



COVID 19 RESOURCES FOR NONPROFITS

GUIDANCE ON COMMERCIAL LEASES DURING THE PANDEMIC

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CAN WE CANCEL OUR LEASE, STOP PAYING RENT, OR PAY LESS RENT DUE TO THE CORONAVIRUS?

In most cases, commercial tenants do not have the right to cancel their leases, stop paying rent, or pay less than the required rent, due to the coronavirus. There are some very limited instances in which tenants may be entitled to do so,

and those are discussed below. Even if you do not have a right to do so, you may be able to negotiate an accommodation with your landlord, which is also discussed below.

WHAT CAN OUR LANDLORD DO IF WE DEFAULT?

If you are not entitled to walk away from your lease or skip any rent payments or pay less than the required rent, and you do it anyway, then you are defaulting under the lease. Your lease may or may not obligate your landlord to notify you of your default and give you time to fix it. If your lease does not obligate your landlord to do so, or if you do not fix the default during the required period of time (which is

usually very short), then your landlord can (among other things):

- File a lawsuit to evict you (if courts are allowing landlords to file them at the time); and
- Try to recover its damages by paying itself out of any security you provided to your landlord (for example, any

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cash deposit or letter of credit) or by filing a lawsuit against you or any guarantor (again, if courts are allowing landlords to file them at the time). Your landlord's damages may include (among other things) rent you fail to pay, late charges, interest and legal fees. In New York State, landlords are rarely obligated to try to reduce their damages by finding replacement tenants, so you may be responsible for the rent owed for the balance of the term.

New York State (and a number of other states, counties and cities across the country) have temporarily suspended evictions. In New York State, landlords will not be able to

evict tenants until at least June 20, 2020. Landlords in New York State cannot even file a lawsuit (in order to evict you or sue you for damages) until at least April 19, 2020. It will probably take more time than usual for courts in New York State to process lawsuits once courts start accepting "non-essential" ones again.

However, despite these suspensions and delays, your landlord can still send you notices and pay itself out of any security you provided. In addition, your landlord's damages may accumulate during this time.

CAN WE NEGOTIATE AN ACCOMMODATION IF WE ARE EXPERIENCING FINANCIAL HARDSHIP DUE TO THE CORONAVIRUS?

If you are experiencing financial hardship as a result of the coronavirus, talk to your landlord about the possibility of an accommodation. In these extraordinary times, commercial tenants across the country are negotiating special arrangements with their landlords. It's better to have this discussion before skipping a rent payment.

Those arrangements have taken various forms, including the following:

- Deferring rent payments (giving the tenant extra time) — e.g., paying no rent or lower rent for one or more months and then paying the missed rent (later this year, sometime next year, or at the end of the term);

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- Waiving or reducing rent payments for a period of time (without requiring the tenant to pay the missed rent later);
- Extending the term and having a free-rent period now (since landlords often give tenants a free-rent period when a lease is signed or renewed); and
- Giving up the premises and paying a termination fee.

Whether landlords agree to such arrangements, and what those arrangements look like, depend on a number of

factors. Those factors include (for example) the extent of the tenant’s financial distress, whether the landlord wants to keep the lease in place, and how much flexibility the landlord has to make an accommodation (taking into account, for example, the landlord’s obligations to its lenders and investors and the availability of insurance).

UNDER WHAT CIRCUMSTANCES DO WE HAVE THE RIGHT TO CANCEL OUR LEASE OR PAY LESS RENT?

Leases generally require a tenant to pay its rent for the entire term, regardless of any adverse developments. That said, there are provisions in many leases that permit tenants to terminate, or to pay no or lower rent for a period of time, under very narrow circumstances. Here are some examples:

- **Deprivation of access or services** — Leases sometimes allow a tenant to pay no or lower rent for a period of time where the tenant is unable to use the building (or certain portions of the building) in which the leased premises are located or to use certain services. This often applies only where the landlord is at fault, but not always.
- **“Force majeure”** — Leases sometimes excuse a tenant from performing its obligations where it is prevented from doing so by factors outside its control. The existence of a pandemic (or governmental restrictions or other consequences arising from the pandemic) may or may not qualify as a factor that can excuse performance. In any event, this type of provision does not allow a tenant to cancel its lease and rarely applies to a tenant’s obligation to pay rent.

