

Commercial Lease Issues During COVID-19 (NY State)

This guide focuses on **rent-related issues** you may be facing with your commercial lease in New York State. If you are in another state, please review local guidance.

This information is current as of March 11, 2020, and should not be considered comprehensive. This is not a substitute for, and should not be relied upon as, legal or professional advice; we recommend you consult professional advisors for guidance on your individual circumstances. Nothing contained herein creates an attorney-client relationship with Cleary Gottlieb. This information should not be construed as an endorsement of any specific financial program.

1 Understand Your Rights and Obligations as a Tenant

If you are having trouble paying your rent, you should understand the three important sources of potential legal protection: (A) your lease, (B) common law, and (C) executive orders/legislation.

A. Your Lease: You should review your lease for the following provisions:

- **Hell or High Water:** Says nothing in the lease should be read to excuse payment of rent. “The obligation to pay rent hereunder is an independent covenant and shall not be subject to any offset, deduction, etc.”
- **Force Majeure:** Excuses performance if a “force of nature”/“act of God” event occurs (e.g., an earthquake or tornado). A pandemic is usually *not* listed, but a state of emergency or government intervention might be. Usually **does not** excuse your obligation to pay rent.
- **Casualty:** Governs rights and obligations in the event of *physical damage* to the premises. Usually **does not** excuse your obligation to pay rent during a COVID-19 closure.
- **Condemnation/Eminent Domain:** Governs rights and obligations when the government exercises its power to take property for public use. Government-mandated closures are not considered a “taking,” so **probably does not** excuse your obligation to pay rent.
- **Covenant of Quiet Enjoyment:** Prevents the *landlord* from interfering with the tenant’s use of the premises. Because COVID-19 closures are *government-mandated*, this **does not** affect your obligation to pay rent. If your landlord does something to interfere with your use of the premises (e.g., changes the locks), this provision may help.
- **Co-Tenancy Clauses/Closure of Common Areas:** Lets a tenant terminate the lease, reduce rent, or seek other relief when certain co-tenants stop operating or no longer occupy the building. Will be difficult to apply under COVID-19, plus the landlord’s co-tenancy obligations may be excused under a force majeure provision (see above).
- **Guaranties:** Requires you or another person to pay the obligations under the lease if your business – as the tenant – cannot do so. Your lease may have a guaranty built into it, or you or another guarantor may have signed a standalone guaranty document.

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¹ This reference guide is intended to provide familiarity with relevant concepts, and does not constitute legal advice.

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Understand Your Rights and Obligations as Tenant (cont'd)

B. Common Law: If you pursue litigation, the following “common law” concepts might offer relief from your rent obligations. **Succeeding on these arguments is highly unlikely and litigation can be expensive and time-consuming.**

- **Impossibility:** Relieves you from performance when it is entirely impossible.
- **Frustration of Purpose:** Relieves you from performance if the intended use for the leased space – as specified in the lease – is no longer permitted.

C. Legislation:² New York State has enacted legislation establishing eviction and foreclosure protections for small businesses facing financial hardship:

COVID-19 Emergency Protect Our Small Businesses Act of 2021 (SA471A/A3207)

- **No initiation of eviction proceedings until May 1, 2021 against small businesses that submit a standard hardship declaration to their landlord or the court**
 - Applies to businesses in New York State that are independently owned and operated, have 50 or fewer employees and are not dominant in their field
 - A hardship declaration is a standard form where a commercial tenant states their business is facing financial hardship and is unable to pay rent because of (i) a significant loss of revenue during the COVID-19 pandemic, (ii) a significant increase in expenses relating to the purchase of protective equipment to prevent the transmission of COVID-19 or (iii) moving expenses and difficulty securing an alternative commercial property make it a hardship to relocate.
 - Your landlord is required to send you a hardship declaration form and attest that the declaration was not returned before they can initiate eviction proceedings
- **Any pending eviction proceeding as of March 9, 2021 or proceeding commenced by April 8, 2021 is stayed for 60 days.** The court must send you a hardship declaration form and determine whether you meet the criteria for protection.
- Applies to non-payment and holdover eviction cases. You can still be evicted for violating your lease by persistently engaging in behavior that substantially infringes on the use and enjoyment of other tenants or causes a substantial safety hazard.
- **Failure to pay rent at this time could still cause a breach under your lease**, allowing the landlord to pursue its remedies (including charging a late fee and interest) even if they temporarily cannot evict. While the above legislation is in effect, your landlord likely will not be able to use “self-help” (as discussed below) to remove you from possession of the premises.
- **NYC Legislation:** For tenants in *NYC only*, landlords cannot enforce personal guaranties (see Section 1(A), above) for breaches that occurred between March 7th 2020 and March 31st 2021 for businesses that had to close or limit services pursuant to Executive Orders 202.3, 202.6, or 202.7.³

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² Government directives are constantly changing; this guide provides a snapshot as of the date of publication, but you should do additional research to see if any other government directives or legislation may apply.

