



CAN RETAIL LANDLORDS REQUEST TENANTS OPEN THEIR DOORS?

The COVID-19 restrictions for businesses have left some questions marks about a landlord's ability to request re-opening.

By Kelsi Maree Borland

November 09, 2020

Most retail leases require that retailers remain open for business, but in the time of the coronavirus, lease requirements have entered a gray area. Many COVID-19 restrictions have put retailers in a compromising position, and while some have found ways to remain open and cope, others have decided to close until the restrictions allow for normal—or at least closer to normal—business operations. So, what rights do landlords have in this decision?

“Tenants whose operations are significantly affected by stringent Covid-19 restrictions will want to reserve the right to stay closed until such restrictions are lifted, even though the shopping center requires them to be open for business,” Gary Glick, a partner at [Cox, Castle & Nicholson LLP](#), tells GlobeSt.com. “However, landlords should be able to request that they open for business if the restrictions are not too onerous. For example, if a restaurant is able to operate for indoor dining at 50% capacity, the landlord should require the restaurant open at that level.”

Of course, these restrictions not only have an impact on business operations but also business revenue, which is often a factor of base rent. “In this situation, in lieu of paying the base rent set forth in the lease, the tenant will want the right to pay a percentage of its gross sales as base rent for as long as the capacity restriction remains in effect,” says Glick. “However, this arrangement shouldn’t dispense the tenant from paying its share of taxes, insurance and common area expenses. It is in most landlords’ interest to agree to such an arrangement since it is often preferable to keep a store open rather than having it go “dark” for any period of time.”

As restrictions are lifted, tenants and landlords should return to normal business arrangements. “Once the capacity restrictions are lifted, tenants will be expected to pay the fixed base rent set forth in the lease in lieu of a payment based on a percentage of gross sales,” says Glick.

On the other hand, some tenants might seek to re-negotiate or even terminate leases due to COVID-19 closures or restrictions. “Tenants may attempt to negotiate termination rights in their leases if Covid-19 restrictions prevent them from operating in material portions of their premises for lengthy periods of time, ranging anywhere from six to 18 months,” says Glick. “Landlords will strongly resist providing tenants with termination rights based upon the argument that they already have provided the tenant with reduced rental obligations that will last for the length of any material Covid-19 restrictions.”

If a landlord chooses to take this option, Glick recommends that they negotiate any outstanding costs. “If the landlord does provide the tenant with a termination right, it should require that the tenant reimburse it for the then unamortized costs of any brokerage commission and/or tenant improvement allowance paid by the landlord in connection with the lease transaction,” he says.