As the COVID-19/Coronavirus (COVID-19) continues to spread and affect our lives, the only certainty seems to be uncertainty. What is becoming clear is that both the short term and long term economic effects of the outbreak are likely to be significant. In light of this, real estate clients are asking important questions regarding the potential legal issues COVID-19 may have on their rights as real estate owners and operators. This article discusses some of the legal and business issues being faced by landlords and property managers because of COVID-19 and some actions that can be taken to better assess and prepare for the short and long term impacts of the virus.

**Property Management & Maintenance**

Short term, landlords and property managers of commercial and retail properties should be monitoring the websites of their local health departments and the U.S. Center for Disease Control and Prevention (CDC) and taking the steps that they can to support applicable directives and maintain a clean and safe environment for their tenants and their patrons. Most, if not all, communities are currently being advised to avoid travel and to practice some level of “social distancing” designed to curb the spread of the virus. These generally include increasing handwashing and use of hand sanitizer and regularly cleaning high-touch surfaces as well as maintaining a six-foot distance from other individuals in public places. Several California counties are also now subject to mandatory “shelter-in-place” orders requiring individuals to self-isolate in their residences except to the extent necessary to perform or obtain certain “essential services” and other functions expressly outlined in the applicable orders.

Owners and managers should understand and comply with all suggested and mandated guidelines for controlling the transmission of the virus, including (to the extent possible and applicable):

- Providing hand sanitizer stations in high traffic areas
- Routinely cleaning surfaces and increasing janitorial services provided to tenants and common areas
- Regularly communicating with tenants regarding building policies and steps being taken to address the outbreak and state and local directives and mandates
Following all CDC recommendations and posting materials in multiple languages to educate tenants and their employees and visitors about proper hygiene and all suggested and mandated “social distancing” and “shelter in place” measures

- Reviewing any “shelter-in-place” orders affecting a property and assessing whether one or more tenants provide “essential services” or constitute “essential businesses” that can or must remain open
- For tenants allowed or required to remain open, assisting with their attempts to promote “social distancing” (e.g., storing customer seating for restaurants to emphasize take-out and delivery services, only).

Assessment of Applicable Lease Terms

Longer term, landlords will want to assess their exposure to the risk of lease terminations and defaults due to the economic impact of the virus. Initially, lease agreements should be reviewed to understand the contractual rights and obligations of both the landlord and the tenant with respect to the property in extraordinary circumstances and the right to evict should the economic impact of the virus cause a default in the payment of rent. Given the scope of this pandemic, however, business and societal considerations, as well as government actions, will likely have a significant effect on the contractual rights of landlords and the ability to exercise their usual remedies.

The starting point for any inquiry will be to review applicable lease terms. No well-written lease should allow for a tenant to withhold rent or terminate their lease based upon a downturn in the economy or their relevant markets. Many leases do, however, contain “force majeure” clauses that excuse or extend the time for performance of some lease obligations if a party is prevented from performing the obligation due to “acts of God” or other causes beyond the party’s reasonable control. An applicable force majeure provision may not expressly list a “viral pandemic” or something similar as an action expressly covered by the clause. Still, certain actions applicable to the COVID-19 virus itself or the actions taken to slow its spread may expressly apply. For example, it is common for some force majeure provisions to include the inability of a party to perform due to regulations or orders of government authorities which arguably may apply to retail tenants in jurisdictions subject to mandated “shelter in place” orders. Events listed in most force majeure clauses, however, are generally presented as non-exclusive examples. Consequently, given the scope of the pandemic and the unprecedented responses by governmental authorities and the public, force majeure provisions will arguably apply whether or not a clearly applicable example in the clause is or can be identified.

Even if a force majeure clause is applicable, however, it should expressly exclude the obligation to pay rent, meaning the timely payment of rent by the tenant should be required whether or not a force majeure event has occurred. Landlords should, therefore, review their leases to confirm such a carve-out is expressly provided for in the lease. If not, a landlord may be subject claims by their tenants that the obligation to pay rent itself has been delayed by the occurrence of the COVID-19 pandemic.

In addition to force majeure provisions, landlords should review the insurance requirements in their leases and confirm whether or not the tenant was required to maintain business interruption insurance. Even if not required by the lease itself, landlords may want to discuss whether a particular tenant has a business interruption insurance policy or potentially other insurance coverage to help cover their rent obligations until the COVID-19 emergency subsides. Certain actions might be necessary or advisable to ensure payments under any such policy are received and applied to rent, or that might otherwise benefit from coordination between the tenant and the landlord. For example, different policies may expressly include or exclude pandemics such as COVID-19 or limit the amount of the coverage in the case of disruptions resulting therefrom. Policies may also require official government action, such as a formal “shelter in place” order by
the applicable authorities. Understanding the parameters of, and triggers for, any applicable insurance policies will better position landlords and tenants to act accordingly and to maximize potential recoveries. ([Additional information regarding Business Interruption Insurance and Losses Related to Coronavirus is available here.])

**Eviction Rights & Restrictions**

In the event tenants are unable to pay rent as a result of the COVID-19 pandemic, landlords will need to assess both the legal and business issues affecting their right to evict tenants. From a business perspective, landlords may find that eviction is not immediately their best or preferred option, whether due to the unavailability of replacement tenants or the overall optics of evicting tenants affected by such an unprecedented and global event. In such cases, landlords may need to negotiate with the tenants and should be prepared for the possibility of rent reductions or rent forgiveness for a period of time, or the deferral of rent and potentially spreading deferred rent over the remainder of the lease term. The ability of a landlord to make such concessions may, however, depend on its ability to negotiate similar concessions from investors or lenders whose returns or debt service payments are funded by the rent payments due.

Landlords that do elect to pursue eviction as a remedy may also find themselves subject to legal and practical limitations on their ability to do so. Cognoscente of the economic impacts the measures taken to hasten the spread of COVID-19 are having and will continue to have on individuals and businesses, government authorities are already restricting the ability of landlords to evict tenants affected by the pandemic. For example, on March 16, 2020, Governor Newsom issued Executive Order N-28-20 which, among other things, increases the ability of local governments to restrict both residential and commercial evictions to mitigate the impacts of COVID-19. The intent of this order is clear, and landlords should expect some level of government restriction against evictions to be put in place throughout California and effective for as long as the virus (and its economic impact) remain a significant threat. ([Additional information regarding Executive Order N-28-20 is available here.])

Moreover, at least in the near term, the practical effects of the virus and shelter in place directives will also affect the ability of landlords to effectively pursue eviction as a remedy. The ability to serve and post-default and eviction notices will be difficult until free movement is restored. With the closing of many courts, filing and pursuing unlawful detainer actions is also currently not possible in many areas. These practical realities will continue to prohibit eviction as a truly viable remedy until circumstances change significantly. During this period, landlords should also monitor all federal, state, and local financial relief efforts and the extent to which they or their tenants may be able to take advantage of such efforts to help soften the financial impact of the virus and avoid the need for an eviction altogether.

In the end, it should not become the job of property owners and landlords to subsidize the losses caused by COVID-19, nor should the COVID-19 pandemic be a catalyst to significantly impinge upon the right of owners and landlords to protect their assets and investments through eviction or otherwise. Wide-scale evictions during a time of crisis, however, will not serve the interest of anyone. So, while these rights may be limited in the short term, hopefully all parties (landlords, tenants, governments, the business community, and individual consumers) can use that time to both ensure the pandemic is behind us and take steps to soften the financial impact of the crisis for everyone.

For more information, please contact: