TREATMENT OF CO-WORKING ARRANGEMENTS DURING THE COVID-19 CRISIS

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The current COVID-19 crisis has up-ended business and legal arrangements across a broad cross section of industries, locations and sizes of businesses. There have been a host of emergency federal, state and local actions to address the crisis and to stabilize business arrangements during the crisis. Among them are the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act), New York Executive Order 202: Declaring a Disaster Emergency in the State of New York, State of California Executive Order N-28-20.

Many of these emergency governmental actions address commercial lease arrangements to protect commercial tenants from evictions while their businesses are impaired. There is also some protection for commercial landlords in the form of relief from mortgage payments and the risk of foreclosures. In New York, Governor Andrew Cuomo issued Executive Order 202.8 on March 20, 2020, banning the enforcement of evictions against residential and commercial tenants for 90 days. The same executive order also puts a halt to foreclosures of both residential and commercial properties for 90 days.

In California, Executive Order N-28-20 freed local governments to regulate residential and commercial evictions. Many municipalities have taken advantage of this, implementing a variety of different rent relief and foreclosure-halting measures. In the city and county of San Francisco, for example, small and medium-sized businesses were given an automatic one-month extension on rent; this extension can stretch to two months if the business shows its inability to pay is attributable to COVID-19. In the city of Los Angeles, a commercial tenant who is not a multi-national or publicly traded company and employs no more than 500 employees cannot be evicted for its failure to pay rent while the local emergency period is ongoing.

One glaring omission from all these governmental actions, however, is any specific mention of co-working arrangements. Co-working arrangements, with WeWork being the most notable example, generally involve occupants using desk space or other small amounts of space on a flexible arrangement. For example, an occupant might have the right to use three desks within a particular area of a building. It is not entitled to the same desks each day and cannot leave papers, computers or other personal belongings at the desks overnight. The arrangement might also allow the

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occupant to use of conference rooms, restrooms and kitchen and other common areas, on a non-exclusive basis. More "advanced" co-working arrangements may involve dedicated, secure spaces, along with shared common space. These arrangements are generally for a short duration. In 2017, more than 500,000 people in the United States worked in co-working arrangements. Even though the industry has suffered some financial and other setbacks in the past 12 months, it remains an important part of the real estate marketplace.

Most co-working arrangements are structured as licenses, not real estate leases. Licenses convey only contractual rights, not leasehold interests. So, unlike leases, the occupant has only a contractual right to use of the space, not a leasehold interest. A ticket to a sporting event is an example of a license. As much as sports fans may be devoted to their home stadium or ball field, their tickets only allow them temporary access to the venue and that access can be revoked if they violate the terms of the arrangement, without resort to legal procedures for eviction. Similarly, in the co-working context, if an occupant fails to pay the required fee, breaks the rules or otherwise violates the occupancy contract, its occupancy rights can be revoked without resort to formal eviction procedures.

The recent governmental actions, which were enacted quickly and under pressure-filled circumstances, seemingly do not address these sorts of licenses prevalent in co-working arrangements. New York Executive Order 202.8, as well as the two regional California orders, referenced above, only halt evictions and offer rent relief for *tenants*. The orders do not mention licensees or other occupants who may pay a fee to access a work space. Because co-working arrangements are not, technically speaking, landlord/tenant relationships, they do not appear to be covered by the various moratoria against lease evictions.

In states with mandatory stay-at-home orders in place, such as New York and California, occupants may not lawfully be able to access co-working spaces at this time. However, fees and costs associated with those arrangements might still be due and owing under their contracts. If the occupant elects not to pay those fees, the property owner may treat the arrangement as terminated, may refuse to allow the occupant access, may sue for damages and may take other enforcement actions. None of the COVID-19-related governmental actions geared toward tenants seem to offer any protection for co-working occupants. As a practical matter, many of the states with stay-at-home orders also have limits on "non-essential" court proceedings. This means that many courts are delaying the commencement of any new non-essential matters, as well as the filing of additional papers in pending non-essential matters. Since breach of contract actions related to defaults under co-working arrangements are likely to be considered non-essential, these matters will be suspended for later adjudication. So, as a practical matter, defaults and litigation related to co-working arrangements may be treated the same as defaults and litigation related to commercial leases, for the time being.

If your organization owns or has a co-working space lease arrangement and you would like to discuss anything relating to your fiscal and/or legal responsibilities, please contact Beth Holden (716.848.1692), Amy Fitch (716.848.1384) or any of our real estate team.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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