

REcap

THE COMMERCIAL REAL ESTATE
PERSPECTIVE

This issue of **REcap** considers how post-pandemic concerns over building environment, real estate economics, and risk allocation may impact the commercial lease agreement.

Before COVID, landlord and tenant perceptions of “standard industry practice” placed soft boundaries on commercial lease documents. While negotiating leverage always affected outcomes, opinions of what was “fair, market, or standard,” limited how far a party might push on deal points.

The pandemic may cause the parties to discard the past. Social distancing, business shutdowns, and greater awareness of infectious disease add a new dimension to the risks associated with owning and leasing property. Since a commercial lease is a risk allocation tool, the character of post-COVID lease negotiations may be very different from the past.

THE ISSUES IMPACTING POST-COVID COMMERCIAL LEASES

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OVERVIEW

POST-COVID THINKING AND BUSINESS MOTIVATIONS

The Common Perspective

The pandemic created heightened sensitivity to health and safety issues in public areas and work environments. The public is divided among those who fear infection and those who feel the hazards are overblown. In theory, landlords and tenants share an interest in finding cooperative solutions that protect property values while maintaining a tenant's business continuity. In practice, their common objectives for fiscal conservatism and risk avoidance conflict.

The Tenant Perspective

Even with re-opening, health officials recommend masks and social distancing. Employees may demand barriers between workspaces. Tenants are now concerned about anything their employees and visitors might breathe or touch in the physical environment.

Businesses are coping with adverse economics. The disruption is choking cash flow. Cutting expenses through consolidations, layoffs, and inventory reductions is a path to survival. Fixed financial obligations likely frustrate business managers. With business closures, fewer employees and smaller shifts, long-term leases prevent companies from making immediate cuts to occupancy expense. Future regulation is uncertain. Under revised codes, office space may allow fewer workers, salons may have less chairs, and restaurants might reduce tables.

And there are liability issues. Many insurance policies don't cover COVID-related losses. Employees and visitors may seek recourse against businesses if health issues develop. Entrepreneurial lawyers will invent new causes of action. Tenants will try to shift these risks to landlords under future lease agreements.

The Landlord Perspective

Landlords face possible costs from new building code standards. One small tenant may require a disproportionately expensive building upgrade that other tenants do not need. Regulations may limit the intensity with which persons can use a property. New requirements may apply for public common areas.

A decline in business earnings places downward pressure on rents. Landlords might support higher rents by implementing improvements to make their properties more valuable to tenants but, whether rents decline, or costs increase, landlords cannot insulate real estate profits from tenant profitability. In many ways, landlords are partners in their tenants' businesses.

Landlords will face liability issues similar to those of tenants. If a lawsuit names the tenant as a first defendant, the landlord will likely be the second defendant. Landlords want to shift new risks onto tenants.

Landlords may be locked into loans that limit management's flexibility for dealing with crisis.

Summary

Increased sensitivity to possibilities once considered improbable will have far-reaching implications for how properties are managed and financed, bringing increased tension to landlord-tenant relations. What may have been a standard lease deal in the past, is now subject to dramatic change. It's safe to assume that parties are rational and seek to maximize profits. Therefore, the insecurity associated with social uncertainty encourages the parties to shift risks onto the other. Negotiating power and fear of the new normal will be the motivating forces that shape the post-COVID lease agreement.

These forces could bring significant change to real estate leasing, management and finance.

The following outline identifies lease concepts that may be scrutinized in a post-COVID world and offers

LEASE DOCUMENTATION ISSUES

THE LANDLORD-TENANT NEGOTIATING DYNAMIC

Post-COVID, new risk perspectives will influence the drafting and interpretation of lease documents. Parties will closely consider whether specific language implies unintended consequences (e.g., a lease that defines a “taking” as “a loss in use due to government action,” is entirely different from a taking defined as “government possession of tenant’s premises”). This outline’s observations may be highly plausible while others appear highly speculative. It intends to prompt thought and invite discussion, not to predict the future.

This issue of REcap is not intended as legal advice. No reader should act on the basis of its information without first seeking legal advice from counsel.

