

Update on Commercial Leasing During the Pandemic

Strategies for Small Businesses

Presented by Ross E. Coe, Esq.

DCBAR
Pro Bono Center

Small Business Legal Issues
Webinar



CORONAVIRUS

Level of Community Spread	Daily case rate	Rate of transmission	Test positivity rate	New cases from quarantined contacts
	5.5 (Oct 3) <small>7-day avg. per 100,000 pop.</small>	0.82 (Sep 23) <small>Effective reproduction number (R(t))</small>	1.8% (Oct 1) <small>Percent positive from RT-PCR tests</small>	6.1% (Oct 1) <small>7-day average</small>
Health System Capacity	Percent hospital utilization	Percent COVID-19 patients	Mean test turnaround time	Diagnostic tests conducted
	82.2% (Oct 3) <small>of available beds without surge</small>	4.5% (Oct 3) <small>of daily hospital census, 7-day average</small>	1.9 (Oct 3) <small>(days) 7-day average</small>	3,445 (Oct 1) <small>7-day avg. per million pop.</small>
Public Health System Capacity	Positive cases with contact attempt	Close contacts with contact attempt		
	98.7% (Oct 2) <small>7-day avg. attempt within 1 day</small>	98.6% (Oct 1) <small>7-day avg. attempt within 2 days</small>		
Community Engagement	Positive cases interviewed	Positive cases who provide close contacts	Mean number close contacts provided	
	72.8% (Oct 1) <small>7-day avg. completed within 3 days</small>	43.7% (Oct 1) <small>7-day avg.</small>	1.2 (Oct 1) <small>7-day avg. mean per positive case</small>	

Background: Where are we today?

From the October 5, 2020, Situational Update provided by the Government of the District of Columbia.

Timeline

- April 30, 2020 – Commercial Leasing During a Pandemic, DC Bar Pro Bono Center, Small Business, Legal Issues Webinar, presented while the Stay at Home and closure of non-essential business orders remained in effect.
- May 21, 2020 – ReOpen DC Advisory Group issues recommendations to DC Mayor.
- May 27, 2020 – *Mayor's Order 2020-067*: Phase One reopening begins.
- June 19, 2020 – *Mayor's Order 2020-075*: Phase Two reopening begins on June 22, 2020.
- July 22, 2020 – *Mayor's Order 2020-080*: Consolidates, clarifies and extends requirements related to wearing masks indoors and outdoors in the District of Columbia.
- July 24, 2020 – *Mayor's Order 2020-081*: 14-day quarantine requirements for all residents or persons returning to or arriving to the District after travel from coronavirus (COVID-19) “high-risk areas.”
- October 7, 2020 – *Mayor's Order 2020-103*: Extends Public Health Emergency through December 31, 2020, and provides additional Phase Two measures.

- Advisory Group appointed by Mayor Bowser, advised by Dr. Anthony S. Fauci and the Center for Health Security Advisors at the Johns Hopkins Bloomberg School of Public Health.
- 4 “Stage” or “Phase” re-opening plan.
- See the full report at:
https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/%23ReOpen%20DC%20Advisory%20Group%20Recommendations%20to%20Mayor%20Bowser.pdf

4 Recommended Stages to Re-Open DC

	Stage 1	Stage 2	Stage 3	Stage 4
What is the nature of the pandemic?	Declining virus transmission	Only localized transmission	Sporadic transmission	Effective vaccine or cure
What is the nature of our city's activities?	Key low-risk activities with strong safeguards (e.g., parks)	Additional activities with strong safeguards (e.g., indoor dining)	Higher-risk activities, with safeguards (e.g., pools)	A "new normal" for DC, likely with all activities as close to normal as possible
How should we gather¹¹?	Up to 10 people	Up to 50 people	Up to 250 people	All gatherings
Should we work remotely¹¹?	Strongly recommended	Strongly recommended	Encouraged	New normal
Can we travel¹²?	Discouraged	Discouraged	Can resume	All travel

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We strongly recommend that DC's universal safeguards apply through the conclusion of Stage 3.

