

Coronavirus Legal & Human Resources

April 6th, 2020

BOMA

Canada



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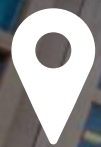
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Welcome from BOMA Canada



Benjamin Shinewald
President and CEO
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Please contact relevant public health authorities for medical/public health advice. Neither BOMA Canada nor the individuals presenting herein are providing such advice.



Force Majeure – A Commercial Leasing Perspective



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Definition of Force Majeure

- The phrase “Force Majeure” is a French based phrase which means “supervening” or “superior force”
- It is mostly synonymous with:
 - Acts of God and natural disasters such as hurricanes, floods, tornados, fires and earthquakes
 - Violence including war, terrorist acts, civil unrest
 - Government actions such as laws, orders, regulations
 - Shortages of power, supplies and infrastructure, transportation
 - Organized labour activities such as strikes and work slow-downs
 - Biological and Environmental Threats or Disease including communicable disease, epidemics, pandemics, harmful chemicals spills or release, harmful gaseous spills or release
 - Propelled or falling objects in or from the sky including aircraft, drones or spacecraft or any parts thereof, meteors, meteorites or asteroids
- The clause is commonly known and referred to as “Act of God” clause
- Definition in a leading contract text is “a contractual term by which one (or both) of the parties is entitled to cancel the contract or is excused from performance ... or is entitled to suspend performance upon the happening of a specified event or events beyond his or her control”

Typical Force Majeure Lease Provision

Despite anything contained in the Lease, if either the Landlord or the Tenant is bona fide (that is, in good faith) delayed or hindered in or prevented from the performance of any term of the Lease by reason of any one or more of the following: strikes; walkouts; labour trouble; industrial disturbances; inability to procure materials or services; failures, fluctuations or non-availability of electric power, heat, light, ventilation, or air conditioning; governmental laws, regulations or control; riots; civil commotion; insurrections; anarchy; acts of a foreign enemy; revolution; acts of sabotage; acts of terrorism; bio-terrorism or cyber-terrorism; invasion; rebellions; military or usurped power; war or warlike operations; blockades; epidemics; washouts; nuclear and radiation activity or fallout; explosions; acts of God (including without limitation, earthquakes, blizzards, floods, hurricanes, lightning, storms and other natural disasters); damage caused by any aircraft; or any other reason whether of a similar nature or not which is not the fault of the party delayed in performing the work or doing the acts required under the terms of the Lease (“Force Majeure”), the performance of the obligation is excused for the period of the delay and the party so delayed is entitled to perform that obligation within the appropriate time period after the end of the period of delay. However, the provisions of this section do not operate to excuse the tenant from the payment of Rent when due nor do they apply so as to extend the period of time for the Tenant to complete the Tenant’s Work or to extend the Fixturing Period, if any.

Health Emergency Article

1. In this Article the following definitions apply:
 - a. **Landlord Person:** a human being that is an officer, director, employee or agent of the Landlord, of a management business employed by the Landlord, of a contractor that does work, in connection with the Building or of supplier of services in connection with the Building.
 - b. **Tenant Person:** a human being that is an officer, director, employee of any tenant or occupant of the Building, of a contractor that does work for any tenant or occupant of the Building, or of a supplier of services in connection with any areas or space suitable for use or occupation in the Building.
 - c. **Health Emergency:** a situation in which the Landlord determines, based on advice from a medical professional, or a directive, bulletin, notice or other form of communication from a public health official, that Landlord Persons or Tenant Persons are or may be exposed in or at the Building to imminent danger from any diseases, viruses or other biological or physical agents that may in any way be detrimental to human health which include by way of example, including without limiting the generality of the foregoing, SARS, and Avian Flu (H5N1) and COVID-19.

Health Emergency Article

2. If the Landlord, acting in good faith, determines, that a Health Emergency exists:
 - a) The Landlord may amend, supplement or otherwise enforce any existing Health Emergency rules or regulations in existence; may pass additional rules and regulations and may impose restrictions, to mitigate or minimize the effects of the Health Emergency by controlling access, to parts of the Building, imposing sanitization requirements, and implementing health precautions consistent with advice from medical experts or public health officials.
 - b) The Landlord will not be in default by reason of:
 - i. anything it does pursuant to Section 2(a) above
 - ii. by reason any decision it makes in good faith in response to the Health Emergency and will not be liable in contract, tort or on any other basis of liability statutory or otherwise, by reason of any actions, omissions or failure to act in connection with or as the result of a Health Emergency.
 - c) If the Landlord, due to a Health Emergency acting in good faith, determines that it needs to suspend, reduce, or restrict Building Services, in whole or in part including but not limited to janitorial services, it will not be considered to be in default under this Lease.