General Issues Affecting Commercial Leases

LEASE PROVISION	EXPLANATION	MOTIVATIONS	ISSUES
Blank Check Provisions vs. Individual Circumstances	Blank check provisions grant parties broad rights upon a triggering event without considering individual circumstances.	<p>Blank check provisions may have unintended consequences.</p> <p>Benefitting persons may not be reasonable about enforcing blank check provisions (e.g., tenants will abate rent under a co-tenancy clause even if the reference tenant’s closure does not impact their profits).</p>	<p>Parties must define clause-triggering events with precision to avoid unintended consequences.</p> <p>Lease provisions may incorporate examples or explanations of the risks that a clause intends to prevent as an aid to interpretation.</p>

Credit and Payment Security

Landlords' documents may provide draconian remedies for a tenant's rent default, but remedies are only as good as a tenant's credit.

Leasing is a credit transaction. The shutdown led to business failures and bankruptcies.

If tenants cannot pay rent or if laws exempt tenants from paying rent, landlords' remedies become worthless.

Bankruptcy law favors tenants. Laws may allow tenants to reclaim cash security deposits or letters of credit provided under leases.

Jurisdictions may adopt measures to prevent evictions or allow rent moratoriums. Commercial landlords may not see comparable relief to pay debt service and property expenses (e.g., California introduced a bill allowing tenants to renegotiate or terminate leases with no material penalty).

Government orders may be impossible to circumvent. Landlords might litigate the constitutionality of such actions. Still, a court's decision may take years and involve high costs.

Deleveraging the capital stack may prove far more practical in reducing landlords' exposure to payment risks. As property leverage declines, landlords strengthen their cash flow security and negotiating power positions.

Many owners seek to maximize leverage to boost returns on equity. But in uncertain times, leverage increases risk disproportionately. Owners must choose between higher short-term returns and longer-term security.

Executive Orders	Leases require parties to comply with governmental laws.	Executive orders may prevent parties from complying with otherwise mandatory lease provisions. Executive orders may be unconstitutional or may differ by state or locality.	Parties cannot do much to avoid shutdown orders, stay at home orders, or eviction moratoriums. What happens when governments lift restrictions? Do parties continue from the point immediately before the restriction? Should parties “true-up” to balance benefits and burdens? If a moratorium excuses performance, should the lease require a tenant to cure nonperformance when restrictions lift? Should a payment default during a rent moratorium be curable?
Innovation and Market Pressure	The market has trended toward increased availability of alternate facilities such as co-working, shared offices, flexible workspaces, hoteling, and temporary spaces.	The typical commercial lease does not provide the flexibility offered under these innovative alternate arrangements.	Even though alternative space providers have struggled with profitability, new competition pressures owners to change long-standing leasing policies.
Government Relief and Insurance	Leases typically assume that parties are rational and will apply for government relief or submit insurance claims at appropriate times.	Parties want relief immediately. However, a party that might grant relief prefers that a requesting party first exhausts other alternatives. If one party receives third-party relief, the other would want to share in those benefits.	Leases may require parties to apply for relief as a condition to accessing pre-negotiated rights under leases. Compliance-monitoring raises issues. Parties may need to establish sharing formulas to allocate relief between them. Parties may require one another to operate in a manner that maintains qualifications for a relief program.

Loans and Lenders

Many properties use leverage. Debt adds to risk. Loans may be recourse or nonrecourse to individuals.

Loans generally prohibit borrowers from reducing rent or allowing early termination. Lenders may have lease approval rights or set minimum rent and term.

Lenders analyze a property's cash flow stability to underwrite loans. Lenders view long-term leases to credit tenants as the best security and prefer leases that extend beyond the loan term as assurance that a property is re-financeable upon maturity.

Lenders fight changes to standard documents to ease administration and facilitate loan sales or securitizations. Loans may prevent prepayments or charge substantial fees as a condition to prepayment.

Landlords are in a squeeze.

Post-COVID, tenants will seek flexibility, and lenders will seek stability. Lenders may search for lease clauses that allow tenants to reduce rent or terminate early. These clauses cause lenders to lower LTVs, fortify covenants, increase pricing, or demand guarantees.