Recommended Re-Opening Stages for Businesses

WHAT MOVING ACROSS STAGES SHOULD LOOK LIKE

ACTIVITIES AND FUNCTIONS	UNIVERSAL SAFEGUARDS			STAGE 4
	STAGE 1	STAGE 2	STAGE 3	
Hotels and accommodations	Open with safeguards	Open with safeguards	Open with safeguards	
Office spaces	Work from home strongly recommended	Work from home recommended but up to 25% capacity in office spaces allowed with physical distancing	Work from home encouraged but up to 50% capacity in office spaces allowed with physical distancing	
Construction sites	Open with safeguards	Open with safeguards	Open with safeguards	
Restaurants and food	Restaurants open outdoor seating with physical distancing and safeguards	Restaurants open indoor seating with physical distancing, safeguards, and up to 50% capacity	Restaurants continue 50% capacity, with case-by-case approvals for expansion consistent with physical distancing	
Bars and night-clubs	Closed	Closed	Bars and clubs open with capacity limits (5 people per 1,000 sq. ft not to exceed 50% capacity)	
Retail	Non-essential retailers can provide curbside and delivery service	Non-essential retailers reopen in-store service, with safeguards and capacity limits (5 people per 1,000 sq. ft not to exceed 50% capacity)	Non-essential retailers continue in-store, with safeguards and capacity limits (10 people per 1,000 sq. ft not to exceed 75% capacity)	
Personal services	Barbershops and hair salons reopen by appointment with strong safeguards and physical distancing (5 people per 1,000 sq. ft)	All other personal services (e.g., nail salons, massage spas) reopen by appointment with strong safeguards and physical distancing (5 people per 1,000 sq. ft)	All personal services continue by appointment with strong safeguards and physical distancing (5 people per 1,000 sq. ft)	



WORK

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Phase I (*Mayor's Order 2020-067*)

- Stay at Home order lifted
- Continued social distancing requirements
- Gatherings of 10 or more prohibited
- Nonessential retail may open for:
 - Outdoor pickup and delivery
 - No indoor shopping or pickup
- Limited operation of barbershops and hair salons
- Otherwise, nonessential businesses remain physically closed to public
- Outdoor dining permitted with restrictions, e.g.:
 - Must be seated, place orders, and be served at tables
 - No more than 6 per table
 - All tables at least 6 feet apart

Phase II (*Mayor's Orders 2020-075 and 2020-103*)

- Moved from substantial, controlled transmission where significant mitigation steps were warranted, to minimal to moderate community transmission, where moderate mitigation steps are warranted
- Continued “social distancing” requirements
- Permitted capacity of large gatherings increased from 10 to 50, subject to exceptions and preliminary injunction granted to Capitol Hill Baptist by U.S. District Court during pending litigation
- Telework required to the extent consistent with current business operations. Encourages development of plans to safely return to office, following DOH recommendations. E.g., staggering employees.
- Indoor shopping generally permitted provided that occupancy does not exceed 50% of occupancy as specified on C/O, subject to social distancing and other DOH protocols
- Additional permitted re-openings, e.g.:
 - Nail salons and certain other similar establishments – under the same conditions as barbershops and hair salons under Phase I
 - Childcare centers – subject to enhanced social distancing and hygiene practices
 - Fitness establishments – subject to additional requirements, such as 5 persons/1,000 square feet capacity limitation.

Phase II (continued)

- Outdoor dining from Phase I continues, and associated permitting fees waived
- Indoor dining permitted, subject to minimum safeguards, e.g.:
 - Must be seated, place orders, and be served at tables
 - No more than 6 per table or joined table
 - All tables must be placed so that patrons are at least 6 feet apart; and
- Limited to 50% of capacity permitted by C/O indoors
- Specific business must remain closed, e.g.:
 - Nightclubs, except food service consistent with prior orders and subject to alcohol regulatory endorsements.
 - Theatres, cinemas, and other entertainment remain closed, subject to waivers required for arts, entertainment, or cultural events, and subject to Phase Two Live Entertainment Pilot announced on September 25, 2020.

Indoor and Outdoor Mask Requirements (*Mayor's Order 2020-080*)

“Indoor”

- Requirement to wear a mask in the common areas of apartments, condominiums and cooperatives.
- Businesses, office buildings and other establishments open to members of the public required to post signage on exterior stating that persons must wear a mask to enter. (Template signage found at <https://coronavirus.dc.gov/phasetwo>).
- Requirement to exclude or attempt to eject persons who are not wearing or who remove their masks.
- Employers required to provide masks to employees.

