

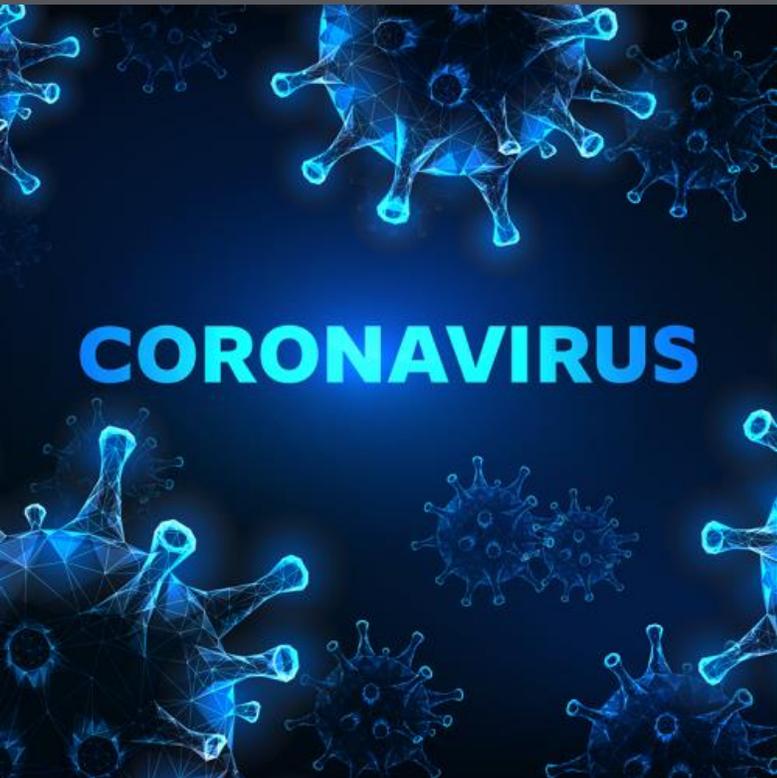
Commercial Leasing During a Pandemic

Strategies for Small Businesses

Presented by Ross E. Coe, Esq.

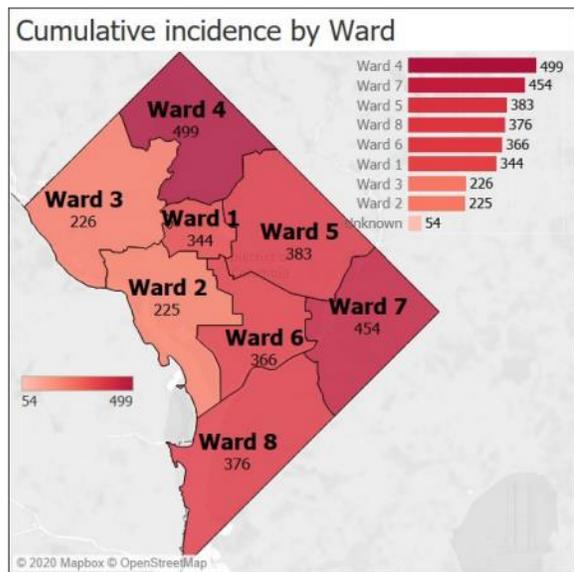
DCBAR
Pro Bono Center

Small Business Legal Issues
Webinar



CORONAVIRUS

Washington, DC As of April 19



Total Confirmed Cases: 2,927

Background: DC Public Health Emergency, Stay at Home Order and Closure of Non-Essential Businesses

From the April 20, 2020, Situational Update provided by the Government of the District of Columbia.

