

Post Pandemic Considerations - Real Estate Contracts

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If we have learned any lesson from 2020, it is to be prepared for the unexpected. This applies to drafting real estate contracts. Breaks in the supply or performance chain necessary to ongoing business operations can cause a chain reaction of failures in performing contract obligations. Reconsideration of some typical real estate contract terms might help prevent those breaks in performance:

1. Force majeure clauses should include obvious new triggers such as widespread disease, but also secondary events affecting performance such as quarantine, material or labor disruptions, and unavailability of electronic communication.
2. Confidentiality terms deserve a fresh look due to the vastly increased number of remote employees, increasing risk of disclosure. One might consider terms prohibiting:
 - Access by remote workers
 - Use of personal devices or data storage
 - Presence of unauthorized persons during remote communications
 - Remote access in public places
 - Remote printing
3. Times for performance should not be dependent upon uncertain facts once thought certain, such as bank or other institutional closures. Performance deadlines should be independent of any potentially uncertain variables.
4. Electronic delivery and communication now often tend to be taken for granted. Contracts are increasingly drafted in a manner that assumes their availability. Notice and delivery should not be entirely dependent on electronic means, and alternatives should be specified where electronic means are not possible for all parties.

Commercial lease agreements give rise to some additional considerations once thought unnecessary. Creating some general exceptions could benefit both parties by allowing the tenant to continue doing business and perform by paying rent.

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1. Where commencement of rent is tied to landlord construction, unexpected labor or material shortages should be provided for in a way that allows the lease to move forward to the benefit of both parties.
2. Common terms such as limiting use of outdoor space or parking lots for business might include exceptions when necessary to continue the tenant's business.
3. Continuous operation, business hours requirements, and prohibitions of vacancy might be waived during times when working in the premises is unsafe or prohibited due to government mandate.
4. Where contributed CAM charges drop due to an unexpected crisis, a continuance of benefits or maintenance might become unfeasible for a landlord. A tenant would want contribution to be based on percentage of rented and not total available space.
5. Options for expansion or renewal should also be carefully reviewed to ensure that parties are not bound if widespread circumstances unexpectedly change.

It is impossible to predict all possible future outcomes, like those we have recently experienced, but it would be wise to consider which circumstances we are taking for granted in drafting agreements today.

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