“Outdoor”

- Requirement to wear a mask if likely to come into contact with another person, such as being within 6 feet of another person for more than a fleeting time.
- Passengers or operators of public transit, taxis, Uber/Lyft, etc.

Sections II and III of Mayor's Order 2020-080. See Section IV for Exceptions.

IT'S SIMPLE: WHEN YOU LEAVE HOME, YOU MUST

WEAR A MASK.



Common allowable exceptions:



You are a child age 2 or younger



You are vigorously exercising outdoors and not close to anyone else

You are actively eating or drinking



You are in an enclosed office and alone



Wear a mask. Save lives. Stop the spread.



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Requirement to Self-Quarantine (*Mayor's Order 2020-081*)

Non-Essential Travel

- Requirement to quarantine for 14 days if you travel to a “high-risk area” upon return to DC
- “High-risk areas” are locations where the 7-day moving average daily new COVID-19 case rate is 10 or more per 100,000 persons. See coronavirus.dc.gov for up-to-date list.
- MD and VA are exempt.
- Businesses may require employees and customers to affirm compliance before allowing entry or providing services.

Essential Travel

- Requirement to self-monitor for symptoms and to quarantine and seek medical advice or testing if symptoms are experienced. To the extent possible, required to limit activities to exempt purpose for 14 days.
- See *Mayor's Order 2020-054* (Stay at Home Order dated March 30, 2020) for the definition of “Essential Travel.” Includes travel related to “Essential Businesses” or “Minimum Basic Operations.”

Mayor's Order 2020-081.

High-Risk States

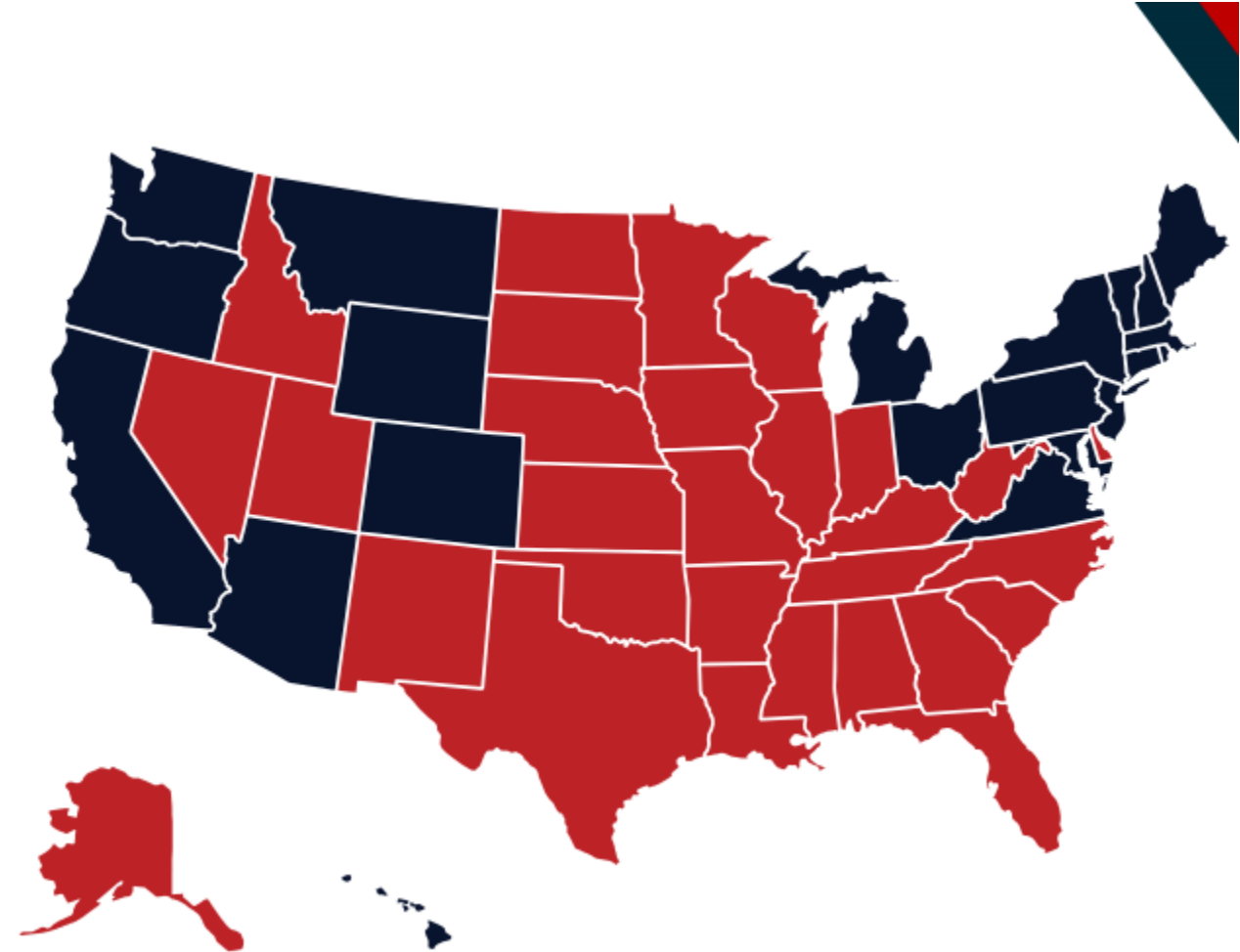
On Monday, October 5, DC Health released the following list of **high-risk states**

