

PROTECT YOURSELF, CLIENTS FROM COVID-19 LOSSES AND LIABILITIES

HOW TO DEAL WITH TENANT INFECTIONS, REQUESTS FOR RENT RELIEF, CONTRACT ISSUES, AND MORE.

By Charlie Lee, NAR associate counsel

The National Association of REALTORS® has been fielding hundreds of COVID-19 questions each week through a dedicated hotline, 800-874-6500. We've developed general guidance to your most common questions. However, every situation is unique so be sure to consult with your broker, legal counsel, and government-provided public health information.

What should I do if someone in a building I own or manage tests positive for COVID-19? If a tenant, visitor, or employee tests presumptive positive or positive for COVID-19, issue a building alert to tenants, residents, and others who share facilities. Report the matter to the local health agencies and be sure to follow directions regarding cleaning and other appropriate actions. Because of health privacy and other legal considerations, don't reveal the identity of the individual or affected company.

Will parties be excused from performing their services or obligations in the lease due to the COVID-19 pandemic? Review the lease. Specifically, check the force majeure, casualty, and condemnation/ eminent domain provisions. Depending on the language, these provisions can give the landlord or tenant certain rights to excuse, suspend, or terminate obligations or services.

A force majeure clause generally permits parties to suspend or terminate their obligations due to certain circumstances beyond their reasonable control. In the context of COVID-19, look to see if the force majeure clause enumerates circumstances such as "disease," "epidemic," "quarantine," "acts of government," or "pandemic" or for broad, general language such as "any cause whether similar or dissimilar to the foregoing."

A casualty clause usually covers fire, flood, explosions or other similar occurrences that degrade the physical or structural integrity of the building. Tenants might look to this clause on the basis that their ability to operate their

business or to use their lease space has been significantly disrupted by the COVID-19 pandemic.

Tenants directly affected by government closures may view their lease spaces as having been taken over by the government. Check to see if the lease addresses condemnation or eminent domain and whether it provides any termination or rent abatement rights.

What if a tenant just decides to stop paying rent based on a theory from a lease provision or for any other reason? Landlords have the right to deliver a notice of monetary default and possibly the right to accelerate all lease payments with possible immediate recourse to guarantors and/or letters of credit. This action will require the tenant to defend its decision. As you know, some states have a moratorium on commercial (and residential) eviction proceedings. But this should not preclude starting action.

Do I have to provide rent relief or assistance to any tenant who requests it? Tenants who seek assistance should be asked to complete a rent assessment application. A sample is provided at nar.realtor/coronavirus-guidance-commercial-real-estate (under the Transaction Guidance tab). The form will help you determine whether relief or assistance provided is based on actual need. You shouldn't feel obligated to provide relief to any tenant who's in default, but if a tenant submits a rent assessment application, respond as soon as practical to avoid potential vacancies.

What relief should be provided to tenants seeking assistance? With the landscape rapidly changing, relief should be limited to 30 to 60 days. Try offering rent deferrals instead of waivers, or consider using the tenant's security deposit in place of a month's rent and having the tenant repay the deposit over time. Be sure to check with the lender and attorney before offering any relief to confirm that it's permissible. Document all assistance provided to tenants, and be sure to have tenants agree to a confidentiality clause.