



Legal and Practical Considerations for Post-Pandemic Real Estate

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September 29, 2021

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Current Landscape

- Uncertainty continues due to variant surges, inconsistent legal/regulatory activities, uneven impact by industry sector; no “playbook”
- DMV/National Capitol Region particularly sensitive to uncertainty factors due to multiple governing authorities, geographic and demographic diversity, and presence of federal government
- Now more than ever, consideration of commercial real estate legal issues requires a broader approach which encompasses several legal disciplines and integrated business strategies

Market Observations

- Acquisition and lease deals are getting done
- Capital is available: level of activity depends on asset class
- Industrial and Multi-Family performed best
- Office and Retail much slower to recover

Market Observations

- Total retail rent collections approached 91% in June 2021 - the first time since March 2020 that collections eclipsed the 90% mark
- National tenants performed even better than the national average, at 94.27% (versus 93.45% in April); rent collections among non-national tenants came in at 87.12%
- Collections for both national and non-national tenants are now less than one percent from their peaks for all of 2020; at this point last year, aggregate collections were down 48% from current numbers
- U.S. office sublease market hits record-high 158M square feet; office sublease space in the U.S. reached a new record high in the second quarter — but the rate at which new sublease space is being listed continues to slow

Stakeholder Obligations

- Key consideration for all market participants:

Fundamental shift in the rights and obligations of sellers/purchasers or landlord/tenants

or

Surgical revision to accepted market practices to address temporal conditions occasioned by pandemic and evolving workplace utilization (e.g., government shutdowns; remote and hybrid workforce)

Leasing Trends

- **Rent Deferral:** Base rent deferred for up to 3 months with a payback period ranging from 3 to 24 months commencing immediately after the deferral period
- **Blend and Extend:** Tenants are agreeing to extend the lease term for a period equal to the length of the rent deferral period, or in some cases, exercising their lease renewals or entering into lengthier extensions
- **Abatements:** Rent abatements are uncommon; they are occurring in limited circumstances where tenants are willing to both extend the lease term and waive rights, such as early termination rights, co-tenancy clauses and gross sales rights
- **Force Majeure:** These clauses will be hotly negotiated going forward on both sides, and may include potential rent protection for tenants
- **Business Interruption:** It is likely that owners/landlords will require additional types of business interruption insurance, the proceeds of which will be payable directly to the owners/landlords upon the occurrence of a force majeure event

Specific Lease Provisions

Critical Clauses:

Force Majeure, Waiver, Abatement, Rent Commencement, Business Interruption, Co-tenancy and Exclusive Use, Conditionality of Rent Deferral, Guaranty of Deferred Rent, Releases, Confidentiality, Reimbursement of PPP Loan Proceeds, Parking, Maintenance (e.g., enhanced cleaning services), and building/suite ingress and egress regulation

Landlord/Loan

Document Constraints:

Owners/Landlords are often constrained in their ability to unilaterally grant tenant relief under their loan documents; Lenders are generally disinclined to grant tenant relief

Specific Lease Provisions

Force Majeure

“Unavoidable Delay” means the inability of a party to fulfill, or a delay by a party in fulfilling, its non-monetary obligations under this Lease expressly or impliedly to be performed by such party due to any acts of God, inability to obtain labor, strikes, lockouts, lack of materials, governmental restrictions, enemy actions, civil commotion, fire, earthquake, unavoidable casualty, government declared health emergency, outbreak, pandemic (including, without limitation, COVID-19), or epidemic, or other similar causes beyond the reasonable control of Landlord or Tenant (as applicable). It is expressly agreed that Landlord shall not be obliged to settle any strike to avoid an Unavoidable Delay from continuing. In no event shall the lack of funds or inability of a party to make payments required hereunder constitute an Unavoidable Delay nor shall an Unavoidable Delay excuse the payment of Rent.

Specific Lease Provisions

Waiver

Notwithstanding anything to the contrary set forth in this Lease, (i) Tenant hereby waives any known or unknown claims or defenses, including those that do not presently exist or that arise hereafter, related to the economic environment or the results of or derivative effect from COVID-19 (including any and all strains or variants thereof), including, without limitation, frustration of purpose and impossibility defenses; and (ii) Tenant hereby acknowledges and agrees that any declared state of emergency or public emergency related to COVID-19 or other outbreak, pandemic, epidemic, or similar event, or any government mandated or ordered quarantines, closures or disruptions related thereto (any of such events or occurrences being a “Government Event”), shall not constitute a defense, offset or counterclaim to payment of any Fixed Rent, Additional Rent, or other charges due under this Lease by Tenant to Landlord, and Tenant hereby waives any rights now or hereafter conferred upon it by statute, proclamation, decree, order, or otherwise, to quit the Premises, or any part thereof, to surrender this Lease or to claim any abatement, setoff, diminution, reduction or suspension of rent or other charges on account of any such Government Event.

Specific Lease Provisions

Abatement

Notwithstanding the foregoing to the contrary, if (y) as a result of a pandemic or other communicable disease, Tenant is prohibited from operating within the entire Premises by governmental rule, order and/or regulation (collectively, the “Pandemic Closure Mandate”) for a period of more than fifteen (15) consecutive days, and (z) Tenant is not in material default hereunder beyond applicable notice and cure periods, then, as Tenant’s sole and exclusive remedy under this Lease on account of such Pandemic Closure Mandate, fifty (50%) percent of the Fixed Rent payable hereunder shall abate commencing on the sixteenth (16th) day after the effective date of the Pandemic Closure Mandate until the Pandemic Closure Mandate is lifted and Tenant’s business at the Premises is legally permitted to be open; provided that if Tenant’s business interruption insurance required by Section 9.03(a)(ii) herein above or otherwise obtained by Tenant covers all of Tenant’s losses as a result of such pandemic (including its Fixed Rent obligations under the Lease), the applicable portion of the proceeds of such insurance shall be applied to, and shall reduce, the foregoing right of Tenant to abate the 50% portion of Fixed Rent hereunder. Partial months of such Fixed Rent abatement shall be pro-rated on a per diem basis. If at any time during the Pandemic Closure Mandate or thereafter Tenant shall default under this Lease after the expiration of applicable notice and cure periods (and excluding Tenant’s obligation to continuously operate its business in the Premises in accordance with Section 4.02), the amount of such abatement shall become immediately due and payable in full, without the giving of any notice by Landlord or otherwise.

Specific Lease Provisions

Rent Commencement

The Rent Commencement Date shall be subject to a day for day extension for any COVID Delay following the Commencement Date. “COVID Delay” shall mean the continued enforcement of the New York State Executive Order Number 202, the extension of such order, or a new “stay-at-home” order established by any governmental authority having jurisdiction over the Premises which orders construction to cease in the location of the Building with respect to the COVID-19 or any future pandemic (each, a “COVID-19 Cause”) which actually prevents the performance of Tenant’s Work (including, without limitation, Tenant’s ability to obtain permits or governmental approvals to perform Tenant’s Work), Tenant’s receipt of governmental approvals or sign-offs for Tenant’s Work, or Tenant’s ability to open for business in the Premises.

Notwithstanding anything to the contrary contained in this Lease, following Tenant opening for business to the general public, if as a result of the continued enforcement of the New York State Executive Order Number 202, the extension of such order, or a new “stay-at-home” order established by any governmental authority having jurisdiction over the Premises with respect to the COVID-19 or any future pandemic (“**Restrictive Ordinance**”), Tenant is required by law to close for business in the Premises, and in fact closes for business, then, as Tenant’s sole and exclusive remedy, 50% of all payments of Fixed Rent only shall be abated from the date which is the later of (i) the date on which the Restrictive Ordinance is in effect and enforced against Tenant and (ii) the date on which Tenant provides notice to Landlord it has stopped or intends to stop operating for business in the Premises until the date which is the earlier of (a) the date on which the Restrictive Ordinance ceases to be in effect and enforced against Tenant and (ii) the date on which Tenant resumes conducting its business at the Premises.

