



The Case for Post-Pandemic Flexibility in Commercial Leases

When negotiating and renegotiating leases, landlords should consider that it won't be business as usual for many tenants, according to attorney Scott Biel.



By **Scott Biel**

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As businesses begin the transition to safe reopening plans, the current focus of parties to commercial leases is appropriately on near-term recovery and the terms of repayment of deferred rent.

In doing so, however, it would be wise to hedge our enthusiasm for a “post-pandemic recovery” with commercial lease provisions that address the uncertainty of lingering impacts of the pandemic and the possibility of future disruptions.

A commercial lease contract is intended to provide landlords and tenants with certainty and predictability regarding their respective legal rights, and obligations for the tenant's use and occupancy of leased premises. Yet, for both tenants and landlords there is little certainty or predictability that a tenant's post-reopening business revenues will cover rents established under much different market conditions (such as whether a retail tenant's customers will resume in-store purchases over the long-term or continue to purchase the same goods through the internet).

One way to address such uncertainty that has been written about extensively during the pandemic is to excuse the tenant's non-performance under the common law concept of impossibility or the landlord's implied covenant of good faith in enforcing its remedies.

Knowing now, however, that such uncertainty and unpredictability of performance will continue to exist after reopening occurs, those "excuse provisions" are going to be less helpful, and a more effective approach to the uncertainty of the tenant's performance is for the parties to agree to lease provisions that provide the parties with greater flexibility and, thereby, hedge the risk of nonperformance.

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One example is to incorporate negotiated relocation rights into existing lease work-outs and new lease agreements. Relocation provisions permit a landlord to move a tenant from those premises specified in a lease contract to another space in the building or shopping center, without the necessity of terminating the lease contract or the tenant's leasehold interest. This means that the landlord need not go through the time and expense of an eviction process, or expose itself to the risks of its tenant invoking the automatic stay or other bankruptcy code protections, in order to recapture premises and move the tenant to another location.

Using relocation rights can eliminate "gap spaces" in a shopping center by aggregating existing tenants in premises adjoining one another, or free up a partially leased floor for leasing to a full-floor tenant.

Often, standard relocation provisions are deleted early in lease negotiations because the relocation right was not included in the landlord's lease proposal, or because the boilerplate language is poorly drafted and is perceived as an unacceptable arbitrary right by the tenant. Under deferred rent work-out negotiations, landlords should be able to condition rent accommodations on a relocation right if the tenant fails to perform. In new lease transactions, landlords and brokers should incorporate relocation concepts into lease proposals using terms that support a constructive dialog regarding their use under reasonable terms.

For example, a landlord's relocation right might be presented as a potential benefit to the tenant, by offering the tenant a rental rate reduction if the proposed relocation space is outside a "preferred area" of the building or shopping center; and instead of general language stating that the landlord will pay all costs of relocation, the relocated tenant can be provided with a fixed renovation allowance upon any relocation. Such beneficial terms should be conditioned on the relocated tenant not being in breach of the lease when the relocation occurs.

Relocation can also be an alternative to a tenant termination right, with the ability to relocate to smaller premises at a rental rate commensurate with such space and with the tenant paying for the cost of improvements to the replacement premises. Landlords might also consider tying relocation to a tenant's proposed assignment or subletting (in addition to, or in lieu of, a recapture right, which requires resorting to the eviction process for enforcement).

After negotiating mutually acceptable relocation rights, the parties should be careful that other standard lease provisions do not contradict those relocation rights. For example, an integration clause, requiring that all amendments to the lease be signed by landlord and tenant, should be drafted to permit exercise of the landlord's relocation right without any amendment of the lease. Relocation provisions should also provide landlords with effective enforcement rights (without having to resort to default remedies if the tenant fails to comply).

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