SFBBG
Schoenberg | Finkel | Beederman | Bell | Glazer LLC

SENSIBLE SOLUTIONS

summer 2022

In This Issue

About Our Law Firm

We are comprised of seasoned and dedicated professionals who familiarize themselves with our clients' industries as well as their legal issues. We strive to maintain long-term client relationships by keeping our clients fully informed and respecting their time and business resources.

Legal Practice Areas

- Banking and Creditors' Rights
- Condo-Community Association Representation
- Corporate and Other Business Transactions
- Defamation, Privacy and First Amendment
- Employee Benefits
- Employment Law
- Estate Planning, Probate and Trust Administration
- Health and Fitness Industry
- Independent Sales Representatives
- Intellectual Property Law
- Litigation and Alternative Dispute Resolution
- Mergers, Acquisitions and Business Sales
- Real Estate and Finance
- Real Estate Tax Reduction
- Securities, Futures and Derivatives
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How the Courts Have Addressed the Pandemic's Effect on Commercial Leases

Courts across the country have been presented with novel and complex questions involving the COVID 19 Pandemic's effect on commercial leases. The courts have been divided on these issues, depending upon the type of establishment and the specific lease provisions involved. Beginning in March 2020, states and other local governmental bodies issued orders either shutting down or restricting the operations of retail tenants. As a result, tenants either could not or did not pay rent, and many landlords sued. While many of the earliest cases favored landlords, a number of courts have recently determined that the landlord's and tenant's obligations under similar leases go hand in hand: payment of rent for use of the premises.

The effect of the government order on the specific business is a major factor in many of these lawsuits, a number of which our law firm has been involved in. Many commercial retail tenants could generate at least some revenue despite the government orders. For example, restaurants continued to offer take-out or delivery services, and retailers continued to conduct online sales and offer "curbside pick-up." On the other hand, other businesses, such as health clubs and movie theaters were ordered to close for months with no ability to use the premises or generate income.

These closed businesses have claimed common law defenses to payment of rent, such as failure of consideration, frustration of purpose, or impossibility. These defenses maintain that as a result of the government orders due to COVID-19, the tenant was deprived of the consideration and benefit under the lease, thereby frustrating and rendering impossible the very purpose of the lease. Courts applying these defenses have recognized that the extraordinary circumstances of the Pandemic, causing a complete shutdown of nonessential services, were not reasonably foreseeable. These courts have held that during the time of the total shutdown, the change of circumstances made certain leases virtually worthless to the tenant. Other courts, however, have looked solely to the provisions of the lease negotiated by the parties and have refused to apply these common law defenses.

The most important provision of any lease applicable to the COVID 19 situation is the *force majeure* provision, which is often a "boilerplate" provision and rarely utilized. *Force majeure* provisions provide for delay in the parties' performance due to events beyond their control such as "acts of god", which include hurricanes, earthquakes, floods, and other natural disasters, as well as war, terrorism, riots, and labor strikes. Many *force majeure* clauses do include government rules, regulations orders or restrictions as possible *force majeure* events. Prior to the Pandemic, however, very few leases included pandemics, epidemics, disease, or other public health emergencies as a *force majeure* event.

Force majeure provisions are usually drafted in the landlord's favor and often do not allow for delays caused by "financial inability to pay" or "which can be cured by the payment of money." Landlords have argued that the COVID governmental orders do not prevent the tenant from paying rent. However, some courts have found that there is no amount of money that the tenant could pay to cure the actual *force majeure* event, namely, a government order closing the business.

Another critical lease provision at issue is the "primary" or "sole" use by the tenant provision. Many leases expressly provide that the tenant is to use the premises primarily or exclusively for one purpose— such a health club or a movie theater. Due to the government closure orders, this primary or sole use became illegal. The lease may also provide that the landlord will do nothing to interfere with this primary or sole use. Since the landlords were and are required to comply with the government orders, the landlord could not permit the continued primary or sole use by the tenant. Some courts have held that the landlord is, therefore, not entitled to rent during the government closure order so long as the tenant is denied the primary or sole agreed-upon use.

