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How COVID-19 has impacted office leasing - by Noble Allen and John Sokul

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To say that the effects of COVID-19 has transformed office leasing is an understatement. When COVID-19 was at its peak, office spaces were practically abandoned either through governmental mandates or through actions taken by businesses themselves.

As we reemerge from the effects of COVID-19, these are some of the issues that office landlords face when negotiating extensions to current leases or negotiating new office leases:

Relative bargaining strength of landlords and tenants. Leading up to the pandemic greater Boston area office landlords enjoyed superior strength in most lease negotiations. Many existing and prospective tenants are coming to the conclusion that they have more space than is needed and/or that their staff and customers may be better served with a suburban location. This has shifted more and more negotiating leverage to tenants. As companies formulate their workplace re-entry plans, it remains to be seen if this trend is temporary or permanent.

Impact on lease term. Office tenants are now more cautious with regards to the initial term of their leases. They are seeking shorter initial terms and more options to extend. They are also seeking early termination rights to be able to better adapt and respond to future unexpected changes in demand for space and market conditions in general. Flexibility is key.

Force majeure clauses. COVID-19 has transformed the office lease negotiation landscape with

regards to the force majeure. A provision that was never on anyone's top ten lease issues list has now taken center stage. The discussions regarding force majeure provisions include what qualifies as force majeure; does it apply to rent and if so to what extent; caps on duration; termination rights; etc.

Use clauses. Landlords have typically preferred narrow use clauses to better control uses throughout their buildings and also to indirectly limit and control a tenant's right to assign the lease or sublease the space. Ironically, recent tenant-friendly court decisions indicate that a court will more likely favor a tenant's refusal to pay rent based on a force majeure or frustration of purpose if the lease contains a narrow use clause rather than a broader one allowing the tenant to use the space for activities other than the stated primary use. Office landlords may now agree to the inclusion of broader use clauses in future negotiations.

CAM clauses. Tenants are seeking the right to opt out of certain shared services due to extended closures. Landlords are being somewhat flexible.

Health and wellness amenities or requirements. Tenants are placing an even greater emphasis on protecting and improving their employees' health and wellness. Tenant "asks" include specialized air filters and other safety requirements, enhanced cleaning services, gyms and other health-oriented and personal amenities.

Kick out/early termination rights. While this is the bane of most landlords and their lenders (not just office landlords), office tenants will again attempt to seek this almost sacrosanct provision in leases. COVID-19 now provides the office tenant with a bit more justification for demanding this from their landlords.

More flexibility to sublease. If office landlords are unlikely to allow their tenants to have early termination or kick out rights, then office tenants will insist on broader rights to sublease in order to monetize any excess spaces resulting from newly enacted work-from-home policies being offered by employers.

It's unclear exactly what the future holds for office leasing. We know that negotiations for new, current and extended leases have certainly been directly affected by the pandemic. And we continue to keep a watchful eye on how the "new normal" will impact office leasing. Landlords or tenants should always consult with legal counsel to navigate the terms of an office lease, particularly as new demands emerge.

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