³ As with most government directives, this legislation is subject to further updates and interpretation.

2 What Can Your Landlord Do If You Don't Pay Rent?

Failure to pay your rent may be a breach (or default) under the lease. Leases are all different, but a landlord's rights upon breach generally include:

A. Evicting You

- **Court:** An eviction proceeding (also known as a *summary proceeding*) may be based on (a) non-payment of rent or (b) holding over (keeping possession of the premises after the expiration of the lease).
 - ✓ A non-payment suit can be based not only on non-payment of rent, but also on non-payment of amounts called "additional rent" in the lease.
 - ✓ Before starting a non-payment eviction proceeding, your landlord must deliver a written notice to you giving you 14 days to pay or vacate.
- **Self-help:** If your lease gives your landlord the right to reenter the premises in the event of a breach (most do), the landlord may be allowed to evict you without a court order after terminating your lease due to a tenant breach ("self-help" is prohibited for residential tenants, but not for commercial tenants). In order for the landlord to pursue "self-help," you would need to actually be in default and the landlord would first need to provide you with a rent demand which accurately lays out the amounts owed (with base rent listed on its own). The "self-help" measures must be peaceful (they could include, for example, changing the property locks.)

B. Suing for the Money Owed (including outside of an eviction proceeding)

- **Duty to Mitigate:** Unless the lease says otherwise, commercial landlords in New York *do not* have a duty to help lessen their financial losses when a tenant breaches.
 - ✓ So, **even if you move out**, you are still responsible for the rent through the remainder of the lease (if that is what the lease states), and the landlord has **no duty** to try to find a new tenant.
- **Acceleration:** Your lease may have an acceleration clause; generally, this means that missing just one month of rent may give the landlord the right to **immediately collect all of the rent** under the remainder of the lease (and possibly more).
- **Late Fees/Interest:** Your lease may provide that nonpayment allows the landlord to charge you **late fees and/or interest** on the amount that is unpaid.

C. Keeping All or Some of Your Security Deposit

3 How to Approach Your Landlord

Negotiating a deal with your landlord may be your best option; it may also be in the landlord's best interest because (a) evictions can be expensive and time-consuming and (b) it may be difficult to find a replacement tenant in the current climate. If your lease has a significant period of time remaining, both sides may have an interest in preserving the long-term relationship.

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3**How to Approach Your Landlord (cont'd)****Remember:**

- ✓ Be upfront, but frame the conversation in terms of broad “concerns” or “difficulties.” If you haven’t missed a rent payment, avoid saying that you’ll be doing so, as that may constitute an “anticipatory breach,” allowing the landlord to seek remedies before you’ve actually missed the payment. Avoid saying that you are unable to pay your debts, as that may result in a bankruptcy-related breach.
- ✓ Your landlord’s options may be limited – they may have a loan on the property. Under the loan, the lender may need to consent to changes to the lease.
- ✓ Explore funding options such as Economic Injury Disaster Loans, the Paycheck Protection Program or other federal, state or private sources.
- ✓ Consider negotiating through the broker if they have a good relationship with the landlord.
- ✓ Maintain a good relationship with the landlord; your landlord may be able to deny your request to extend the lease, exercise a purchase option, or exercise other rights you may have under the lease, even if you reach a deal on the rent.

Think About What You Want:

- A rent holiday to be paid back over time (ideally with no interest)
- Use of the security deposit to pay rent and pay back the deposit over time
- Moving an allowance or free rent period forward
- Renewing or extending the lease now in exchange for a free rent period
- Amending the lease to include a percentage rent provision, where you pay the landlord a portion of your revenues in exchange for a lower base rent. This may be appropriate if your business will only face minor impacts from post-reopening social distancing.
- An early lease termination; your landlord would likely require an upfront payment (probably a last resort, but may be helpful if you know your business will struggle due to post-reopening social distancing). Ensure that any guarantors and security deposits are released.

Start Small Think Big Offers Legal Help

Start Small Think Big may be able to provide COVID-19-related **pro bono legal help**.

Visit <https://covid19.startsmallthinkbig.org/request/> to request assistance with your legal issues, including review of and advice on your small business commercial lease.