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- **“Casualty”** — Leases often permit a tenant to terminate or avoid paying rent because the building is damaged in a fire or other casualty. The standard casualty provision is typically applied in instances of actual physical damage (rather than the presence or threat of a contagious disease).
- **“Condemnation”** — Leases often permit a tenant to terminate or avoid paying rent because a government takes over the building. It is far from clear that a shelter-in-place or similar order represents a taking for this purpose.
- **“Co-tenancy”** — Leases sometimes allow a tenant to terminate or pay a reduced rent due to decreases in foot traffic. These leases are usually for retail space in shopping centers and regional malls and not for other types of space (e.g., office space).

Although a tenant’s ability to terminate or to not pay rent based on any of these provisions is limited, you should carefully review your lease to assess your rights in light of the specific language contained in your lease and the facts of your particular situation.

If circumstances other than a lack of funds make it impossible for you to use your space, but your lease does not give you the right to terminate your lease, there are

certain laws that could conceivably give you that right. Here are the main examples:

- **“Frustration of purpose”** — If a condition (e.g., a governmental order) makes it impossible for a tenant to use its space for any permitted purpose, the tenant may be able to terminate its lease by claiming that the purpose of the lease has been so frustrated that the lease is void. A tenant cannot terminate its lease on this basis (even though certain uses may have become unlawful during the term) if the lease permits the tenant to use the space for one or more purposes that remain lawful. In addition, a tenant will generally need to show that it would be unreasonable to continue to bind the tenant.
- **“Constructive eviction” or breach of “covenant of quiet enjoyment”** — If conditions at the leased premises are sufficiently poor that they preclude the tenant from being able to use the premises, the tenant may be able to terminate the lease by claiming that the landlord has effectively evicted the tenant or has breached the landlord’s obligation to allow the tenant to make proper use of the premises. In order to succeed on one of these claims, a tenant must typically show fault on the part of the landlord. The existence of a pandemic or governmental restrictions is unlikely to be enough. A tenant may be

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able to succeed if the landlord is aware of a dangerous condition and fails to take the basic precautions that an ordinary owner would take.

While a crisis like the one created by the COVID-19 pandemic may lead courts to read leases or apply laws in tenants' favor, leases and laws generally set a very high bar

for excusing tenants from their lease obligations. Unless your circumstances clearly fall within one of the protections described above, you should not stop complying with your lease on the assumption that you have a right to do so.

MIGHT THE GOVERNMENT STEP IN AND WAIVE TENANTS' OBLIGATIONS TO PAY RENT?

Many state and local governments are considering potential laws that would forgive tenants' obligations to pay rent for a period of time. For example, bills have been proposed in New York State's Senate and Assembly to waive the rent that would otherwise be payable during a 90-day period

by "small businesses" that have lost income or been forced to close as a result of the coronavirus outbreak. While there is some support for such laws, there is also opposition to them, and it is very unclear whether any such laws will be adopted.

WHAT ALTERNATIVE SOURCES OF RELIEF ARE AVAILABLE TO US?

You should consider the availability of alternative sources of relief, including government programs designed to assist ailing businesses during these trying times (such as loans under the Small Business Administration's Paycheck Protection Program pursuant to the CARES Act), support

from foundations, charitable fundraising and insurance coverage. You can find information on available resources at <https://www.paulweiss.com/practices/transactional/coronavirus-covid-19-relief-center/practice-overview/relief-center> and at <https://nylpi.org/coronavirus/>.



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New York Lawyers for the Public Interest

151 West 30th Street, 11th Floor
New York, NY, 10001-4017

Tel 212-244-4664 | Fax 212-224-4570

NYLPI.org

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