



RETAIL TENANTS WANT RENTS LINKED TO REVENUE

NEW LEASE PROVISIONS ARE PUSHING FOR A PERCENTAGE OF THE RENT TO BE BASED ON GROSS SALES SO THAT IN THE EVENT OF MORE BUSINESS CLOSURES, RENTS ARE REDUCED

The pandemic has triggered a slew of changes for the commercial real estate industry, and lease structures are no exception. **Gary Glick**, a partner at **Cox, Castle & Nicholson LLP**, has spoken about new lease provisions that are on the table at retail lease negotiations. One push from tenants is to link rent to gross revenue to protect tenants in the event of further business closures due to COVID-19.

“Many retail tenants are attempting to negotiate provisions in their leases providing that, if a COVID-19 restriction is imposed on their business after they have opened substantially all of their premises, they will retain the right to close or pay base rent based upon a percentage of their gross sales,” Glick tells GlobeSt.com. “Landlords will want to incentivize such tenants to stay open despite the restrictions because maintaining a proper tenant mix is critical to achieve maximum synergy for the shopping center. In addition, it allows the landlord to continue to receive some rent and 100% of the tenant’s share of taxes, insurance and common area expenses.”

Landlords aren’t without options to meet tenants halfway on this issue. Glick recommends, for example, limiting the provision. “The landlord may attempt to negotiate a provision that limits the tenant’s right to pay base rent based upon gross sales, or other types of alternate rent, if the tenant’s gross sales do not decline by more than an agreed percentage due to Covid-19 restrictions,” he says. “Although this is a fair request, it may be met with resistance by a tenant that argues that its sales would have increased much more significantly but for the COVID-19 restrictions.”

Landlords can also negotiate rent abatement or deferrals instead. “If COVID-19 restrictions force a retail tenant to close all—or nearly all—of its premises, the tenant may prefer to have all of its base rent and additional rent abated,” says Glick. “If the landlord agrees to such an abatement, it should attempt to have the abated rent deferred and paid over a one-year period commencing a few months after the tenant is once again able to occupy a substantial portion of the premises to conduct its business.”

In addition, some tenants may choose to alter their lease term instead. “Some parties may agree to extend the term of the lease for periods during which the tenant has the right to abate or defer base rent due to Covid-19 restrictions,” says Glick.

It is important to note that these changes to rent payments in the event of business closures don’t include taxes or insurance. “The landlord will usually require the tenant to continue to pay its share of taxes, insurance and common area expenses during all closures,” says Glick. “All of these items will be subject to negotiation based upon the relative bargaining strengths of the parties.”