



## **HOW RETAIL LEASES WILL CHANGE IN A POST-COVID WORLD**

### **WE TALK TO A COX, CASTLE & NICHOLSON PARTNER ABOUT THE RETAIL LEASE PROVISIONS THAT WILL CHANGE AS A RESULT OF THE CORONAVIRUS PANDEMIC.**

By Kelsi Maree Borland

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In the post-COVID world, retail leases will need to change and adapt. Several provisions will need to be changed and added to account for the possibility of a pandemic and the mandated shuttering of businesses. This includes adjustments to force majeure and insurance provisions as well as use of common areas, common area caps, alterations, and rules and regulations, all of which should be adjusted to reflect the new market.

“These modifications will likely put landlords in a better position to respond and react to the new normal that will exist until a vaccine is developed and widely distributed,” **Dan Villalpando**, a partner at **Cox, Castle & Nicholson**, tells GlobeSt.com.

In regard to the common areas, most leases are currently too broad to account for usage and social distancing. This is one of the first areas that will need to be addressed in leases.

“Landlords should make sure that the language in the Control of Common Area provision found in most leases is broad enough for landlords to respond and adapt to pandemics and similar emergencies, such as by installing items to improve health and safety conditions and making other, perhaps currently unforeseeable, changes to the common area to comply with recommendations or requirements of the Center for Disease Control and Prevention, World Health Organization, or state or local authorities,” says Villalpando.

In some instances, common areas may need to be converted into dining and retail spaces to accommodate social distancing guidelines, and landlords will need to comply. “As a result of physical distancing and store-capacity requirements, tenants may need the right to use portions of the common area (like sidewalks) for customers to form lines outside the stores,” says Villalpando. “A landlord should not decline a request by a tenant to use the common area for queuing. Nevertheless, a landlord can condition such use upon tenant fulfilling certain

prerequisites, such as giving the landlord prior written notice of such intent and the expected duration, peak times, and specific area the tenant wants to use. Additionally, landlords may want to specifically require that the tenant cleans up the area used for queuing on a daily basis.”

In addition, these changes to common areas do not apply to increase caps, according to Villalpando. “In leases where a landlord provides a tenant with a cap on increases in common area costs, such cap does not typically apply to uncontrollable costs,” he says. “Following COVID-19, landlords should consider expanding the list of “uncontrollable” costs. For example, costs associated with a pandemic and the related health or safety measures the landlord takes, for example the installation of hand sanitizing stations, upgrades to automatic doors, use of more personnel to administer cleaning and to make sure guests comply with social distancing requirements, should be deemed uncontrollable and not be subject to any cap.”

In addition, landlords should also take into account the cost structure, particularly during a pandemic. “If it turns out that the “base year” for setting the “floor” for common area costs occurs during a year when the common areas are used less because of a pandemic or related outbreak, the landlord should consider including a “gross up” concept to bring the “floor” up to a number that is more reflective of what common area costs would have been but for the pandemic,” says Villalpando.

Villalpando also suggests that landlords can modify the cap during the lowest period. “Another alternative would be to modify the cumulative versus non-cumulative nature of the cap for any period during which common area costs are artificially low,” he says. “Basically, with a cumulative cap, when the common area costs for a particular year exceed the cap, the landlord can apply any unused portions of the cap from previous years to make up the difference.”