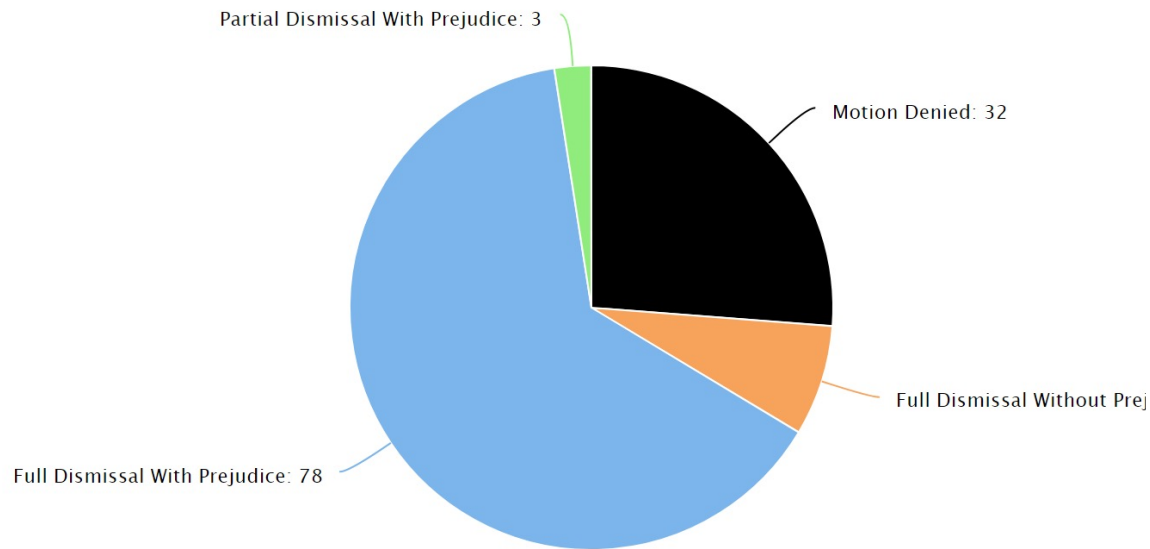
Judicial Trends

Force Majeure/Frustration of Purpose Litigation:

- Cases prove most difficult when tenant's business is open/active regardless of use or economics; revenue generation and operations of any type are determinative
- The use of equitable defenses such as frustration of purpose and impossibility of performance have been successful if a tenant's business has closed due to governmental mandate; mere closure of a business because of the pandemic's effect have not been successful
- Courts are generally not inclined to expand the definitions of "Force Majeure", but there are cases in which "acts of god" and words of similar import have been interpreted to include the pandemic
- Courts are not inclined to grant relief from the obligation to pay rent, regardless of the applicability of a Force Majeure clause
- There has been very little success for claims based on the premise that the pandemic is a "casualty event"

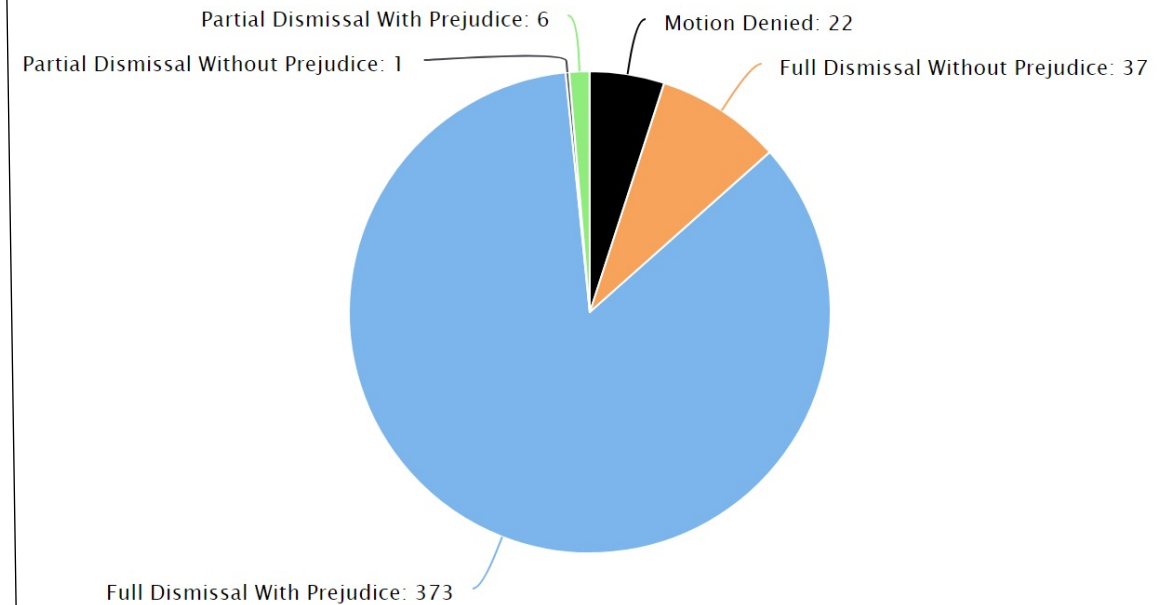
Business Interruption Litigation

Merits Rulings on Motions to Dismiss in State Court



- **Venue:** State versus Federal Courts
- **Form:** Policy forms vary significantly
- **Advocacy:** Use an experienced coverage practitioner
- **Patience:** Be prepared for the long haul; do a cost/benefit analysis