How to Handle Rent Relief Requests From Tenants



Devin Lucas
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Introduction

- In today's current economic climate amid ongoing governmental restrictions, an increasing number of tenants are struggling to keep their businesses afloat.
- As a result, most landlords and property managers have received a significant amount of rent relief requests from tenants.
- It is, therefore, important for landlords to handle these requests in a strategic manner in order to maintain their cash flow, meet their own obligations, and avoid losing occupancy to protect their long-term financial stability



Different Options – Important for both parties to get together to reach a solution

- **Rent Deferral:** The landlord may defer all or a portion of the tenant's rent, but would require the tenant to repay deferred rent at a later time, either in a lump sum or by increasing subsequent monthly amounts amortized over the balance of the lease term.
- **Rent Reduction:** The landlord can reduce the tenant's base rent or operating expenses for a portion or the entire balance of the lease term.
- **Rent Abatement:** If a tenant is significantly past due on its rent, a landlord may agree to forgive a portion of its rental arrears if the tenant remains current thereafter at the full rate or at a reduced rate.
- **Loan Conversion:** Instead of forgiving past due rent, a landlord can agree to convert the past due rent into a loan payable over time evidenced by a promissory note. The tenant would, however, continue to pay the current rent.



Due Diligence – Financial Information

- Upon receiving a tenant's request for rent relief and before committing to anything, it is important for a landlord to do its due diligence.
- This should mean requesting and reviewing the following:
 - Financial statements and sales reports for 3 months before the COVID-19 crisis and 2 months afterwards;
 - Bank account statements for the same period;
 - Listing of account payables; and
 - Evidence that a tenant has applied for federal and provincial aid.



Due Diligence – Is the Tenant Already in Default?

- Also, a landlord should look into whether or not the tenant is in default at the time of its rent relief request.
- Any document providing a rent modification ought to be expressly subject to the tenant otherwise not being in default.
- This is an opportunity to exert leverage on the tenant to cure any other default that may be outstanding.



Rent Deferral Agreements – Key Clauses

- **Rent:** Deferred rent to be repayable by a certain date or repayable over a certain period, such as six or twelve months.
- **Termination:** If for any reason there is an early termination, then the entire remaining unamortized balance will be accelerated and immediately payable.
- **Financial Assistance:** Should a tenant receive any government financial assistance, then the tenant is obligated to inform the landlord and pay a portion of such assistance immediately towards the outstanding balance.
- **Guarantor:** If there is presently no personal or corporate guarantor in the current lease, the landlord may wish to add a guarantor of the tenant's obligations as security for the deferred rent.
- **Confidentiality:** The landlord should request a provision in the agreement stopping the tenant from discussing the terms of the agreement with others.



Conclusion

Tips for landlords and property managers:

- Do your due diligence – there is no need to rush to enter into an agreement;
- Consider using the request as an opportunity to tighten up other terms of the lease in exchange for agreeing to defer rent;
- Ensure that you are not waiving your ability to collect the deferred rent, should it remain unpaid, from the tenant and/or the guarantor; and
- If you are unable to have the tenant agree to something in writing, consider suing for unpaid rent rather than terminating the lease following the end of the COVID-19 crisis.



Thank you



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Our changing Workforce and How to Manage It



Louise Porthouse
Vice President, Human Resources
Triovest



HR Key Principles

- Immediate priority is the care and well being of your employees
- Communicate regularly – be clear, direct and factual
- Reassure – remember that this is temporary, and we will rebound
- Tailor your actions to fit your organization



Working From Home

Majority of office centric roles are now working from home, but less than 20% of workers are accustomed to working from home.

- **Provide tech support/equipment** – consider an allowance to purchase equipment
- **Flexible work arrangements**
 - Support parents and primary caregivers with flexible work hours
- **Create sense of team and community**
 - Regular team meetings – set standards such as all calls using video
 - Share non-work information – e.g. we start each meeting with a service story
- **Managers – check-in individually with staff**
 - Provide virtual hang-out space, online meeting resources, tips for Managers to work remotely
- WFH provides **opportunity to assess productivity**, engagement – likely that when we rebound from this more roles will maintain WFH structure

On-site Workers – Key Considerations

- Majority of building staff/PM are working with a skeleton staff
 - They are feeling the most pressure – look out for their mental health and well-being
- Increased health, hygiene and safety measures need to be taken
- Rotate staff to provide necessary breaks
- Support for staff who have childcare and primary care responsibilities:
 - *Can work schedules be revised? Can you stagger work hours?*
 - *Can you reassign work? What tasks can be done from home?*
- How do you handle an employee who refuses to work due to fear of Covid-19?
- Provide assurance that work-site is safe and precautions have been taken
- Consider a flexible work schedule such as coming in during different hours

Communication

Be clear and consistent

Identify your key messages

- Who is delivering them?
- Have your C-suit leaders lead
- Use mix of media – email blasts, virtual town-halls, personalized video message

Provide reference links to reliable sources



Cost Containment

Most recent data indicates that 80% of salaried employees are being paid at regular rates, 63% of hourly employees are being paid at regular rates.

Cost control
measures
include:

- Reduced work and work hours
- Temporary pause on car/transit/parking allowances
- Roll back on pay for executives between 10-20%
- Leave of absence with partial or no pay
- Layoffs
- Hiring freeze

Cost Control Measures



Income Support Measures

- Temporary Layoffs; combine with SUBP
- Workshare Program; drop of 10% or more in business activity



G&A Expenses

- Hiring Freezes
- Early termination of contracts
- Delay and/or postpone non-critical projects



Compensation

- Reduction in base salaries
- Desire to protect the lower paid positions
- Board retainer reductions
- Bonus plans are being hit
- Cancelling, delaying merit increases



Question & Answer
Please use the chat
functionality on the webinar

Follow the conversation



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@BOMA_BEST



BOMA Canada,
Benjamin Shinewald



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