and retail tenants) to remain in continuous operation of the premises or pay percentage rent and maintain a certain threshold of minimum sales. Every lease is unique and has different terms, thus, each lease must be analyzed separately to determine if performance may be excused.

The specific types of events under a *force majeure* clause that may trigger non-performance may very well be covered in these situations, but analysis of the particular provisions in a lease is necessary. Landlords should be aware that following orders imposed by governmental or quasi-governmental authorities that cease tenant operations or limit tenant operations may be considered by the tenant as a casualty event or *force majeure* which may excuse tenants from performance under the lease. This conduct may entitle the tenant to certain remedies including abatement or postponement of rent. In many instances, tenants are already affirmatively notifying landlords that if such closure occurs, then they will affirmatively invoke their rights under the lease.

Given the rapid development of events—declarations of emergency, travel bans, and forced shut downs and closures of entire industries—landlords and tenants should work together to proactively address rent relief, potential defaults and eviction concerns. As stated above, parties should document agreed-upon terms in

writing. Landlords and tenants should also consider the holistic implications of triggering a *force majeure* provision.

For example, a tenant seeking to trigger the provision with its landlord may want to block a customer from triggering a similar provision to excuse performance under a separate agreement. Consistency will be important if litigation ensues.

Q. Are courts still open and what will happen to with FED actions and eviction cases?

A. Courts around the country are on alert and are limiting the services they are offering at this time. Most courts have issued notices to the public and attorneys asking them to notify the court if they or their clients have experienced any symptoms of COVID-19 or have been exposed to anyone who may have COVID-19 so that hearings can be rescheduled. Many courts have also issued orders stating that unlawful detainer actions and associated hearings are delayed to an undefined date in the future. Certain jurisdictions have stopped non-emergency services and law enforcement has advised that they will not be enforcing eviction orders. As a result, landlords can expect significant delays in effectuating an eviction.

Additional Questions

If you have additional questions as you navigate difficult scenarios brought on by or arising out of the COVID-19 pandemic, please contact your Kutak Rock attorney or one of the authors listed below:

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