BLANKROME

DC Public Health Emergency, Stay at Home Order and Closure of Non-Essential Businesses

- March 11, 2020: World Health Organization characterizes COVID-19 as a pandemic
- *Mayor's Orders 2020-045 and 2020-046*, issued March 11, 2020: Declarations of Public Emergency and Public Health Emergency
- March 13, 2020: President declares national emergency
- *Mayor's Order 2020-050*, issued March 20, 2020: Extends the public emergency and public health emergency declared by Mayor's Orders 2020-045 and 2020-046, respectively, through April 24, 2020
- *Mayor's Order 2020-053*, issued March 24, 2020: Closure of non-essential businesses and prohibition on large gatherings through April 24, 2020
- *Mayor's Order 2020-054*, issued March 30, 2020: Stay at Home order through April 24, 2020
- *Mayor's Order 2020-063*, issued April 15, 2020: Further extends the public emergency and public health emergency declared by Mayor's Orders 2020-045 and 2020-046, respectively, and extended by Mayor's Order 2020-050, and "Stay at Home" order through **May 15, 2020**

Closure of *On-Site Operation* of all Non-Essential Businesses

“Essential” businesses

- Healthcare and Public Health Operations
- Essential Infrastructure
- Food and Household Products and Services
 - “Restaurants and other facilities that prepare and serve food are included in this category, but only for delivery, carry out, or ‘grab and go,’ including food trucks and rapid made-to-order meals, but not for sit down consumption”
- Social Services Providing the Necessities of Life
- Communications and Information Technology
- Energy and Automotive
- Financial Services
- Educational Institutions
- Transportation and Logistics
- Construction and Building Trades
- Certain Housing and Living Facilities
 - See *Mayor’s Order 2020-063* for additional restrictions regarding exclusion of visitors and screening requirements.
- Certain Professional Services
- Childcare facilities

Examples of “Non-Essential” businesses

- Tour guides and touring services
- Gyms, health clubs, spas, and massage establishments
- Theaters, auditoriums, and other places of large gatherings
- Nightclubs
- Hair, nail, and tanning salons and barbershops
- Tattoo parlors
- Sales not involved in essential services
- Retail clothing stores
- Professional services not devoted to assisting essential business operations.

Sections II and V.1 of Mayor’s Order 2020-053.

Operation of Essential Businesses and Teleworking

- “1. All Essential Businesses are strongly encouraged to remain open. 2. To the greatest extent feasible, Essential Businesses that remain open shall comply with Social Distancing Requirements as defined in section IV.5 of this Order, including by separating staff by off-setting shift hours or days and maintaining a separation of at least six (6) feet among and between employees and members of the public, including when any customers, clients, or patients are standing in line or sitting in a waiting room, to the maximum extent possible, separating shifts. 3. Essential and non-Essential businesses shall take all reasonable steps necessary for employees to work remotely from their residences and to deliver services to the businesses and their customers by telephone, video, internet, or other remote means.” *Section III of Mayor’s Order 2020-053.*
- “5. ‘Social Distancing Requirements’ include: a. Maintaining at least six (6) feet of distance from other individuals; b. Washing hands with soap and water for at least twenty (20) seconds or using hand sanitizer frequently, or after contact with potentially-infected surfaces, to the greatest extent feasible; c. Covering coughs or sneezes, preferably with a tissue immediately disposed of, or into the sleeve or elbow, not hands; d. Regularly cleaning high-touch surfaces; and e. Not shaking hands.” *Section IV.5 of Mayor’s Order 2020-053.*
- Additional restrictions regarding the use of gloves and masks or mouth coverings in food sale, hotel and transportation businesses were incorporated subsequently by amendment. *Section X of Mayor’s Order 2020-063.*

Non-Essential Businesses: Tele-Work and Minimum Basic Operations Permitted

- “Businesses, including non-Essential Businesses, may continue telework operations consisting of employees or contractors performing work at their own residences (i.e., working from home) and home-based businesses may continue to operate, to the extent such businesses do not involve individuals making physical contact with other persons and can be carried out in compliance with the Social Distancing Requirements, as defined in section IV.5 of this Order.” *Section II.1 of Mayor’s Order 2020-053.*
- “‘Minimum Basic Operations’ means:
 - a. The minimum necessary activities to maintain the value of the business’s inventory, ensure security, process payroll and employee benefits, and related functions;
 - b. The minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences; and
 - c. The minimum necessary activities to facilitate teleworking or the remote delivery of services formerly provided in-person by the business; to provide cleaning and disinfection of a business’s facilities; and to provide employee supervision of contractors or employees providing essential maintenance of the facility.” *Section IV.4 of Mayor’s Order 2020-053.*

Strategies for Commercial Leases

Is a tenant required to pay rent during a pandemic?