Borrowers need greater flexibility to deal with a crisis. Lenders can be irrationally inflexible or slow to accommodate requests. Lender bureaucracy or predatory practices impede the ability to deal with crises.

During past crises, government action favored financial institutions (e.g., "too big to fail") and tenants (e.g., eviction moratoriums) while providing no comparable relief to commercial property owners.

Increasing tenant lease flexibility without incorporating comparable flexibility into a property's capital structure is a recipe for disaster.

The real estate industry's debt addiction gives lenders great negotiating power. Until the industry rejects traditional loans, lending practices will not change.

Material changes to loan documents are practically impossible. In the near term, reducing leverage may be the only practical way to increase a landlord's flexibility. This may reduce short-term returns but allows properties to perform during downturns.

Landlords should push to retain broad discretion to restructure leases and manage properties without involving lenders. The ability to prepay mortgages without penalty could help. Legislation requiring lenders to disclose loan documents before borrowers place nonrefundable deposits may also level the playing field.

Landlords and investors may use different equity classes to simulate leverage. Investors could receive preferential (not guaranteed) returns. Property profits would determine distributions. Unlike loans, these approaches relieve cash pressures in an emergency.

New equity agreements might also include upside and downside sharing formulas. "Sharing the pain" may prevent different equity classes from suffering a complete loss due to catastrophe.

Option Mutuality	<p>Leases contain provisions that give a party the right, but not an obligation, to take action.</p>	<p>Parties exercise options to receive benefits, except if the consequences are not favorable.</p> <p>Options may have unintended effects.</p> <p>Parties have different risk or return profiles associated with a specific lease option. E.g., a fixed rent extension option may seem balanced because unknown future market conditions have an equal chance of benefitting either party. However, a tenant's extension option incorporates an extra option—the right to terminate. Parties tend to overlook all rights hidden in a seemingly balanced option.</p>	<p>Parties should thoroughly evaluate the dynamics involved through the exercise of an option to determine if a balancing right (or option) is prudent.</p> <p>E.g., A tenant's assignment option may balance with a landlord's termination option, or an option to increase rent. Similarly, a landlord's option to withhold consent may balance with a tenant's option to terminate.</p>
Reasonable Consent	<p>Leases frequently condition a party's right to withhold consent based on a "reasonableness" standard.</p>	<p>The "reasonableness" concept is backward-looking. Yesterday's reasonableness may not apply to a future extreme event. Perceptions of "reasonable" vary greatly with unprecedented events and uncertainty.</p>	<p>Consent provisions may require more detailed consent requirements (e.g., assignment consent provisions may include more restrictive use and occupancy conditions).</p>

Tenant Voting and Discretion	Leases define a party's discretion in performing or consenting to specific actions.	A party possessing discretionary authority may fail to act. Voting rights could be used to compel action.	<p>Buildings may take on voting rights similar to those associated with condominium ownership.</p> <p>Tenant voting may be a strategy to compel specific property-wide actions that some may be unwilling to undertake.</p> <p>E.g., Some tenants may want a higher janitorial standard while others object to cost. The landlord may object because reimbursement caps would not allow full recovery. A voting mechanism could compel action and allocate costs.</p>
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Specific Lease Provisions

LEASE PROVISION	EXPLANATION	MOTIVATIONS	ISSUES
Amenities	<p>Landlords use amenities like conference rooms, food service, and tenant lounges to make properties more attractive.</p> <p>Leases may require landlords to keep amenities available.</p>	<p>Shutdowns or other restrictions limit amenity use.</p> <p>Amenity use may create liability issues.</p>	The conditions for using building amenities may now incorporate sanitation standards, revised occupancy limits, higher costs, indemnity, or special insurance.

