



**MESSNER**  
**REEVES LLP**

## **CRA Virtual Town Hall Meeting 3/30/2020**

### **COVID-19: Rent Concerns During the Pandemic**

**Speakers:** Deanne Stodden and Matt Sullivan, attorneys with Messner Reeves

#### **Key Takeaways**

- There is no “one size fits all” approach to negotiating leases because each lease agreement, landlord, and business will vary.
- There is currently NO law or order at the federal, state, or local level that says commercial tenants do not have to pay their rent. The state moratorium on evictions only applies to residential properties.
- You need to take the time to sit down and thoroughly read your lease and understand your obligations before reaching out to your landlord.

#### **Reviewing your lease: What do I need to look for?**

##### Force Majeure Clause

- These clauses cover unforeseeable circumstances that prevent someone from fulfilling a contract, such as “acts of god”.
- Most of the time, in situations such as COVID-19 closures, this clause does not waive your rental obligations. Please contact an attorney if you need assistance understanding Force Majeure language in your lease.
- If your lease agreement does offer coverage under this clause, some may require you to send written notice that you will not be fulfilling some of your obligations because of a Force Majeure event.

##### Continuous-Operations Clause

- Continuous-Operations Clauses are provisions within a lease that require a tenant to operate its business in the leased premises throughout the term of the lease.
- If you choose to close because of COVID-19, you may be in violation of this clause.
- This may be a term you ask your landlord to waive as part of the negotiation.

##### Defaults

- It is very important that you carefully review this portion of your lease to understand what constitutes a default. This will vary by the lease agreement.
- Some key things you will want to look for are how many days you have to pay rent, what qualifies as a late rent payment, if there are any late charges or interest for late payments, etc.

- You may also have some maintenance obligations or other nonmonetary requirements; these may have some room to be waived or delayed during negotiations.

### **Be proactive! Communicate with your landlord**

- It is best to be proactive and approach your landlord first. Be honest and transparent with them, tell them that you cannot fulfill all the requirements of your lease agreement because of COVID-19 closures and mandates. Ask if they would be willing to negotiate a plan that will work for both of you during these unprecedented times.
- If you avoid the conflict and miss rent payments, your landlord can put a lien on the equipment in your space. They can come after you personally, and garnish wages and bank accounts, or put a lien on your personal belongings. **There is nothing in current law that states commercial landlords cannot require rent payments.**
- If you decide that you must negotiate with your landlord, have records of your current finances. Be able to accurately convey the state of your finances over the past year, and the state of your finances now.
- Be clear and specific about what you are asking for. Some ideas are:
  - Rent abatement: This will allow tenants to suspend rent or pay only a portion of the rent for a specified period of time.
  - Rent deferment: The landlord can defer a portion of the tenant's rent, but would require them to repay the rent deferred at a later time, often in a lump sum or by increasing subsequent payments or extending the term of the lease. There is room here to be creative with repayment options to find something that works well for both parties.
- Have a clear plan laid out and ready to present to them. Be ready to negotiate.
- Have a list of ideas or programs you have implemented in your business to adapt to the changing times and continue to bring in revenue. Demonstrate to your landlord that you are participating in delivery and takeout services, and have a description ready to show them how you plan to recover once this crisis is over.

### **What if I can't reach my landlord to negotiate a plan?**

- Continue to try different avenues of communication. Email, phone, and written letters are all effective.
- Landlords are likely busy dealing with other tenants at this time, be patient and continue to try to contact them.
- Document, document, document. Keep track of the times you have tried to reach them, and relay those to your landlord. *"I don't mean to pester you, but I have tried to contact you (on these dates). I would like to speak with you to discuss the terms of our lease agreement."*

### **Insurance plans**

- Most business interruption claims that are filed are being rejected. In order to trigger business interruption insurance coverage, there must be damage to the physical property of the business. This doesn't mean that you shouldn't file a claim, however. The National Restaurant Association is heavily lobbying the federal government to allow these claims to be processed for COVID-19, and we hope to see this approved in the next federal relief bill.

- We are also seeing some litigation on these claims in the private sector, so we may have some case law to refer to soon.

### **Loans**

- There are funds through the SBA for businesses to use in the short term.
- Many of SBA's requirements around collateral and credit history are being waived, and they are working to get these loans out to businesses as quickly as possible.
- These disaster relief loans are currently at 30-year terms with 3.75-4% interest rates.
- You should have a really good handle on your finances before applying for a loan. Make sure you understand historically what your finances look like, and what you would like them to look like in the future.
- Lenders want to know you have the ability to re-pay, so have an outline ready for how you plan to stimulate your business after the crisis and what you are currently doing to keep revenue coming through the door.
- If you don't qualify for SBA disaster loans, there is nothing that prohibits you from applying for other SBA loans and other lenders.

