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LEGAL ADVICE TO HELP MINIMIZE TAXES AND PROTECT ASSETS

COVID-19: ADVICE FOR COMMERCIAL REAL ESTATE LANDLORDS & TENANTS

The recent onset of the COVID-19 pandemic presents an economic crisis that directly impacts the activity of commercial landlords and tenants. While virtually every business has been affected by the pandemic, there is legal action that can be taken to alleviate economic loss and to minimize ongoing risk. Culp Elliott & Carpenter (CEC) is here to help clients navigate this historically uncertain time through swift and innovative client service that is personalized to address our client's unique needs.

Rent Payments

Given the indiscriminate loss of revenue due to government mandated "stay-at-home" orders, many businesses will see a significant reduction in revenue resulting in severe financial hardships in the coming weeks and months.

Recently landlords across the country have received notices from tenants requesting rent relief. Before requesting or agreeing to abate or defer rent, landlords and tenants need to carefully evaluate their rights and obligations as the parties face unfamiliar circumstances. Here are a few things to consider:

Review Lease Agreement.

The written lease agreement will govern whether a tenant is excused from its obligation to pay rent. Generally, force majeure or "act of God" provisions that excuse performance of lease obligations due to events outside of the parties' control specifically carve out monetary obligations. However, each lease is unique and may address this issue in a different manner. Although force majeure provisions may not

excuse a tenant's obligation to pay rent, other lease provisions may provide relief in the event tenant is unable to access or use the premises. For example, a tenant may have right to defer or abate rent under condemnation provisions or due to breach of landlord covenants, representations or warranties. Some leases may include cotenancy standards which could provide relief in the event a certain occupancy threshold is not met for the building or shopping center.

Monitor Legal Developments and Economic Conditions.

The parties should monitor legal developments that may impact the rights and obligations of the parties. Some states have issued stay-of-eviction notices that prohibit any commercial or residential evictions. Given the widespread economic damage, government officials and courts may take unprecedented steps to protect tenants.

While in many parts of the country landlords are still permitted to proceed with a commercial eviction, landlords would likely find it very difficult to find a

replacement tenant in the current economic environment. Landlords and tenants should continue to monitor the economic environment to determine the best option available.

Review Loan Documents.

Landlords should carefully review their loan documents before agreeing to amend any lease. Many loan documents require the lender's consent to amend existing leases and/or may contain other covenants that could be impacted by a tenant workout, like debt service coverage ratios. Landlords will be best served by involving their lender in the process as early as possible.

Alternative Rent Relief Structures.

Although in most cases tenants will likely still be obligated to pay rent during the pandemic, landlords should consider working with tenants to find a mutually beneficial solution that allows both landlord and tenant to survive the hardships created by this unprecedented crisis. Alternative rent structures should be considered prior to agreeing to straight rent abatement. For instance, rent deferral or amortization over the remaining lease term may be a mutually beneficial option.

Additional Concessions.

In exchange for rent relief, landlords should consider asking for concessions from tenants, including increased tenant financial reporting obligations; additional remedies, security and guaranties; and removing or limiting any special tenant rights (i.e., rights to assign or sublease, renewal or expansion rights and rights of first refusal/offer). In addition to any concessions received, landlords should also seek certain protections from the tenant in any lease workout, including estoppel language, indemnification, waiver of defenses, and clarification of ambiguous provisions relevant to the current crisis.

Further, landlords and tenants should also consider requiring the other party pursue all available government assistance, including loans/grants under the CARES Act (see below).

Proceed with Caution.

Landlords and tenants should proceed carefully to avoid agreeing to anything informally. Any agreement should be memorialized in writing. Landlords should consider requiring tenants to enter into a pre-workout agreement prior to engaging in any negotiations. Such agreements should include covenants of confidentiality and requirement to provide financial information.

Loan Payments.

As tenants are unable to meet their rental payment obligations to landlords, landlords may have trouble fulfilling payment obligations to lenders. Like tenants, landlords are unlikely to find relief from their debt service obligations to lenders under their loan documents. Any relief or forbearance generally must be negotiated directly with the lender.

Insurance

Each landlord and tenant should review their respective business interruption or loss of rental income insurance policies to determine whether any relief is available. However, policies may not cover losses arising from the COVID-19 pandemic due to standard exclusions. Despite the potential unavailability of insurance proceeds, landlords and tenants should consider providing notice to insurance carrier to preserve their rights. While the carrier may deny coverage, courts will have the final word on this issue and courts may decide that coverage exists where the insurance carriers have denied it.

Further, landlords and tenants should also consider requiring that both parties pursue all legitimate insurance claims related to

COVID-19 and fully cooperate with any claims pursued by the other party.

The CARES Act

The CARES Act, passed in response to the COVID-19 pandemic, provides economic relief for businesses impacted by the economic crisis. Commercial tenants and landlords alike may benefit from its provisions.

Employee Retention Credit

This credit allows qualified employers to take a payroll tax credit equal to 50% of qualified wages paid to employees through the end of 2020. The credit is available in full to employers (1) whose average number of full time employees during 2019 was less than 100, (2) whose operations are fully or partially suspended by government order relating to COVID-19, and (3) whose gross receipts during a calendar quarter are less than 50% of the gross receipts for the same quarter during 2019.

Economic Injury Disaster Loans (EIDL)

EIDLs can be provided in an amount up to \$2 million for small businesses that suffer substantial economic injury as a result of COVID-19. Such loans may provide much needed liquidity to landlords to allow the landlord to service their debt obligations and pay for operating expenses given potential lost rental income from cash-strapped tenants. For tenants, EIDLs may be a viable alternative to defaulting under a lease and risking eviction from an uncooperative landlord.

Payroll Protection Program (PPP)

PPP loans offer landlords and tenants an opportunity to obtain small loans to maintain business operations in the short term. A business may borrow up to 2.5 times the average monthly payroll costs of the business at a 1.0% interest rate with no payments for the first six months. Additionally, subject to certain restrictions,

if the borrower uses the funds for qualified expenses such as payroll, salaries, and qualified mortgage interest, debt, rent and utilities, and maintains prior employee headcount levels and compensation, the loan will be forgiven. The availability of these loans should be considered in connection with any lease workout.

Time is of the Essence

Landlords and tenants should act as soon as reasonably practicable to preserve their respective rights and resolve any potential conflicts. Landlords, tenants, and lenders should attempt to resolve any leasing issues to provide much needed clarity in a time of uncertainty. Allocating risk among the parties will allow each party to better decide how to act moving forward as the risks and losses become more certain.

Further, many provisions of the CARES Act reward those businesses that act first. For example, the PPP loans will be given on a first come, first serve basis.

We Are Here to Help

Culp Elliott & Carpenter has the experience and acumen to help businesses deal with this complex and evolving situation. CEC's unique approach offers businesses legal, business, and tax analysis in an integrated method that ensures all factors are considered in arriving at the best business decision. This memo is published as a service to our clients and friends. It is intended to be informational only about the general legal issues facing commercial landlord and tenants may face during this unprecedented crisis. This memo does not constitute legal advice regarding any specific situation. Please reach out to one of CEC's attorneys should need more information or help with navigating the current and unprecedented challenges facing your business.

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