Assignment and Subletting	A lease defines a tenant's right to assign or sublet its premises. It may provide either landlord or tenant with discretion concerning these decisions.	Absent express prohibitions, leases are generally assignable and sub-lettable.	Perceived higher-risk uses may motivate landlords to define assignment and sublet rights closely. Parties may explore broad prohibitions that redline a range of potential uses. E.g., Leases may either prohibit assignment to a specific medical practice area or prohibit any medical use.
Building Rules and Regulations	Leases contain rules to facilitate building operations. Landlords reserve the right to change rules to adapt to changing conditions. Failure to abide by rules may lead to special charges or trigger default. Some tenants prohibit changes to specific rules without their approval.	Parties often negotiate for control over the property environment, each with different or conflicting reasons. Without sufficient regulatory health guidance, rules could be critical to operating a multi-tenant property.	Many factors influence the need to control property management. Leases may place new requirements on workplace rules, such as sending sick employees home or establishing return-to-work procedures.
Casualty, Damage, Destruction, Condemnation, and Takings	Leases use casualty, condemnation, and takings provisions to allocate the risks associated with a loss of use for the premises. Some leases distinguish between partial and permanent takings.	The inability to use the premises due to a disaster or government action may engage a takings clause. More careful definitions avoid unintended consequences.	Parties should consider whether a lease defines casualty, condemnation, or taking in terms that apply to a pandemic or government-mandated shutdown or whether these provisions should apply in those situations.
Common Areas	Leases define a tenant's right to use common areas. Tenants and the general public may share common areas. Leases allocate common area maintenance costs and common area control.	The possibility of transmitting illness through common areas raises access and liability issues. Tenants may rely on common areas such as parking, elevators, restrooms, outdoor areas, and shared building amenities to support their businesses.	After 9/11, some buildings installed security checkpoints. Buildings may now require temperature screenings at checkpoints. Landlords may implement additional access control points. Checkpoint operating costs require allocation.

Compliance with Law	Leases require both parties to comply with federal, state, or local laws.	Legislative action is unpredictable. Legislators are slow to react or quick to overreact. The current pandemic raises the possibility of conflicts of law as federal and state mandates may differ.	Allocating cost and performance obligations for future legislative change is controversial. Parties must address whether new costs are borne by one party, several parties, or shared through building reimbursable charges.
		The pandemic invites material change to health and building codes. Changes may apply to the general public or tenants in specific industries. Changes may bring increased costs for implementation or compliance.	Where conflicts of law exist, parties must decide which law applies. They may default to a choice of law provision, complying with the more or less stringent requirement, or relying on independent counsel's advice.
Confidentiality	Leases may contain provisions prohibiting disclosure of certain information.	Enforcing confidentiality provisions is difficult. Breach and damages are hard to prove.	Remedies may involve revoking or recapturing concessions or liquidated damages.
	Medical and financial tenants may require landlords to execute special confidentiality agreements.		Laws may compel disclosure and invalidate confidentiality provisions.
Co-tenancy Clauses	Retail leases may require rent adjustments if a major tenant closes or a property fails to maintain an occupancy level.	A large retail tenant closure may reduce traffic to a shopping center, impacting smaller tenants relying upon the anchor tenant to bring traffic.	Co-tenancy provisions are a trap for the unwary. While some tenants genuinely need protection, others use co-tenancy as a trap to take unwarranted rent discounts. A needs-based approach should guide drafting. Parties must consider whether a standard co-tenancy clause should apply during shutdowns or whether some other provision, more specific to a shutdown's cause or duration, should apply.
		Some tenants may benefit during an extreme event while other tenants struggle. Specific types of tenants may bring about increased sensitivity (e.g., medical offices).	

Cure Periods	Leases may provide for prior notice and an opportunity to cure as a condition to place a party in default.	Cure provisions may be drafted narrowly.	Cure periods could be extended when unprecedented conditions prevent a party from curing a triggering event. Cure periods might not apply if a party takes unreasonable advantage of an emergency.
Delivery and Surrender of Premises	Terms like “broom clean,” “as-is,” and “ordinary wear and tear” do not consider viral or bacterial contamination.	Liability issues warrant a clean environmental cutoff upon lease commencement or termination.	Liability cutoffs require “bright line” standards to avoid disputes. Pathogenic baselines don’t seem possible. Instead of certifying a level of environmental hygiene (e.g., “germ-free”), certifying compliance with an agreed-upon sanitation process is far more practical. Parties should also consider how to sanitize any furniture on the premises.
Discretion	Leases define the discretion that a party has in performing or consenting to specific actions.	Parties want greater discretion to address uncertainty. Parties generally lack the trust to grant another party broad discretion. Defining discretion reflects individual risk perceptions.	Government order might trigger discretionary rights. However, parties must work through any void if the government is slow to act or if a party perceives a higher risk than government experts perceive.

