

IDAHO STATE BAR REAL PROPERTY SECTION

Justin Cranney

JCranney@hawleytroxell.com

208.388.4837

COVID and Commercial Real Estate Leasing

REQUESTING RELIEF

- Necessary
- Proportionate
- Supported by a business case

RENT RELIEF

- Rent Abatement
- Rent Deferral
- Lease Termination

RENT ABATEMENT

- The act of eliminating or nullifying.
Abatement, Black's Law Dictionary (11th ed. 2019).
- Basic Rent, Additional Rent, Percentage Rent

RENT DEFERRAL

- To postpone; to delay until a later date. Defer, Black's Law Dictionary (11th ed. 2019).
- Basic Rent, Additional Rent, Percentage Rent
- Interest?

AMENDING THE LEASE – KEY PROVISIONS

- Specific relief being granted
- Obligation to seek relief (insurance, governmental funds)
- Default of Amendment
- No Default under Lease (both landlord and tenant)
- Affirmation of Lease Terms
- Waiver of late fees / interest
- Confidentiality

LEASE TERMINATION

- When Advisable
- Terms for Termination of Lease

FORCE MAJEURE

- “**Force majeure**” is a legal term of art generally meaning an event or effect that cannot be anticipated or controlled, particularly an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do. Force Majeure, Black's Law Dictionary (11th ed. 2019).
- A force majeure clause typically has two components: (i) a provision excusing one or both parties from performance under the contract (or allowing for contract termination) when a force majeure event occurs and, (ii) a list of events qualifying as force majeure sufficient to trigger the clause.

FORCE MAJEURE (CONT.)

- Neither party will be liable or responsible to the other party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement, when and to the extent such failure or delay is caused by or results from the following force majeure events: (a) flood, fire, earthquake, or explosion; (b) war (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (c) government order or law; (d) actions, embargoes or blockades in effect on or after the date of this Agreement; (e) action by any governmental authority; (f) national or regional emergency; and (g) strikes, labor stoppages or slowdowns or other industrial disturbances.

FORCE MAJEURE (CONT.)

- Neither party will be liable or responsible to the other party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement [**except for any obligations to make payments to the other party hereunder**], when and to the extent such failure or delay is caused by or results from the following force majeure events: (a) flood, fire, earthquake, [**other potential disaster(s) or catastrophe(s), such as epidemics**] or explosion; (b) war (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (c) government order or law; (d) actions, embargoes or blockades in effect on or after the date of this Agreement; (e) action by any governmental authority; (f) national or regional emergency; [and] (g) strikes, labor stoppages or slowdowns or other industrial disturbances [; **and (h) acts of God**].

COMMON LAW DOCTRINES OF IMPOSSIBILITY OR IMPRACTICABILITY

- Under the doctrine of supervening impossibility, nonperformance may sometimes be excused if the subject matter of the contract is no longer capable of being performed due to an unforeseen, supervening act for which the impacted party is not responsible.
- Under the related doctrine of impracticability, the duty to perform may be discharged if performance is rendered impracticable without fault of the obligated party and as a result of the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made.

BUSINESS INTERRUPTION INSURANCE

- Provides coverage for lost profits and related costs when a company can't continue normal business operations.
- The business interruption must result from "direct physical loss or damage" to the policyholder's property.
- Many business interruption policies contain exclusions for property damage arising from:
 - virus (likely applies to COVID-19);
 - communicable disease (likely applies to COVID-19); or
 - bacteria (arguably applies to COVID-19).

LANDLORD OBLIGATIONS

- Returning to Offices
- <https://www.boma.org/coronavirus>

LANDLORD OBLIGATIONS (CONT.)

- Protective Equipment for Building Staff
- Common Area
- Cleaning specifications;
- Building security;

LANDLORD OBLIGATIONS (CONT.)

- Essential Services
 - Access Rights
 - Security of Premises
 - Amenities
- Non-Essential Services
 - Access Rights
 - Security of Premises

EVICTIIONS

- Status
- Issues

Justin Cranney

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208.344.6000

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