

# TOP 5 BUILDING OCCUPANCY QUESTIONS DURING COVID-19

Landlord-tenant issues are top of mind right now as COVID-19 has changed the rules of the game nationwide.

By Diane De Felice and Joshua Rabinowitz

As real estate attorneys, Diane De Felice and Joshua Rabinowitz are used to fielding questions regarding building occupancy and the individual duties of landlords and tenants. Then COVID-19 hit and those questions intensified — as well as shifted.

Below are answers to the five most commonly asked questions these attorneys address on a daily basis.

## 1. What should landlords and tenants keep their eyes on as they navigate the pandemic?

Real estate owners and managers are navigating an evolving regulatory landscape that varies by jurisdiction, as well as market-specific conditions.

One continuing question that is being visited in commercial contracts is how force majeure clauses will be applied in COVID-19 times. Parties are reviewing existing contracts to determine its application, which could include suspension or even termination of the lease or other real estate contracts.

How the legal concept is interpreted will dictate its applicability to the pandemic conditions. For future contracts or renegotiations, the definition should include government shutdowns. Landlords will negotiate to still allow rent collection, while tenants will negotiate for rent flexibility depending on varying degrees of business operations regulated by the government.

The timing of lease execution may also be a determining factor in whether a force majeure provision excuses the obligation to pay rent (i.e., should the tenant have known about the threat of a pandemic when signing the lease?). COVID-19 is likely to permanently leave a mark on force majeure provisions, including new language that speaks to government-imposed restrictions, co-tenancy provisions with carve-outs for specific forced closure or reduced operating capacity restrictions and claim noticing provisions.

## 2. What are the common conflicts arising between tenants and landlords and how are these conflicts being resolved?

These questions tend to boil down to “will a conflict over rent or other related COVID-19 issues lead to a lawsuit?” From a business standpoint, conflicts cost money for both sides.

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To the extent disagreements over rent terms or occupancy issues can be resolved, that is what we see parties attempting to do.

A relatively small number of conflicts will result in lawsuits. For example, we’ve already seen some rulings, including in the U.S. Bankruptcy Court for the Northern District of Illinois, holding that a restaurant lease’s force majeure provision excused some of the lessee’s obligations to pay rent during the government-mandated closure because of COVID-19. There is also legislation pending in many states that would require retroactive business interruption insurance coverage.

Other types of lawsuits over COVID-19 issues have been filed, such as the Sketchers USA suit against its landlord in Los Angeles Superior Court alleging its landlord failed to heed COVID-19 safety protocols in its building, thus putting Sketchers’ employees returning to work at risk. The suit may, however, have been motivated by other previous building issues that are referenced.

In the absence of regulatory certainty, landlords engaging in proactive communications lead to better tenant relations that will assist in lease restructuring, if needed.

## 3. How will the commercial real estate industry’s needs change as the economy resumes?

In the ever-changing circumstances driven by the pandemic, solutions to landlord-tenant conflicts will, in part, be determined by temporary rules and regulations of different jurisdictions. Depending on location, the answers will vary regarding rent abatement, rent deferment, eviction, allowed occupancy rates, necessary safety precautions and others.

Even while navigating different contract issues, the status of the buildings themselves brings into question the safety of returning to temporarily unoccupied buildings. For instance, what is the condition of the building and what steps are being taken to ensure tenant health and safety? From the landlord’s perspective, they may

question limits on allowed occupancy for spaces and guidelines for shared common areas in tenant-occupied buildings.

While the pandemic conditions may drive some jurisdictions to alter building codes in efforts to make buildings safer, other jurisdictions in mild climates may be able to increase safety by expanding the use of outdoor areas onto sidewalks or other public spaces. For restaurants, this enables businesses to maintain seating capacity while providing social distancing. Similarly, buildings situated in hot climates face operational challenges with existing HVAC systems. Decisions to ensure HVAC systems support proper air filtration to minimize transmission risk may also need to be weighed against retrofitting needs. If it becomes too expensive to retrofit a system, then increased operating costs may be pass-through expenses of the tenants.

On the tenant side, the focus surrounds whether contract provisions can accommodate their changed circumstances, as well as the safeguards being implemented. For example, does the space need to be redesigned for precautionary health purposes? What steps are being taken to ensure shared amenities like elevators, lobbies and bathrooms are safe when employees return to work? Referring to the Centers for Disease Control (CDC) guidance provides all parties with a starting point for expectations regarding proper safety.

## 4. Are there any opportunities for property owners to repurpose spaces and satisfy new types of demand?

Ultimately, most of the COVID-driven trends were largely in motion pre-pandemic and have only been accelerated. While there are questions as to whether sectors like retail will further decline, that sector’s industry experts now focus specifically on the “retail experience” to entice customers away from ecommerce and door-to-door delivery.

With respect to trends in building systems, touchless sensors, keyless entry and automation are nothing new



De Felice



Rabinowitz

and will only improve. Real estate will remain a strategic asset as buildings are not merely places for people to do their jobs or consume goods, but serve as critical gathering places for social interaction. That said, landlords will be strategic about repurposing their buildings. They will have to consider short-term tenant concerns to reoccupy those spaces as capital improvement best practices are refined.

## 5. How does COVID-19 fit into the larger trends in the marketplace?

Who will win the battle between suburban and urban living has been an ongoing investor question. In the short-term, there is a new willingness to leave city centers for both residential and commercial purposes. For the first time, large companies like Facebook and Google have indicated remote working is a wave that will continue.

Things to watch include pending legislation in California that could have major implications for struggling tenants and their landlords. Senate Bill 1410, recently passed by the state Senate, would allow 10 years (Jan. 1, 2024 to Jan. 1, 2034) for tenants to make up forgone rent during the pandemic. Assembly Bill 1436 would make it temporarily illegal for landlords to evict tenants who haven’t paid rent and would be in effect for 90 days after California’s emergency order expires. This bill would not provide rent forgiveness, however, and doesn’t prevent landlords from collecting rent through other means.

These are obviously very difficult and challenging times. The pandemic’s effects will be with the market for a while, but we are also see accelerating trends that will have lasting and positive effects on many aspects of commercial real estate.

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Diane De Felice & Joshua Rabinowitz, Shareholders, Brownstein Hyatt Farber Schreck in Santa Barbara, Calif.