Environmental	<p>Leases allocate responsibility for environmental conditions, including the use, presence, and handling of hazardous materials (historically defined in terms of chemical pollutants, such as asbestos or hydrocarbons).</p>	<p>Leases may require compliance with environmental law and tend to reference EPA standards.</p> <p>HHS has regulatory authority over infectious disease.</p> <p>Scientific understanding evolves. Fixed rules may have unintended consequences as understanding evolves.</p> <p>It is difficult to rely on regulatory standards absent a body of case law to show how regulations apply.</p>	<p>The pandemic adds a new dimension to the definition of hazardous materials in a hopelessly complicated area of law.</p> <p>Leases might distinguish between chemical contaminants under EPA control and microbial contaminants under HHS control.</p> <p>In addition to cost and liability issues, landlords may place greater restrictions on the handling of medical waste and the use of common areas for the pickup and delivery of potentially bio-hazardous materials such as medical collection boxes.</p>
Fair Market Value Options	<p>Leases may provide tenants the option to extend the term, tying option rent to “fair market value” or “FMV.”</p> <p>Larger tenants tend to have extended periods to exercise renewal options.</p>	<p>Parties’ perception of FMV may differ widely under stable market conditions. Unstable market conditions make FMV determination more challenging.</p> <p>A market disruption may invite tenants to exercise a FMV option to exploit a temporary window of decreased rents.</p>	<p>Landlords may counter with termination rights, floors on rent adjustments, or repricing/look back/”true-up” mechanisms.</p>

Force Majeure

Force Majeure clauses forgive a party's failure to perform obligations due to circumstances beyond that party's control.

Landlords typically provide that the obligation to pay rent is exempt from Force Majeure.

Force Majeure can provide for different kinds of relief (e.g., the waiving of operating provisions, liquidated damages, rent relief).

Force Majeure may now expressly provide for rent relief under defined events.

Force Majeure relief may be contingent on a showing that either a party needs relief, that the event was genuinely unforeseeable, or the extent to which a party failed to take precautionary measures. E.g., If a tenant does not bear the cost of an optional precautionary measure, the tenant would not be entitled to Force Majeure for related adverse conditions.

Force Majeure events typically excuse performance, but they might also prevent performance. E.g., Some retail tenants reserve the right to terminate a longer-term lease if sales do not achieve a specified target. A tenant may use Force Majeure to compel a lease renegotiation. A Force Majeure event may prohibit a party from exercising options that were intended for stable market conditions. A prohibition on exercising individual options during a Force Majeure period may balance interests.

Insurance	<p>Leases allocate responsibility for insurance costs and coverages.</p> <p>Property loan agreements often allow lenders to alter insurance requirements at their discretion. Landlords try to pass insurance costs onto tenants.</p>	<p>Insurers are pushing back on claims for pandemic-related payments. Some policies specifically exclude such events. Insurance riders may guaranty pandemic coverage, but costs are a deterrent.</p> <p>Lenders may now require landlords to obtain new insurance; landlords will want tenant reimbursement for those costs.</p> <p>Parties may seek greater assurance that insurance carriers will pay benefits when required.</p>	<p>Insurance may be a key future battleground. Lenders may now require owners to obtain pandemic insurance. Parties may renew focus on cost pass-throughs, defining uncontrollable expenses, and increase caps.</p> <p>Where insurance is available, one party may obligate the other to file a claim. Insurance availability may tie to lease concessions. The failure to obtain optional but expensive coverages might bar a party from exercising selected lease rights.</p> <p>A perceived increased chance of super-regional or nationwide risks may restrict the use of blanket policies and self-insurance due to concern that a single crisis could have a broader impact.</p> <p>ACORD forms do not guaranty insurance. Landlords may now review policies to confirm coverages. Parties may become more diligent about requiring specific policy forms.</p>
Landlord Entry	<p>Leases define a landlord's right to enter a tenant's premises for various reasons.</p>	<p>Landlords may want an unfettered right to enter premises for cleaning or disinfecting.</p> <p>Tenants have an interest in protecting confidential client records.</p>	<p>Entry provisions may balance with indemnity and confidentiality clauses.</p> <p>Landlords may want broader rights to enter premises, including those that store confidential information, and tenants will resist.</p>