“Essential” v. “Non-Essential”

- Does the distinction between “essential” and “non-essential” businesses matter?
- What if an “essential” business chooses to close?

Is there relief from paying rent due to force majeure?

In the event that either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, labor troubles (that are industry wide and not the result of the party's own actions), inability to procure labor or materials, failure of power, **restrictive governmental laws or regulations**, riots, insurrection, war, acts of God, fire or other casualty or **other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed in performing work or doing acts required under the terms of this Lease** (each an "***act of Force Majeure***" and collectively referred to as "***Force Majeure***"), then performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. **The provisions of this Section shall not operate to excuse Tenant from the prompt payment of Base Annual Rent or Additional Rent or from surrendering the Demised Premises, and shall not operate to extend the term of this Lease. Delays or failures to perform resulting from lack of funds shall not be deemed delays beyond the reasonable control of a party.**

Is COVID-19 a casualty?

If the Demised Premises shall be *damaged* by fire or other casualty, ...

If the damage or destruction is such as to make the Demised Premises or any substantial part thereof untenable (in Landlord's judgment), and provided that such damage or destruction is not due in whole or part to the act or omission of Tenant or Tenant's agents, employees or invitees, the Base Annual Rent shall abate proportionately (based on proportion of the number of square feet rendered untenable to the total number of square feet of the Demised Premises), from the date of the damage or destruction until the date the Demised Premises has been restored by Landlord.

What about the “service interruption” clause?

Notwithstanding anything to the contrary in this Lease, in no event shall Landlord be liable to Tenant in damages or otherwise for any interruption, curtailment or suspension of any utility services to the Demised Premises, whether resulting from repair or maintenance activity at the Demised Premises or the Building or the Project, actions of a third party not controlled by Landlord, accident, action of public authority, strikes, acts of God or public enemy, or any other cause, whether similar or dissimilar to the aforesaid.

Notwithstanding the foregoing to the contrary, if solely as a result of (x) Landlord’s failure to provide a service, perform a repair, or comply with any Legal Requirements, which service, repair or compliance is the express obligation of Landlord under this Lease, or (y) the exercise by Landlord of any of its rights hereunder, Tenant is unable to utilize all or any portion of the Demised Premises for the conduct of its business in its usual and customary manner **(but specifically excluding any such condition resulting from fire, casualty, Force Majeure, the erection of bridges or sheds or other obfuscation of the Demised Premises, or any matters caused in whole or in part by the acts or omissions of Tenant, its employees, agents contractors, invitees or guests)**, for a period of five (5) consecutive days after notice thereof by Tenant to Landlord specifying the same, then all rent shall abate proportionately commencing on the first day after Landlord’s receipt of such notice until the date on which Tenant is reasonably able to conduct its business at the Demised Premises (or any part thereof) in its customary manner, computed on the basis of the ratio which the amount of square footage of the Demised Premises affected bears to the total square footage of the Demised Premises. Such abatement of rent shall be Tenant’s sole and exclusive remedy and none of the foregoing shall be deemed an eviction or disturbance of Tenant’s use and possession of the Demised Premises or any part thereof, or relieve Tenant from the performance of Tenant’s obligations under this Lease, other than the payment of Base Monthly Rent and additional rent as expressly set forth in this Section.

Other arguments

Temporary condemnation?

Frustration of purpose?

Impossibility of performance?

Covenant of quiet enjoyment?

In practice, how are businesses handling rent?

