



## Insights

# Lease Provisions that Should be Re-Evaluated in a Post-COVID World – Part I

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Almost six months into the COVID-19 global pandemic, it is apparent that the commercial leasing landscape has changed indefinitely. Going forward, landlords and tenants will need to re-evaluate certain common lease provisions to adapt to the new reality created by COVID.

### Force Majeure

The first, and perhaps the most discussed provision since March, is the force majeure provision. For the most part, while landlords and tenants have agreed to add COVID and pandemics generally as a force majeure event, landlords have continued to carve out a tenant's monetary obligations from the force majeure provision.

We anticipate that tenants will increasingly try to push against that carve out; however, we do not anticipate many sophisticated landlords conceding on this point. On the other hand, as COVID litigation starts to take shape, landlords may argue that pandemics are now foreseeable and are not valid force majeure claims.

Landlords and tenants need to carefully consider the force majeure provision and draft the same with as much precision as possible to make sure intent is clearly conveyed and to prevent the necessity of court interpretation later.

### Continuous Use

In a similar regard to force majeure, the past six months have changed the way landlords and tenants approach the concept of continuous use, which is a common lease provision requiring tenants to operate continuously within the leased premises. As a result of government mandates and capacity restrictions, many tenants have argued that compliance with this provision may be impossible and out of their control in the age of COVID.

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We anticipate a growing trend of sophisticated tenants refusing to agree to continuous use provisions in their leases going forward. On the other hand, landlords will continue to have a strong incentive to push hard for continuous use provisions, especially in regard to multi-tenant retail projects.

When negotiating new leases or amending existing leases, landlords and tenants will want to place a renewed focus on the concept of continuous use and how such provisions interplay with force majeure in a post-COVID world.

### **Covenant of Quiet Enjoyment**

For landlords, the flip side of the coin to continuous use is the covenant of quiet enjoyment. Over the past six months we have seen numerous tenants, mostly in the office context, point to this provision as a defense to paying rent during any period their building has been closed. The success and viability of such a defense will depend heavily on the wording of the original provision and the interplay with any force majeure provision.

Going forward, however, we expect landlords will want to take a closer look at this provision, which many have previously glossed over as boiler plate and unimportant. We believe that quiet enjoyment provisions, like continuous use provisions, will require greater flexibility and thoughtful drafting going forward, and this will likely be a permanent change to commercial leasing.

Although some would propose that explicit carve outs in these provisions are simply a contractual codification of the common law doctrine of impossibility, we believe both landlords and tenants are better off relying on careful and precise drafting.

### **Modifications & Negotiations**

While scary to think about, future government shutdowns are a reality all businesses need to contemplate and plan around. In this context, both landlords and tenants might be incentivized to add pre-negotiated modifications to rent in their leases. By negotiating such a provision now, both parties receive the advantage of predictability along with future time and cost savings. Tenants can feel secure that they will have relief already in place should further shutdowns become a reality, and landlords can be comforted knowing that their economic exposure has already been negotiated.

As we saw with the almost-immediate lease amendments in April and May, the common ground for rent leniency seems to be base rent deferment with either an extended term or a six to twelve-month repayment period. For added security, landlords may want to consider including a provision requiring tenants to seek any pandemic-related government assistance available, especially with a proposal for a second round of PPP loans currently sitting in front of Congress.

As we will discuss further in Part II of this series, almost every lease provision requires re-evaluation in light of the pandemic, along with the need to add new provisions not previously relevant. Among other topics, Part II will discuss new considerations with respect to insurance provisions, maintenance obligations, and assignment/subletting.