

## Commercial Contracts Generally

Businesses experiencing disaster-related interruptions may nonetheless be subject to ongoing contractual obligations. As a general matter, commercial contracts, including but not limited to commercial leases, are not uniform and can vary greatly—not all commercial contracts contain provisions that excuse non-performance caused by natural disasters. It is therefore important for businesses to review the terms of their contracts to determine their obligations and remedies during disaster-related business interruptions.

## Obligation To Pay Rent And Additional Rent

Review your lease to determine whether you have a legal obligation to pay rent and additional rent (i.e. real estate taxes, utilities, etc.). If you are unable to pay your rent you may reach out to your landlord to renegotiate your lease, negotiate a payment plan, or a reduction in your rent. Make sure that any agreement reached with the landlord is in writing. For legal assistance with your commercial lease contact the Community Development Project at (212) 426-3000 or [communitydevproject@legal-aid.org](mailto:communitydevproject@legal-aid.org)

## Eviction For Failure To Pay Rent

Currently, there is a 90 day (until June 19, 2020 unless extended) moratorium on all commercial evictions. However, this does not eliminate your obligation to pay rent nor does it prohibit your landlord from seeking to evict you from your commercial space once the moratorium on evictions ends if you fall behind on rent and/or additional rent.

## Termination of Commercial Leases

Commercial leases, do not typically contain termination provisions that are triggered by natural disasters except where the damage resulting from the disaster is to such an extent that the property is nearly destroyed and the property owner gives notice that it cannot or does not intend to restore the property before the end of the lease term or in certain cases within a reasonable time period prior to such date.

## Force Majeure Clauses in Commercial Leases

Some commercial leases contain a “force majeure” clause, which temporarily excuses non-performance caused by events beyond the non-performing party’s control, such as war, terrorism or “Acts of God.” “Acts of God” refer to natural disasters, such as hurricanes, floods, earthquakes, and tornados. The events covered by a force majeure clause vary, and in some cases may include fire or prolonged loss of electricity or phone service. (In addition, although rare, some contracts may excuse non-performance in circumstances where performance would be economically devastating because of a change in prices or costs or shortages in labor or supply chains.) Businesses experiencing disaster-related interruptions should review their contracts to determine the scope of the applicable force majeure clauses. In that

regard, they should also review the notice and other obligations with which they may be required to comply during the non-performance period.

## Obligations not covered by a Force Majeure Clause

Not every commercial contract contains a force majeure clause. Also, not every force majeure clause will cover every type of disaster or event that prevents a party from performing under a contract. Certain clauses are broader in their language and cover “acts of God” or “events outside of the contracting parties’ control”. Others will be more specific to fire, flood, war or insurrection, among other instances. In such cases, each party is required to perform its obligations under the contract. Otherwise, a party can be sued for non-performance or breach of contract. In situations where non-performance is not contractually excused, businesses should consider whether the applicable contract contains a liquidated damages provision. This type of provision sometimes allows either party to terminate the contract in exchange for a payment penalty. In some circumstances, the liquidated damages provision may provide an “out” that is less costly than the cost of performance.

Courts interpret force majeure provisions narrowly, however, and will frequently insist that the event giving rise to the suspension or termination of the agreement falls squarely within one of the defined events. In situations where a force majeure provision contains a catch-all phrase in addition to specifically defined events, such as “other events beyond the [applicable party’s] control”, courts will hold that words constituting general language of excuse be held to apply only to the same general kind or class as those specifically mentioned and apply only to objects similar in nature to those objects enumerated by the preceding specific words.

Further, force majeure events must not only be included in such a clause, but also unforeseeable. To the extent that a lease was entered very recently, specifically after the emergence of the virus in China, a landlord may argue that the events currently playing out were foreseeable at the time the lease was entered into. As noted above, however, where events and information are changing daily and even hourly, the result may depend on whether subsequent events were reasonably foreseeable based on the information available at the time the agreement was entered. Depending on the language used, rent abatement rights may arise if the provision of certain essential services to the premises, such as utilities, are interrupted.

## Casualty and Condemnation Clauses

Not every commercial contract contains a force majeure clause, however, and as noted, not every force majeure clause will cover every type of disaster or event that prevents a party from performing under a contract. One may also want to review the casualty or condemnation clause where there may be some exculpatory language. First, the condemnation clause should be reviewed to specifically determine whether the condemnation clause specifies whether a government taking needs to be temporary or permanent taking, and whether the state or city mandated closures would be covered by a temporary government taking which may not be clear yet with courts. Second, the casualty clause should be reviewed to

determine how broadly its provisions apply. Although certain leases define the term “casualty” narrowly, in terms of physical damage to or destruction of the premises, others have more expansive clauses, allowing termination of the lease or abatement of rent when the premises are rendered inaccessible or unusable. There is little existing law on whether government “shelter in place” orders render premises inaccessible for purposes of a casualty clause, though New York courts have generally held that the presence of pathogens in a property is insufficient to trigger the clause.

## Notice

In the event a business is a “non-essential” business and thus required to be closed, it should review the notice provisions of its lease as to when it should notify the Landlord of such closure, and provide notice of the event as soon as practicable, even if it does not know whether the event will result in its inability to perform. For example, it may be prudent for a lessee to inform a building owner that the lessee is being compelled to close its business, and while it hopes to be able to continue its performance, it may in the future be forced to exercise its rights under the force majeure provision. Doing so reduces the risk of unnecessary dispute about the timeliness of any notice, and also potentially creates an opportunity to discuss arrangements that may be made with the Landlord regarding payment of rent, particularly given that re-tenanting a commercial space in the current climate may be difficult to impossible for the Landlord.

## Remedies if a Business is Sued for Non-Performance, Including For Eviction

If a party is sued due to its non-performance, the party can argue impossibility or frustration of performance and ask the court to find that the lease should be held as unenforceable or to set aside rent obligations. Impossibility is a defense that, due to an unforeseen event, it is too difficult, too expensive, or too impractical to carry out the terms of a contract. However, New York courts apply this doctrine very narrowly, and the non-performing party must meet very high standards to show that circumstances were too overwhelmingly difficult or expensive to perform the contract.

**This is for informational purposes only and is not legal advice or counsel regarding your actual circumstances. If you have any questions or need legal assistance for your small business or not-for-profit organization please contact The Legal Aid Society’s Community Development Project at (212) 426-3000 or [communitydevproject@legal-aid.org](mailto:communitydevproject@legal-aid.org)**