Alabama	Kentucky	Oklahoma
Alaska	Louisiana	South Carolina
Arkansas	Minnesota	South Dakota
Delaware	Mississippi	Tennessee
Florida	Missouri	Texas
Georgia	Montana	Utah
Idaho	Nebraska	West Virginia
Illinois	Nevada	Wisconsin
Indiana	New Mexico*	Wyoming
Iowa	North Carolina	
Kansas	North Dakota	

*Recently added

An updated list of high-risk states will be posted on coronavirus.dc.gov/phasetwo on Monday, October 19.

From the October 5, 2020, Situational Update provided by the Government of the District of Columbia.



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Current Business and Leasing Environment for Small Businesses

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Closures and Loss of Access to Capital

- Tightening of lending standards for small businesses.
- Paycheck Protection Program funds spent.
- Fed's Main Street Lending Program not popular.
- Additional Federal stimulus before election appears unlikely.
- "Small-business transaction data collected by software and business-services provider Womply show that about 1 in 5 businesses that were open in January have stopped transacting entirely. Most of them have likely closed for good. In a recent survey of 6,325 small-business owners conducted by small business social-networking company Alignable, 42% of respondents said they were at risk of going out of business in the fourth quarter."
- Source: <https://www.wsj.com/articles/covid-is-crushing-small-businesses-thats-bad-news-for-american-innovation-11602235804?st=aets3vlf1eilubx&reflink=article> email share

DC Business Closures

- Closure of numerous small businesses in DC, such as Wagner Opticians, Bogart hair salon and Twins Jazz club. Source: https://www.washingtonpost.com/local/a-requiem-for-all-the-mom-and-pop-shops-shut-down-by-the-pandemic/2020/09/17/ff6510b0-f903-11ea-be57-d00bb9bc632d_story.html

Payment of Rent

- Less than 1/3rd of retail companies paid at least 75% of June rent.
- By July, the percentage of rent payers had almost doubled to 65%.
- Failure to pay rent in full is creating tension between retailers and landlords. In some instances, litigation arises.
- Source: <https://www.cnbc.com/2020/09/24/retailers-resume-rent-payments-but-are-still-fighting-with-landlords.html?&qsearchterm=real%20estate>

Rent Deferral and Abatement Agreements

- See initial April 30, 2020, presentation regarding rent deferral and abatement agreements.
- Applicability?
- Litigation.

Legislative Actions by D.C. Council

COVID relief

- Current iteration is Title IV (Housing and Tenant Protections) of the Coronavirus Support Second Congressional Review Emergency Amendment Act of 2020 (B23-0869; A23-0405, Expires on November 16, 2020). Full text:
https://lims.dccouncil.us/downloads/LIMS/45470/Signed_Act/B23-0869-Signed_Act.pdf.
- Office of the Tenant Advocate Resource:
<https://ota.dc.gov/sites/default/files/dc/sites/ota/publication/attachments/2020.09.11%20%28FINAL%29%20OTA%20COVID-19%20and%20Tenant%20Rights-Resources.pdf>.
- Permanent legislation *subject to Congressional review*.

