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A Quick-Response Guide for Commercial Landlords During the COVID-19 Crisis

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A Quick-Response Guide for Commercial Landlords During the COVID-19 Crisis

By Stephanie Frieze

All of us are focused on the safety of our families and the communities we live in during the COVID-19 crisis. But many aspects of business can't wait, and that's certainly true in commercial real estate. Rents and loans are due, regardless of the current situation, and both landlords and tenants may be uncertain which way to turn.

We recently authored this guide for CREW Atlanta at this link. Here is a quick list of do's and don'ts for landlords to consider as you consider your plans for the next few weeks:

- **Do be sympathetic, but don't say too much.** People are seeing businesses they spent a lifetime building circle the drain. But keep any written communications expressing sympathy brief and don't overcommit. Don't say you would like to waive rent unless you really intend to do so. For instance, we offer clients form letters that set safe parameters, reducing the risk that someone would confuse empathy with a promise to abate or forgive rent.
- **Don't stop sending regular bills for rent** and other services, even if you know the business is not in a position to pay now. When you do send bills, be sure to include any arrearage. If you continually send bills that do not include past-due amounts, a tenant could argue you have waived collection of those debts. Whether such a defense would hold up in court is up for debate, but you don't want to invite such a claim.
- **Don't advise a tenant whether they are required to close a business.** You do not have police powers just because you own or manage a property. Only the government has the authority to issue such orders and you set yourself up for potential liability if you interfere in a tenant's right to enjoy their property. You may, however, remind a tenant it is obligated to comply with all applicable laws and governmental regulations.
- **Don't disclose the identity of a COVID-infected tenant, but Do notify others.** Whether a landlord can deny access to an infected person is not clear, but there is much discussion as to whether a landlord has a duty to notify other tenants and occupants if the landlord is aware that a COVID-infected person is or has recently been in the building. Therefore, it is not only permissible, but advisable, to notify other tenants so long as the identity of the infected person is not disclosed.

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- **Do close common areas of buildings** - dining areas, meeting rooms shared by tenants, laundry rooms, gyms and gardens. You have the right and maybe even a responsibility to take actions that comply with social distancing guidelines. And if continued use of shared space is allowed, require individual users to sign waivers accepting the risk.
- **Don't be too quick to forgive rent.** The first step, if you choose to do so, is to offer a deferral, maybe three months, with the rent due at a specified time later in the lease. You are not out of line to charge a fee for this extension and include other terms, such as enhanced security such as a personal guaranty, just as a bank would if it extends repayment of a loan. Alternatively, you may grant a deferral of rent for a specified period or number of months in exchange for an extension of the term for a like period, perhaps at an increased rental rate.
- **Do approach any rent relief discussions cautiously.** We recommend a pre-negotiation agreement before you sit down to talk with your tenant that states this is just a discussion and you are not obligating yourself to anything prior to signing a lease amendment. Do make sure you review and understand the express terms of the Lease, including any provisions that might obligate a landlord to provide rent relief. It is also appropriate to ask that a tenant provide reasonable documentation in support of its request for rent relief and evidencing the claimed hardship.
- **Do point out government resources to tenants.** The CARES Act passed by Congress in March is best known for the \$1,200 payment to individuals, but it also has provisions, such as the Payroll Protection Program, to help businesses. Companies with 500 or fewer employees and other qualifying businesses can receive help for payroll and other basic expenses including rent payments. The law also provides loans to large companies.
- **Do keep your lenders and investors informed** of your financial situation. In some cases, you may be contractually required to inform them of material changes in your business, and nonpaying, near-bankrupt tenants; and agreements to provide rent relief may trigger notification obligations. Review any loan documents and have a working knowledge of your obligations under those documents before undertaking any rent relief negotiations so you don't promise something to a tenant that creates a default or a sticky situation with a lender. Also, generate as much information as you can from tenant discussions in order to have a complete financial picture at your disposal to aid you in pursuing discussions with lenders.
- **Do recognize that tenants are not all the same.** Retail tenants that are part of a chain are more likely to weather this storm without rent relief to survive. Mom and pops may not be so fortunate, and if the shutdown continues you will have to decide whether to grant them rent forgiveness or some other relief.
- **Don't expect to carry out an eviction in the short term.** In most Georgia counties, the courts are closed for all but essential business, and they won't consider evictions essential. This ever-increasing backlog will take time to work through once the courts return to normal. This means that you may have someone whose nonpayment of rent started long before the coronavirus, but you'll have to carry them a while longer.
- **Do expect a wave of litigation once the COVID-19 crisis is past.** We're all feeling supportive of each other now, but money pressures will trump feelings when this is over. Many tenants and businesses will have daunting financial problems and will look for ways to sidestep debt obligations. There will be plenty of gray areas in leases due to the COVID-19 crisis. Talk to your lawyer to anticipate such problems and take steps now to limit your risk.
- **Don't undertake any remedies as a landlord or a tenant** without fully understanding all governing documents and consulting with your advisors. This crisis is fluid, and there is a lot of misinformation circulating, so don't base your decision or action on assumptions or rumors.

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