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Rent Relief for Retail Tenants During the Coronavirus Pandemic: A Checklist for Landlords

As the coronavirus (COVID-19) pandemic unfolds, retail locations across the world are closing or facing steep business declines in the face of “shelter at home” orders and social distancing recommendations. Accordingly, retail tenants and landlords are having difficult conversations regarding the possibility of rent relief. When approaching rent relief discussions, landlords should keep the following considerations in mind:

- **Individualized Responses:** Landlords may offer varied responses to different tenants, depending on the nature of each tenant’s business, the size of the tenant, the length of the lease term remaining, whether the tenant has been ordered to close, and other factors. Some landlords are requesting tenant financials in advance of and during any rent relief period.
- **Abatement or Deferral:** The type of rent relief offered by landlords can be diverse and tailored to each property and tenant’s unique circumstances. Landlords can agree to abatement of rent entirely, or defer rent with repayment on a certain date or in accordance with a specific payment plan. The parties can also add additional months to the end of the existing lease term at a higher rate. Abatement or deferral can apply to minimum rent only or also to common area expenses, depending on the circumstances. However, tenants will usually still be obligated to pay their own utilities.
- **Length of Rent Relief:** In any event, the abatement or deferral period should be established up front, and not tied generally to an unknown period of pandemic or “stay home” orders. The parties can always agree later to extend the rent relief period as the situation progresses.
- **Tenant Aid:** Landlords and tenants will need to agree whether any government aid or insurance proceeds that later become available to the tenant must be used to repay the landlord and offset any rent relief provided.
- **Termination Rights:** If the lease contains percentage rent, the landlord or tenant may want the right to terminate the lease if closures last beyond an outside date, or if the tenant’s business performance remains below a certain threshold for a specified period of time.
- **Claim Waivers:** Landlords should require an estoppel, waiver and ratification from tenants and their guarantors, confirming they have no claims against the landlord under the lease, and waiving any claims or defenses against the landlord with

respect to constructive eviction, casualty, condemnation, failure of co-tenancies, landlord closures or other potential pandemic-related claims. Otherwise, the landlord could be faced with claims for additional relief beyond the structure originally agreed upon.

- **Third-Party Approvals:** Once the landlord and tenant have agreed upon the general terms for rent relief, the landlord may still need the consent of third parties before it can sign a lease amendment. Landlords should check the following documents to see if they expressly grant lenders, investors or other third parties express approval rights over lease amendments or budget changes. The documents might also contain debt coverage or other income tests, fiduciary obligations, or specific co-tenancy and operational provisions that could be implicated by granting rent relief or giving tenants the right to go dark. Limited lease guarantees may need to be revised or expanded to cover the particular rent relief structure.
 - Loan documents.
 - Partnership/LLC agreements.
 - Other lease-related documents, such as franchisor riders, guarantees, sublease consents, tenant financing consents and subordination agreements.
 - Leases with other tenants at the property.
- **Confidentiality and Disclaimer:** In all circumstances, but especially where landlords offer varied relief to different tenants, it is wise for landlords to get written assurances from tenants and guarantors that the negotiations and ultimate lease amendment will remain confidential. In all correspondence with tenants, the landlord and its property managers, brokers and representatives should include a statement of disclaimer making clear that all conversations are considered confidential and the landlord is not bound to any deal discussed until an amendment has been finalized and signed.
- **Notice Provisions:** Landlords and tenants should consider requiring official notices under the lease to be sent solely by email during the pandemic, except to the extent the particular eviction or other laws of a property jurisdiction require otherwise. Representatives of all parties may be working from home and not able to send or receive overnight mail, and carriers could suspend services. It is also a good idea to lengthen the list of employees slated to receive such notices, to ensure notices are seen and handled quickly. The parties may also wish to allow for further extensions of the rent relief periods by email only, where permitted by local laws.

As always, be sure to check with local counsel to ensure any agreed-upon approaches are permitted in the applicable jurisdiction. [Click here](#) to read more Brownstein alerts on the legal issues the coronavirus threat raises for landlords and tenants, including [force majeure](#), [business interruption insurance](#), and [government aid](#).

Blake A. Hansen
Associate
bhansen@bhfs.com
303.223.1114

Ashley B. Wingfield
Shareholder
awingfield@bhfs.com
303.223.1218

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