Merits Rulings on Motions to Dismiss in Federal Court



PPP Loan Proceeds

- Eligibility
- “covered purposes” include rent and utilities expenses for the 8-24 month “covered period” following PPP loan disbursements
- To the extent a PPP loan is forgiven, a taxpayer is not required to include the forgiven amount in its gross income
- Recipients of PPP loans are permitted to take any deductions that would otherwise be allowable for expenses paid by proceeds from a forgiven PPP loan (i.e., potential “double-dip”)
- Confer with tax advisors and legal advisors with specific PPP loan experience

Return to Workplace: Employment Law Considerations

Phase 1: Transition of employees to remote work

- Originally anticipated to be a short period of time

Phase 2: Preparing corporate spaces for return to office

- Understanding and following changing laws and guidance
- Developing workplace rules/policies, including cleaning/hygiene practices and protocols
- Putting up social distancing signs and barriers, installing touchless fixtures, utilizing/installing technology to limit face-to-face interaction
- Implementing flexible layouts to adjust to shifting business needs, work pods, enforcing policies and workplace rules

Phase 3: Returning to physical workspace

- Being prepared to adapt to change!
- Keeping up to date on new laws/guidance
- Enforcing existing policies, and changing and/or eliminating policies and rules as necessary

Return to Workplace: Employment Law Considerations



When You've Been Fully Vaccinated

How to Protect Yourself and Others

Updated Aug. 19, 2021 Languages Print

NOTICE: [FDA has granted full approval](#) for Pfizer-BioNTech (COMIRNATY) COVID-19 Vaccine. CDC's [Advisory Committee on Immunization Practices is meeting on Monday, August 30, 2021](#), to discuss its updated recommendation for this vaccine.

Choosing Safer Activities

- If you are not fully vaccinated and aged 2 or older, you should wear a mask in indoor public places.
- In general, you do not need to wear a mask in outdoor settings.
 - In areas with [high numbers of COVID-19 cases](#), consider wearing a mask in crowded outdoor settings and for activities with [close contact](#) with others who are not fully vaccinated.
- People who have a condition or are taking medications that weaken their immune system may not be fully protected even if they are fully vaccinated. They should continue to take all [precautions recommended for unvaccinated people, including wearing a well-fitted mask](#), until advised otherwise by their healthcare provider.
- If you are fully vaccinated, to maximize protection from the Delta variant and prevent possibly spreading it to others, wear a mask indoors in public if you are in an area [of substantial or high transmission](#).
- If you are fully vaccinated, see [When You've Been Fully Vaccinated](#).



If you haven't been vaccinated yet, [find a vaccine](#).

[Source: When You've Been Fully Vaccinated | CDC](#)



U.S. Department of Labor issues updated guidance on protecting unvaccinated and other at-risk workers from the coronavirus

WASHINGTON, DC – The U.S. Department of Labor's Occupational Safety and Health Administration today issued [updated guidance](#) to help employers protect workers from the coronavirus. The updated guidance reflects developments in science and data, including the Centers for Disease Control and Prevention's updated COVID-19 guidance issued July 27.

The updated guidance expands information on appropriate measures for protecting workers in higher-risk workplaces with mixed-vaccination status workers, particularly for industries such as manufacturing; meat, seafood and poultry processing; high volume retail and grocery; and agricultural processing, where there is often prolonged close contact with other workers and/or non-workers.

OSHA's latest guidance:

- Recommends that fully vaccinated workers in areas of substantial or high community transmission wear masks in order to protect unvaccinated workers;
- Recommends that fully vaccinated workers who have close contacts with people with coronavirus wear masks for up to 14 days unless they have a negative coronavirus test at least 3-5 days after such contact;
- Clarifies recommendations to protect unvaccinated workers and other at-risk workers in manufacturing, meat and poultry processing, seafood processing and agricultural processing; and
- Links to the latest guidance on K-12 schools and CDC statements on public transit.

[Source: August 13, 2021, OSHA Trade Release | OSHA](#)

Best Practices for Workforce RTW Plans



Proactive Planning Will Minimize Risks and Liability:

- Understand impact of various laws and have required protocols in place
- Update employer policies and safety plans
- Consider physical design modifications
- Plan for operational and retention issues
- Think crisis management planning - employee communications are critical
- Work out the logistics as soon as possible
- Train managers and supervisors
- Prepare to pivot and adapt – implement models with maximum flexibility

Who Can You Call...



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