Mortgage Relief (Section 401)

- Requirement for mortgage lender to develop a deferment program for borrowers.
- Minimum 90-day deferment of interest and principal, and waiver of any late fee, processing fee or any other fee accruing during public health emergency.
- Lender may not report to credit reporting agency as delinquent the amounts subject to deferral.
- Borrower to demonstrate evidence of financial hardship resulting directly or indirectly from the public health emergency.
- Repayment period is either (a) a reasonable agreed upon time period, or (b) otherwise, 3 years from the end of the deferment period or maturity date, whichever is sooner.
- Lender may not request or require a lump sum repayment.
- Applicable during the public health emergency and for 60 days thereafter.

Tenant Payment Plans (Section 402)

- Landlords required to offer a rent-payment-plan program for eligible tenants. Landlords required to notify all tenants of the availability, terms and application process.
- **“Eligible tenant” means:**
 - **Notified Landlord of inability to pay all or a portion of the rent due as a result of the public health emergency;**
 - **Not a franchisee unless franchise is owned by a District resident; and**
 - **Residential tenant, commercial retail tenant or commercial tenant of premises comprised of less than 6,500 square feet.**
- Applicable during the public health emergency and for 1 year thereafter (“program period”).
- Covers gross rent and other amounts due under the lease during program period and prior to cessation of tenancy, with a minimum length of one year unless a shorter payment plan term length is requested by the eligible tenant.
- Waiver of any fee, interest or penalty that arises out of an eligible tenant entering into a payment plan.
- Landlord may not report to credit reporting agency as delinquent the amounts subject to payment plan.
- No loss of rights under lease as a result of the payment plan.

Tenant Payment Plans (Continued)

- Requirement to make payments in equal monthly installments for the duration of the payment plan unless a different payment schedule is requested by the tenant.
- Landlord may not request or require a lump sum repayment.
- To be agreed upon in writing.
- Minimum deferral of 1 year, unless shorter term requested by tenant.
- Tenant to demonstrate evidence of financial hardship resulting directly or indirectly from the public health emergency.
- If denied, commercial tenants may file a written complaint with Department of Consumer and Regulatory Affairs (DCRA).
- During the program period, unless landlord offers payment plan, prohibited from filing collection lawsuit or eviction for non-payment of rent.
- See <https://dcra.dc.gov/release/rent-payment-plans-commercial-tenants>.

Eviction Prohibition (Section 404)

- Prohibited during public health emergency and for 60 days thereafter.

Rent Increase Prohibition (Section 406)

- No rent increases for commercial retail tenants or other commercial tenants if premises comprised of less than 6,500 square feet.
- Applicable during the public health emergency and for 30 days thereafter.

Exit Strategies in Commercial Leases

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Who signed the lease?

- Individual, corporation, partnership, limited liability company, etc.
- If an entity signed the lease, does the entity own any other assets?
- Is there a guaranty? Corporate v. personal guaranties.
- Security deposit or letter of credit?

Assignment/Sublease

- Landlord consent required? Sole or reasonable discretion?
- No consent transactions
- Change in control and related restrictions
- Advance notice required
- Recapture
- Profit sharing
- Continuous operation requirements
- Required trade name
- Use restrictions
- Primary liability? Release from liability and/or release of guarantor

Duty to mitigate, *Trans-Lux* and rent acceleration

- “It has long been the rule in this jurisdiction that in the absence of a contractual provision reserving the landlord's right to re-enter and re-let upon tenant’s default while holding the tenant liable for any deficiency or loss of rent, the landlord is under no obligation to mitigate damages before the expiration of the lease even after an abandonment.” *Simmons v. Federal Bar Bldg. Corp*, 275 A.2d 545 (D.C.App. 1971).
- 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>.
- Court could not locate any District authority directly on point with respect to rent acceleration, but determined that Landlord may not terminate a lease and also enforce a rent acceleration clause. *16 Cobalt LLC v. Harrison Career Institute*, 590 F. Supp. 2d 44, 49 (D.D.C. 2008).

Outlook

- Continue to watch updates at <https://coronavirus.dc.gov>.
- DC Grants and Assistance for Businesses, such as the \$4mm Streatery Winter Ready Grant program and \$3mm Small Business Resiliency Fund: <https://coronavirus.dc.gov/recovery-business>.