Lowndes

Insights

Lease Provisions that Should be Re-Evaluated in a Post-COVID World - Part II

Lowndes Leasing Lawyers Blog
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In Part I of this series, we discussed how COVID-19 had impacted almost every provision of a commercial lease, including the covenant of quiet enjoyment, continuous use provisions and force majeure clauses, among others.

In Part II, we continue our review of standard lease provisions and arrangements that should be reconsidered in light of the pandemic's lasting effect.

Maintenance Obligations

As businesses around the world attempt a return to normalcy, it's become clear that changes in our standard infrastructure will be needed. In the leasing context, landlords and tenants now need to consider and negotiate new building services in response to the pandemic. For instance, landlord and tenants will both have an incentive to make HVAC upgrades to improve ventilation, increase cleaning and janitorial services, add screening procedures and security, and modify elevators and common areas to allow for social distancing.

The cost for these increased measures and updated improvements will have to be apportioned between landlord and tenant and will become a new point of negotiation prior to entering into new leases or amending existing leases. Landlords will want to pass through these charges to tenants, and tenants will push for some assurances or cap on the types of services and the cost for same.

While historically a fertile ground for contentious lease negotiations in the multi-tenant context, we anticipate an even greater emphasis to be placed on building services and operating expenses provisions going forward.

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Another hot topic prompted by COVID is insurance coverage. Extensive litigation of business interruption insurance policies has begun, with many insurers arguing against coverage due to a lack of physical damage to the premises.

Permanent changes to insurance requirements in leases will ultimately depend on the insurance industry's response to COVID. For instance, will insurers begin to offer a product that could protect landlord and/or tenants from pandemic-related losses?

In the meantime, landlords and tenants will need to re-evaluate and revise their indemnification provisions to account for third-party COVID claims. Well-positioned landlords will also likely insist on a release from the tenant for any liability arising out of COVID spread at the premises.

Assignment and Subletting

In addition, we anticipate that tenants will want to seek increased flexibility with respect to assignment and subleasing provisions in a post-COVID world. Landlords may consider granting these type of requests with certain limitations, such as detailed credit requirements.

Given the speed at which things have changed over the past six months, the need for future flexibility has been highlighted, and we expect a greater emphasis to be placed on assignment and subleasing provisions as a result.

Lease Security and Credit

Lastly, we believe landlords will be benefited by a renewed focus on lease security and credit. We anticipate that landlords will increase their credit standards and likely also seek larger security deposits going forward. In addition to providing financial security against a future tenant default, a security deposit could provide a cushion in the event that landlord and tenant need to negotiate rent deferment or abatement due to a future shutdown.

Similarly, we would expect that that landlords holding multiple leases with the same tenant would look for a cross-default provision as added security given the risky leasing environment created by COVID.

While landlords and tenants have adapted almost instantaneously to changes forced by COVID as they arise, whether those changes to common lease provisions will ultimately address the continued circumstances of the pandemic (and whether those changes will become permanent) remains unseen. Ultimately, almost every lease provision requires re-evaluation in light of the pandemic, along with the need to add new provisions not previously relevant.