Leases often require the tenant to maintain business interruption insurance. Some courts have relied upon such provisions to hold that the parties, in effect, shifted the risk of loss due to any interruption to the tenant. While this may be true in many situations, it is not necessarily so with respect to COVID-19. In litigation between tenants and insurance companies, most courts have ruled in favor of the insurance companies on this issue, finding that business interruption insurance requires direct physical loss or damage to property so that COVID-19 interruptions are not covered. Therefore, provisions regarding business interruption insurance should not be a guide as to whether the tenant is required to pay rent during a government shutdown due to a pandemic.

Going forward, tenants will require that *force majeure* clauses expressly include pandemics, epidemics, disease, public health emergencies, and governmental responses. On the other hand, following the COVID-19 Pandemic and the courts' scrutiny of *force majeure* provisions, landlords will likely insist that the clause be drafted so that payment of rent is never excused due to any *force majeure* event.

For more information, please contact Bill Klein at bill.klein@sfbbg.com or Norm Finkel at norm.finkel@sfbbg.com. They also can be reached by calling 312-648-2300.

Illinois Expands Statutory Unpaid Bereavement Leave

Case Success Story

On July 6, SFBBG litigation attorney Andrew Johnson defeated a petition for a temporary restraining order ("TRO") that was being sought against an SFBBG client, the majority owner of a business. The petition, which was filed on July 5 and argued in court the next day, asked the court to prohibit SFBBG's client from using or transferring funds of the business for any purpose, including payment of business expenses or the client's salary. Working through the night with SFBBG's Adam Maxwell to prepare for the hearing, Johnson prevailed and the TRO was denied by the Court.

Welcome Aboard!

The Firm welcomes our newest attorneys:

- Tedd Warden, Litigation, May 23
- W. Jordan Melvin, Corporate, July 25

Speaking Engagements

On June 30, Joan Berg presented to the 2022 incoming class of Credit Analysts for Byline Bank. The one-hour presentation on commercial real estate focused upon lending for acquisition, as well as construction and development of commercial real estate.

Matt Tyrrell presented a continuing legal education seminar entitled "Conducting Voir Dire and Jury Selection" hosted by the National Business Institute on June 21.

Notable Publications

"Your Beloved Spouse Just Died: How to Deal with the Estate Tax" (*Forbes*, May 22, Bruce Bell)

"What Employers Need to Know About City's Amended Sexual Harassment Ordinance" (*Chicago Daily Law Bulletin*, July 7, Matt Tyrrell)

"Companies Face FMLA Quagmire Given New Mental Health Focus" (*Law360*, July 20, Matt Tyrrell and Adam Maxwell)

"How To Survive Foreclosure on Your Home" (*Forbes*, July 23, Bruce Bell)

"Impugning a Plaintiff's Personal Traits Does Not Support Claim for Defamation" (*Chicago Daily Law Bulletin*, July 26, Phil Zisook)

"'Scorched Earth' Tactics Burn Both the Manufacturer and its Legal Counsel" (*The Representor*, Summer 2022, Adam Glazer)

"Creative Retirement Designs for Small Business Owners" (*The Representor*, Summer 2022, Bruce Bell)

Congratulations to Our 2022 Leading & Emerging Lawyers

Leading Lawyers: Dan Beederman, Bruce Bell, Joan Berg, Norm Finkel, Mark Flessner, Michael Friman, Len Gambino, Adam Glazer, Rich Goldwasser, Michael Kim, Bill Klein, Herb Rosenberg, Ron Silbert, Phil Zisook

Emerging Lawyers: Andrew Johnson, Adam Maxwell, Jason Newton, Matt Tyrrell

Website Updates

Please visit our new websites:

- sfbbg.com (Main Site)
- nationalsalesrepattorneys.com (Sales Rep Practice)
- Illinoispropertytaxlawyer.com (Property Tax Reduction)

