

Requesting Rent Abatement: A Practical Approach During the COVID-19 Pandemic

Chances are your business has been interrupted by the Coronavirus epidemic, and if you rent space, you are considering how to obtain rent concessions from your landlord. Most likely, your lease will not give you an express right to rent abatement if your use is precluded by a "shelter-in-place" order or other government action. Nor will your lease take into account the damage your business will suffer as we enter into a recession or its impact on your ability to pay rent in the longer term. Although an iron fist approach that states a legal claim to abatement is certainly an option, using the art of persuasion may lead to a more productive conversation.

Leases are generally unforgiving to Tenants insofar as rent abatement is concerned, but a careful review of your rights before you make your approach to the landlord is warranted. You will likely find that there are a number of provisions that hold out some hope but do not apply neatly to the situation at hand. Many leases have "Cessation of Services" provisions that may provide rent abatement in limited circumstances when the landlord fails to provide agreed upon services to your premises for a period of time. It is questionable whether this provision will apply if access is denied altogether by government order. Most leases will also contain a "Covenant of Quiet Enjoyment" for the benefit of the tenant, but there is again a question of whether a government action that precludes access will amount to a breach of this covenant. "Force Majeure" provisions are also common, but most carve out the tenant's obligation

Anecdotal information we have received from industry professionals indicates that the vast majority of abatement requests are being made directly by tenants as opposed to brokers or even lawyers (one informal dataset we reviewed indicated 6 of 7 tenants are handling abatement requests on their own). Here are factors to consider when making the rent abatement request:

Consult with Your Broker. Your broker may have information about how your landlord is handling these requests, and should have information on what she or he is seeing in the marketplace. Your broker's insights will be useful when you draft your abatement request.



by David C. Longinotti

Contact the Landlord First. Have a conversation with your landlord's representative before you send a formal request. This will give you an opportunity to commiserate about the epidemic with the representative on a human level and build some goodwill. If you are a tenant in good standing, especially if you have been so for a period of years, let them know it. A cold request is less likely to be well received.

Admit Your Challenges Without Breaching the Lease. An admission that you are unable to perform your rent obligations as they come due may give the landlord grounds to make a claim for anticipatory breach or to request further financial assurance of performance from you. It is better to state more generally that you will be challenged without being specific, and are seeking consideration from your business partners including the landlord.

Make a Fair Economic Proposal. The landlord has financial obligations and challenges as well; this is not the time to ask for free rent. Rather a proposal that takes into account the landlord's own economic reality is more likely to be given consideration. Here are three alternatives we are seeing in the marketplace:

1. Ask for three months' rent abatement in exchange for an extension of the lease term for the same duration. Other than free rent, this approach is most favorable to the tenant in that it does not require any additional payments until the very end of the leasehold, and the payment will be in exchange for beneficial occupancy.
2. Ask for three months' rent abatement, with the abated rent amortized over the remaining duration of the lease. This proposal would likely work only if there were a significant portion of the lease term remaining. It would provide interim, full relief to the tenant which would be paid in increments over time. The abated rent would be repaid without interest.
3. Seek a partial abatement for a period of time. Your ability to pay should probably dictate the amount of the requested abatement. An alternative approach would be to pay partial rent tied to the landlord's debt service and monthly property taxes and insurance. Of course the landlord would have to be willing to share this information, and the amount you pay will be based on the landlord's debt stack, the property's current assessed value and other factors outside of your control.

Be Prepared to Demonstrate Your Need. A landlord with any sophistication will likely ask you to justify the basis of your need. You should have prepared your financial projections and have an understanding of your financial challenges before making the request.

Reserve Your Legal and Equitable Rights. If the landlord denies your request, you may have to assert whatever defenses to payment of rent you may have under the lease, at law or in equity. For this reason, including a reservation of rights provision, stated in plain language, is recommended.

Seek Legal Review. It is prudent to seek legal review of the letter you draft before you send it, to assure you are not creating any legal exposure under your lease and have reserved your rights adequately. Copying your attorney on the proposal is a judgment call, but I would probably recommend against it in most situations.

Set a Clear Timeframe for Response. Time is of the essence with rent abatement requests. In many situations you will be considering whether to pay rent and would like to get a response from the landlord before you do so. Setting a clear timeframe for response will underscore urgency and hopefully facilitate a timely response.

What to Expect. Your landlord is most likely not going to approve your request on the spot, especially if it is a larger corporate concern. In many cases any rent abatement will need to be approved by the landlord's

lender (with REIT owned buildings as a notable exception) and equity partners. For this reason you can expect either an outright denial or a request for further financial and other information as noted above. Either way, the tenant should take this response as an opportunity for further dialogue leading to a fair and equitable abatement.

For more information, please contact:

David C. Longinotti, Partner
415-995-5041
dlonginotti@hansonbridgett.com