Landlord Inducements	Lease economics and loan agreements don't give landlords an incentive to give tenants rent adjustments.	While tenants would like assurance that rent adjustments are available, landlords resist because a predetermined provision may be only a starting point for negotiations.	Credit enhancement, termination rights, term extensions, canceling tenant options (e.g., renewal, contraction, expansion) may induce landlords to adopt pre-negotiated relief provisions.
Lender-Approval	Express lease provisions, loan documents, and SNDAs may require lender approval for lease modifications (usually tied to rent or lease term adjustments).	<p>To avoid uncertainty, tenants want to pre-negotiate clauses. A tenant does not want to rely on a lender's benevolence.</p> <p>Landlords prefer to preserve their rights and negotiate relief and concessions on a case-by-case basis.</p>	Since loan agreements are inflexible, parties may consider incorporating concession and relief provisions into the original lease document, rather than seek lender approval for amendments.
Maintenance	<p>Leases allocate costs and responsibility for property maintenance.</p> <p>"Gross-Up" provisions complicate cost allocations.</p>	<p>Unprecedented events give rise to backward-looking preventative measures. Parties may want to change maintenance standards in response to an emergency (e.g., Parties may demand periodic ductwork sanitization or special cleaning).</p> <p>Cost allocations may distinguish between fixed and variable costs, but some variable costs are fixed in the short term. Leases may not fully address sudden, temporary changes in operating costs.</p> <p>Equipment and materials shortages arise during emergencies.</p>	<p>Parties may decide to stockpile equipment (e.g., PPE, sanitizer, batteries, generators, cleaning agents) for emergency use.</p> <p>Altered maintenance standards impact operating expenses, which ties to allocations, expense appropriateness, cost-sharing formulas, and the application of caps on operating expense increases.</p> <p>Parties may now revisit their respective responsibilities for unanticipated maintenance costs. Events may exempt specific increased maintenance costs from cost-sharing caps.</p>

Notifications	Leases may require a party to provide specific notice upon a triggering event.	Parties may want notification of transmittable illness that may occur within a building.	<p>Notice requirements must be balanced with privacy issues. Having notice requirements raises issues of monitoring responsibilities and constructive knowledge.</p> <p>State laws flip-flop on notice requirements related to infectious disease. Some jurisdictions mandate COVID reporting and expressly prohibit other disease reporting (e.g., AIDS). Will the failure to report create liability to anyone becoming infected or to infected persons who want to protect personal privacy?</p>
Percentage Rent	<p>Retail leases may provide that a landlord receives additional rent based upon tenant sales.</p> <p>These provisions typically include operating covenants to increase sales and maximize percentage rent.</p>	Government-mandated shutdowns may reduce retail sales.	<p>Alternate rent provisions may apply during mandated shutdowns.</p> <p>These alternate provisions could work in several ways. During shutdowns, fixed rent or other charges may increase to an adjusted minimum rent, or fixed rents may convert to a percentage formula. A shift to percentage rent during a crisis may be balanced by a “catch-up” rent clause when the crisis ends.</p>
Possession and Holdover	<p>Leases may require tenants to take possession of the premises and commence rent by a specific date.</p> <p>Holdover provisions may invoke rent premiums for tenants who remain beyond the expiration of the term.</p>	Shutdowns may limit a tenant’s mobility or prevent a landlord from delivering a space.	Parties may create carve-outs to account for periods when moving becomes impractical.