Illinois Governor Pritzker recently signed into law the Family Bereavement Leave Act ("FBLA") which, effective January 1, 2023, requires covered employers to provide unpaid bereavement leave for eligible employees dealing with grieving and loss associated with pregnancy loss, unsuccessful fertility treatment, and failed adoption or surrogacy arrangements. The FBLA makes two significant changes to current bereavement leave requirements in Illinois by (i) expanding the definition of "covered family members" under the FBLA, and (ii) including fertility-related losses as protected reasons for employee leave under the FBLA. The FBLA applies only to employers with Illinois-based employees subject to the Federal Family Medical Leave Act ("FMLA"). Companies with eligible Illinois-based employees should evaluate their current leave plans and practices to ensure compliance with the new requirements, highlights of which are addressed in this article.

Expanded Bereavement Leave Coverage for Eligible Employees

The FBLA amends and expands the Child Bereavement Leave Act ("CBLA"), which previously provided for bereavement leave only for the death of a "child." Under the FBLA, covered employers must provide employees with a maximum of ten workdays of unpaid leave to attend the funeral of a "covered family member," which now includes an employee's child or stepchild, spouse or domestic partner (defined broadly to include adults in a committed relationship, even if not a legally-recognized partnership), sibling, parent or step-parent, mother-in-law or father-in-law, grandchild, or grandparent.

In addition, the FBLA expands the recognized reasons for bereavement leave to include losses associated with fertility and starting a family. Covered employers must now provide unpaid leave to employees in the following circumstances (in addition to the death of a covered family member): a miscarriage; an unsuccessful round of intrauterine insemination or an assisted reproductive technology procedure (defined to apply to methods of achieving pregnancy other than sexual intercourse); a failed adoption match or an adoption that is not finalized because it is contested by another party; a failed surrogacy agreement; a diagnosis that negatively impacts pregnancy or fertility; and a stillbirth.

New Procedures for Covered Employees and Employers

Consistent with the provisions of the CBLA, an employer with Illinois-based employees is required to comply with the FBLA only if it has employees who are deemed to be "eligible employees" pursuant to the FMLA. Thus, FBLA eligibility is limited to employees who: (i) have been employed by their employer for at least 12 months; (ii) have worked at least 1,250 hours in the prior 12 months; and (iii) have worked at a worksite in Illinois with at least 50 employees or where there are at least 50 employees in Illinois within a 75-mile radius of the worksite. The employee must provide 48 hours advance notice prior to taking leave unless such notice is not practicable. The employee must also complete any leave under the FBLA within 60 days of the date on which the employee receives notice of the covered family member's death or experiences any of the other qualifying circumstances.

Employers may require "reasonable documentation" for leave under the FBLA, but it is not required. If an employer requires documentation, when an employee seeks leave for any of the new permitted reasons (related to pregnancy loss, failed adoption, or unsuccessful assisted reproduction), such documentation must be completed by a health care provider treating the family member at issue or the agency coordinating the surrogacy or adoption event. The documentation must certify that the employee suffered an event covered by the FBLA, but the employer must specifically refrain from requiring the employee to identify the specific event category for which the employee is seeking leave. The Illinois Department of Labor will publish a model form to be used for this purpose.

Retaliation for the Exercise or Attempted Exercise of FBLA Rights is Unlawful

Finally, it is unlawful for any employer to discharge, demote, discriminate, or to take any adverse employment action against an employee who exercises or attempts to exercise rights afforded by the FBLA. The FBLA further clarifies that it is unlawful for an employer to take any action in retaliation against any employee who (i) opposes an employer action or practice that he/she believes is in violation of the FBLA, or (ii) supports another's exercise of rights available under the FBLA including, but not limited to, bringing or supporting a legal action or proceeding relating to the FBLA.

Impacted companies with Illinois-based eligible employees should review and revise company bereavement leave polices to comply with the FBLA's requirements before January 1, 2023. Companies should also provide notice to employees and train managers and appropriate HR/leave professionals about the relevant changes to this law and to any applicable employer policies.

For more information, please contact Tedd Warden at (312) 775-3616 or tedd.warden@sfbbg.com.