- “As of Friday, [April 17, 2020,] about 51% of retail tenants had paid their April rent, compared with the 85% who had paid their March rent, according to data from real-estate business-intelligence company Datex Property Solutions, which tracks payment trends for more than 800 national tenants and tens of thousands of retailers nationwide. National tenants were more likely to cover their April rent, with 53% paying as of Friday, than non-national tenants, of whom 47% paid.” See <https://www.wsj.com/articles/landlords-commercial-tenants-negotiate-rent-breaks-amid-coronavirus-disruption-11587375005>.
- Strict enforcement of lease may be unrealistic for a landlord.
- In DC, landlords and tenants should be aware of *Trans-Lux Radio City Corp. v. Service Parking Corp.*, 54 A.2d 144, 146 (D.C. 1947). Redemption of lease by payment of “trans-lux amount” after judgment entered, but prior to eviction. See: <https://www.dccourts.gov/sites/default/files/pdf-forms/Notice-to-Tenant-of-Payment-Required-Translux-form-Form6-LT.pdf>.

Payment v. non-payment of rent

- Many tenants, especially retail tenants, have missed payment of April rent and are expected to miss payment of May rent.
- Liquidity/cash flow concerns for landlords and tenants.
- Reputational risks of non-payment of rent, especially for large, well-capitalized businesses and online businesses. Taking advantage of Coronavirus?
 - <https://www.reuters.com/article/us-adidas-stores/adidas-apologizes-for-deferring-store-rent-will-pay-up-idUSKBN21J5J7>
 - <https://www.wsj.com/articles/landlords-companies-clash-over-rent-payments-during-coronavirus-11586865600>
- Lease guaranties, letters of credit and security deposits.

Agreements to defer or abate rent

Rent deferral

- Preferred by landlords
- Duration
 - 2-3 mos.? Up to 6 mos.?
 - Based on duration of pandemic or “stay at home” orders?
 - Shrinking deferral periods. Re-ramp period?
- Requires subsequent repayment over an amortization period; make sure it falls within lease terms
- Full v. partial deferral
- Fixed Rent v. Additional Rent (Passthroughs for CAM, taxes and insurance)
- Generally – no interest charged
- Waiver of late charges and default interest
- Written amendment to lease
- Subject to lender consent
- Landlord may require the tenant to use stimulus funds or insurance proceeds that later become available to repay the landlord and offset any rent relief provided
- Conditioned on payment of all or a portion of delinquent rent

Rent abatement

- Never repaid
- Shorter duration?
- Full v. partial abatement
- Fixed Rent v. Additional Rent
- Written amendment to lease
- Subject to lender consent
- Conditioned on payment of all or a portion of delinquent rent

Other Considerations

- Communication; default notices
- Requirement to submit financial information, such as sales figures
- Bartering with other lease provisions, such as extension of term
- Waiver of COVID-19 claims
- Forbearance agreements with mortgage lenders
- Compliance with other obligations under the lease
- Bankruptcy courts have approved non-payment of rent for certain debtors with closed stores, such as Pier 1 Imports Inc., Modell's Sporting Goods Inc. and CraftWorks Holdings Inc.

Outlook

- Coronavirus testing, quarantine and contact tracing – On April 23, 2020, Mayor Bowser establishes the DC Contact Trace Force, to hire hundreds of additional tracers at DC Health. According to the Mayor’s press release, “DC Health currently has about 65 contact tracers, and about 70% of confirmed cases have been traced. The Force is in the process of increasing that team to about 200 tracers, with up to an additional 700 tracers to be hired through Phase One of re-opening the District. The Contact Trace Force will help contain the virus and mitigate community spread through a five-step process: (1) Test; (2) Isolate; (3) Trace; (4) Quarantine; and (5) Connect to Services.”
- Per Michael Cembalest, Chairman of Market and Investment Strategy for J.P. Morgan Asset & Wealth Management, the United States appears to be about 2 weeks behind Europe. See <https://www.jpmorgan.com/jpmpdf/1320748415723.pdf>.
- Some US states are beginning to loosen restrictions. If we follow current trends in Europe, the restrictions in the Stay at Home order and Closure order could be loosened before a complete repeal, with social distancing requirements remaining in effect, such as requirements/strong recommendations to wear masks. In addition, we might see particular categories of stores re-open first and/or smaller stores re-open before larger stores, as well as maximum occupancy restrictions.
- The impacts of Coronavirus on commercial leasing will likely continue after the initial loosening of restrictions.
- New leases.
- Adapting your business to the “new normal.”