Premises	Defining the leased premises impacts maintenance, insurance, and compliance obligations. The premises also define expense-sharing ratios.	Governments may change use and occupancy classifications. Reducing occupant load makes the premises less efficient. Lowered efficiency makes leaseholds less valuable.	Changed classifications may trigger remeasurement or new expense sharing ratios due to a changed relationship between usable and rentable square footage.
Quiet Enjoyment	Quiet enjoyment asserts a tenant's uninterrupted use of its premises.	Third-party interference may breach the quiet-enjoyment covenant. Generally, landlords must have some responsibility for the interference to engage the covenant. A landlord's voluntarily building closure may engage the covenant.	Quiet enjoyment could be a back-door approach to obtain force-majeure-type relief.
Recapture of Abatement or Deferral	Leases that allow rent abatement generally do not contain provisions that allow a landlord to recapture abated rents.	Deferral, versus abatement, may increase a landlord's willingness to provide emergency assistance.	Conditions that trigger recapture could tie to a tenant's subsequent receipt of relief or a tenant's post-crisis financial performance. Repayment terms such as interest, timing, installment or lump sum payments, or lease extensions are open for discussion.

Rent Abatement, Deferral, or Reduction	Leases may require landlords to abate rent under certain conditions.	Shutdowns prevent tenants from making full use of their premises.	Leases must define shutdowns and, possibly, partial shutdowns. Definitions may incorporate concepts related to the financial impact, duration, occupancy restrictions.
		Shutdowns may have indirect impacts. A shutdown in one region may cause a supply chain disruption that impacts a tenant's operation in another region.	Parties should consider if rent abatement is appropriate under all shutdown circumstances. Revenue or profit benchmarks may trigger this provision.
		Landlords may lack the cash flow to grant concessions. Loan covenants may prohibit landlords from granting concessions.	Partial shutdowns require formulas for rent proration. Deferral may replace abatement. Credit enhancement (springing guaranties) on deferred amounts could make terms more palatable. Leases may require parties to apply for third-party relief as a precondition.
Representations and Warranties	A lease party may make assertions on a range of topics.	People want to know that their workplaces will not make them sick. Indoor air-quality concerns have grown. Communicable illness adds a new dimension to these concerns.	Nobody can guaranty a premise's hygiene. Parties may find it more practical to represent and warrant specific sanitizing processes.
Restoration	Following a casualty, leases allocate responsibility for restoring the premises to a functional condition.	Restoration obligations may mandate other building upgrades.	When determining how shutdowns relate to restoration, parties should consider causation, availability of insurance proceeds, and the extent of physical damage to the premises.
		E.g., Older buildings may have "grandfathered" facilities or exempt from current code requirements. Generally, a restoration project must meet current codes.	

Tenant Improvements	Code requirements, employee issues, public perception, or liability issues may induce new design standards.	<p>Out of caution, parties may choose designs that exceed code requirements.</p> <p>Offices, work, and visitor areas may need to be larger and better ventilated. ASHRAE standards are evolving. Standards may vary subject to the nature of a tenant's business (e.g., business office, medical office, retail store). Depending on building design, upgrades may be costly.</p>	<p>New design standards may impact space efficiencies, which impact lease economics.</p> <p>Complex issues arise when a tenant's alterations or landlord's capital improvements trigger code upgrades during an individual tenant's lease term.</p> <p>Cost allocations may consider the extent to which changes are tenant-specific or generally applicable to any occupant.</p>
Use and Occupancy of the Premises	Leases define the permitted use and occupancy restrictions of the tenant's premises. Leases may prohibit assignment or subletting that results in a change in use.	<p>People may perceive some uses as a higher risk. Occupancy ratio, traffic patterns, or the character of visitor traffic links to health and safety concerns.</p> <p>Some uses may create negative perceptions among other tenants (e.g., Despite anti-discrimination legislation, fear of AIDS discourages tenants from leasing in a building with an AIDS clinic).</p>	<p>Use provisions may define rights with greater precision and set more substantial limits on change.</p> <p>As opposed to static restrictions, provisions may incorporate forward-looking concepts that adapt to changing conditions.</p> <p>If an undesirable tenant leases at the property, other tenants may seek termination rights (see Co-Tenancy).</p>

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Kirk Cypel is an attorney and licensed real estate broker who completed millions of square feet of office, residential, retail, and light industrial leases for both property owners and tenants. He negotiated many sophisticated leases involving detailed construction requirements, complex expense-sharing provisions, and multifaceted option rights. He also devised administrative and documentation guidelines for real estate portfolios regarding accounting, assignment, subletting, hypothecation, subordination, and lien waiver issues. His special expertise includes buyouts, liquidations, restructurings, workouts, and insolvency situations.





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