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# Rent Relief Considerations for Commercial Landlords During the COVID-19 Pandemic



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As COVID-19 continues to impact businesses across all sectors of the economy, many commercial landlords have been flooded with rent relief requests over the past month. With the first of the month quickly approaching, and more rent relief requests likely to emerge, below are some considerations for landlords navigating these tenant requests.

## Assess the Type of Relief

Landlords should carefully consider the type of relief they may offer a tenant. Is it in the form of a rent deferral or is it an abatement? If the rent is deferred, how quickly must the tenant repay and over what period of time? Forcing a tenant to repay rent too early could have a detrimental impact on the tenant's post-COVID-19 recovery, jeopardizing its ability to perform under the lease for the remainder of the term. Is it better for a landlord to collect partial rent (e.g., an amount sufficient to pay monthly debt service) or is it more advantageous to defer all base rent for several months and extend the term of the lease proportionately? A property owner should analyze the financial impact each proposal has on the landlord's cash flow, and should not hesitate to offer alternatives to the tenant that are more viable from the landlord's perspective.

## Analyze Each Tenant

When analyzing rent relief proposals, landlords should understand the financial viability of each tenant and ask for supporting financial information to verify each tenant's claims. Understanding whether the tenant's business is likely to recover is integral in determining the rental arrangement moving forward. For example, while many restaurants are completely closed due to government order, others have been able to recoup some of their lost revenue by offering take-out and delivery options.

Landlords should also consider whether a tenant has applied for any other forms of relief. Has the tenant sought to recover under its business interruption insurance? Has the tenant applied for any of the [loan programs in the CARES Act](#)? Landlords may consider conditioning any rent relief provided to a tenant on that tenant first exhausting other, non-lease-related options. Understanding each specific tenant's situation can help determine what type of relief a landlord should consider.

## Review Lease Obligations

Another issue a landlord must consider, is whether the tenant is in compliance with its other lease obligations, both monetary and non-monetary. In most triple net (NNN) leases, the tenant is responsible for paying its proportionate share of real estate taxes for the property, as well as common area maintenance expenses and insurance costs.

Under some leases, the tenant may make these payments directly to third parties (e.g., real estate taxes paid directly to the taxing authority), and has no obligation to inform the landlord if and when such payments are made. Landlords should verify such payments are made by requesting evidence from their tenants, and they may also consider contacting the applicable third parties to whom

payments are made.

In addition, landlords should also consider whether the tenant is complying with its non-monetary obligations under the lease. For example, if the tenant is responsible for property maintenance under the lease, is the tenant still adequately maintaining the property? Is the tenant required to maintain insurance under the lease? Before granting any sort of relief, landlords should confirm the tenant is in full compliance and is otherwise performing under the lease.

### **Review Lender Issues**

Before considering whether to grant rent relief, landlords should carefully review loan documents, where applicable. Is the landlord permitted to grant relief without obtaining its lender's consent? Do the loan documents require a landlord notify the lender of any requests for rent relief, or are they simply required to copy the lender on any formal correspondence with the tenant? Has the tenant stopped paying rent while the parties negotiate the terms of a potential deferral? Do the loan documents require the landlord to enforce the terms of the lease against the tenant (e.g., by formally notifying the tenant of a default)? Before taking any action, landlords should confirm they are complying with their obligations under their loans. Once a landlord has confirmed it is in compliance with its loan documents, it should still consider looping in its lender on any rent relief discussions. Transparency with the lender will often result in a more cooperative lender should additional relief be required down the road.

### **Request Confidentiality and Non-Binding Nature Agreement**

Before beginning any discussions with their tenants, landlords should consider entering into an agreement confirming:

- That all discussions and negotiations relating to the proposed rent relief to be granted remain confidential and will not be disclosed to any third parties; and
- That all such discussions and negotiations are non-binding and will not be deemed to waive any of landlord's rights under its lease or at law.

Many tenants may ask for mutual confidentiality provisions, especially if the tenant is required to submit financial information to the landlord. But, from the landlord's perspective, it wants to ensure that tenants are not sharing the details of any proposed relief package with any other tenants in the building.

With respect to the non-binding nature of the negotiations, the landlord wants to ensure that entering into discussions with the tenant is not deemed to modify any terms of the lease, and will not relieve the tenant from complying with its obligations unless – and until – a formal, written agreement is executed. Most leases by their express terms do not permit a tenant to withhold rent as a result of the COVID-19 pandemic. Therefore, any deviation from the tenant's obligation to pay monthly rent must be put in writing. Similarly, any delay in the landlord's efforts to enforce its remedies under the lease must not be construed as a waiver or forbearance of its rights to do so at a later time. While the landlord certainly wants to maintain a long, productive relationship with its tenants, if negotiations stall, the landlord must be in a position to enforce the terms of the lease. These issues are only some of the matters every landlord should consider when analyzing whether to grant rent relief to its tenants.