### **What should I do if I can't pay rent?**

- If you are in default and you haven't been able to come to an agreement with your landlord or secure a loan, you may face eviction.
- Whether your eviction will immediately go to court depends on many factors. The Colorado Supreme Court has issued guidance that Colorado courts focus on cases that impact public safety, but it is up to the counties to prioritize their own caseloads. Because of this, we may see some counties move forward with eviction cases when others are not.
- Although landlords should not simply lock the doors and ban you from the property, some still do. Landlords should go through the court system, and before they do, they should issue you a 3-day "cure" notice to allow you to remedy the issue. This notice will be posted on the property, and served on you. It may also be posted and mailed without personal service if the landlord is not seeking a monetary judgment.
- In most cases, it is not beneficial to argue the eviction if you are in default. Negotiating a graceful exit from the property is typically a better outcome than contesting the eviction. If you contest the eviction in court and you lose, you are then required to cover the landlord's attorney and court fees.
- If you are facing an eviction, speak to an attorney to understand your rights and defenses.

### **What about Frustration of Purpose and Impossibility? Can I use these to defend myself?**

- There are common-law terms that have not been tested in courts for COVID-19. Whether they will be effective defenses will vary by case.
- Frustration of purpose: Frustration of purpose occurs when an unforeseen event undermines a party's principal purpose for entering into a contract such that the performance of the contract is radically different from the performance of the contract that was originally contemplated by both parties, and both parties knew of the principal purpose at the time the contract was made. Simply put, you entered into a lease agreement with the understanding that you would generate revenue as a restaurant. Now that an unforeseen event, such as COVID-19, has occurred, you can no longer generate revenue as a restaurant, which defeats the purpose of having the lease.

- **Impossibility:** This is an excuse for the nonperformance of duties under a contract, based on a change in circumstances that makes the performance of the contract literally impossible. This essentially would argue that landlords would not be able to hold their tenant responsible because they can't fulfill their lease payments.
- Both of these are uncharted territories, and we have no way of knowing if it will be effective in court.

## Q&A

What if people are trying to reach their landlord, but their landlord will not respond?

- The best thing is to continue to be proactive and try to open the door for solutions with your landlord. Continue to try to pay rent, show good faith and take the correct steps towards making rent payments. Landlords are probably dealing with a lot of tenants right now. Make sure you document your efforts to reach them. Phone calls, emails, and written letters are trusted methods. You should also look at your lease and see what types of notice provisions your landlord has. If you are required to contact them by overnight mail, make sure that you do that.

If somebody has an agreement with their landlord, should they request a formal amendment to the lease? Is an email okay? What do you need?

- Always get something in writing, ideally an amendment to the lease that is signed by both parties. Document everything you can, utilize DocuSign, and have everything on paper in writing. If your agreement is discussed over the phone, follow up with an email restating what you agreed on.

Is there such a thing as too much transparency? Will sharing my finances with my landlord negatively impact me later on?

- We do not foresee any consequences of being transparent. If you are asking for help, you need to be prepared to show your reasoning and convey the current state of your finances.

Some businesses have had to invest in new equipment to adapt to the changing regulations. Can you include these purchases in the SBA loans?

- The guidance for this has not been issued quite yet, but if we had to guess, probably. **\*\*\*Update 4/3/20: In order to qualify for forgiveness under PPP, 75% of the loan amount must be used towards payroll costs. Payroll costs include salary, wages, commissions or tips (capped at \$100,000 on an annualized basis for each employee) employee benefits (vacation, paid leave, allowance for separation or dismissal) payments required for the provisions of group health care benefits including insurance premiums, retirement benefits, and state and local taxes assess on compensation. Other allowed purposes are rent, mortgage interest, and interest on any outstanding debts you had before the loan was issued.**

Is there any reason for a restaurant to wait to apply for loans to see what gets covered in the CARES act?

- Keep your options open, apply for anything you can apply for. You are not required to take the loan if you are approved. **\*\*\*Update 4/3/20: The SBA has suggested that businesses apply for the PPP as quickly as possible in order to prevent backlog.**

What arguments can be made for restaurants that have no choice but to be closed?

- Frustration of Purpose would likely be the best argument, as it is impossible for you to achieve your obligations under your lease. Whether that will be a successful argument will depend on quite a few factors.

Does Eminent Domain come into play here?

- Eminent domain requires an actual taking/seizure of property. Government closures will not constitute that.

Can restaurants request that the landlord use their security deposit towards missed payments?

- You can do that, but many landlords may require that you replenish the deposit within 30 days. Most landlords do not believe that this is the purpose of that deposit and are hesitant to use it. Don't be surprised if they refuse.

If a restaurant is closed, can they modify their insurance coverage to cut out some clauses that are not relevant during the closure as an effort to cut costs?

- Insurance under the lease is a requirement, so you may need to keep your policy the same. As long as you are leasing the space you will need something to protect you against liabilities. Make sure that what you are cutting out of your policy will not leave you vulnerable.

Should restaurants be requesting that landlords file a rent-loss claim with their insurance company?

- Most landlords are probably already doing this, and it doesn't change your obligations whether they have or have not done that.

If guests/employees are in and out of the restaurant and they later test positive for COVID-19, can that be considered physical property damage?

- There is no case law tied to this issue. It could be an argument to bring up if you need to exercise your rights. We will only know once this goes to court and case law is made for it.