COVID 19: Risk Mitigation, Planning and Preparing for Re-Occupancy

Wednesday, April 8, 2020
1:00–2:00 pm ET

BOMA Coronavirus Resource Center:
www.boma.org/coronavirus
Disclaimer

This webinar is provided for informational and educational purposes only. The views expressed are those of the speakers/presenters and are not necessarily endorsed by or reflect the policies or positions of BOMA International. The information is not intended to constitute medical or legal advice and should not be taken as such.

The COVID-19 situation is rapidly evolving. BOMA and our webinar presenters do not warrant the accuracy or completeness of any information provided and assume no responsibility for any injury or damage to persons or property arising out of or related to any use of the information provided in this webinar.
Speakers

Marc Fischer, CPM, RPA, CCIM, LEED Green Associate, BOMA Fellow President | CEO
InspiRE Training & Development
marc@inspirecre.com

Ryan Miller, ARM-E
Principal
Critical Functions, LLC
Risk and Resilience Advisors
ryan@criticalfunctions.com

Andrew Robinson, Esquire
Principal
Offit Kurman | Attorneys at Law
arobinson@offitkurman.com
Lessons Learned

- Mitigation is Undervalued and Essential
- Much Easier to Leave than it is to Return
- Shortages and Bottlenecks are Inevitable
Create a Risk Mitigation Plan

- Use Time Wisely
- Leverage Your Team
- Use Scenario Analysis
- Take Decisive Action
Anticipate Shortages in Supply

- Vendor Risk Analysis
- Suppliers / Contractors
- Be Creative
- Leverage Partnerships
Prepare for Re-Occupancy

- Points of Reference
- Stakeholders?
- Work Backwards
- What Must Go Right?
- What Could Go Wrong?
- Share the Plan
The Basics

- “Force Majeure” – Unforeseen “superior forces”
- Insurance Coverage – Business Interruption, Cancellation, Civil Authority, misc.
- Litigation – Claims and disputes are inevitable
“Force Majeure” – unforeseen “superior forces”

Is COVID-19 a Force Majeure event?

- It depends . . .
- Express clauses in your agreements
45.7 Force Majeure. The occurrence of any of the following events shall excuse performance of such obligations of Landlord or Tenant as are rendered impossible or reasonably impracticable to perform while such event continues: strikes; lockouts; labor disputes; acts of God; inability to obtain labor, materials or reasonable substitutes therefor; governmental restrictions, regulations or controls; judicial orders; enemy or hostile governmental action; civil commotion; fire or other casualty; and other causes beyond the reasonable control of the party obligated to perform (financial inability to perform excepted). Notwithstanding the foregoing, the occurrence of such events shall not excuse Tenant’s obligations to pay Minimum Monthly Rent and additional rent (unless the provisions of Article 23 apply) or excuse such obligations as this Lease may nevertheless impose on the party to obey, remedy or avoid, despite such event. If any work performed by Tenant or Tenant’s contractor results in a strike, lockout and/or labor dispute, such strike, lockout and/or labor dispute shall not excuse Tenant’s performance hereunder.
(e) Force Majeure. Landlord and Tenant will be excused for the period of any delay in the performance of any obligations hereunder when prevented from so doing by cause or causes beyond the reasonable control of either party which shall include without limitation, all strikes, shortages of material, labor trouble, governmental restrictions and limitations, scarcity of materials or supplies, unavailability or delays in obtaining fuel, services or labor, war, insurrection, riot, governmental emergencies, floods, earthquakes and other acts of God.
§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, health advisories or state or federal shuttering of normal business activities, including restrictions of public gatherings and activities in response to a disease or national emergency, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor’s control; or by other causes that the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.
What are my remedies?

- It depends . . .
- Express clauses in your agreements (excused performance, abatement, termination, equitable adjustment)

What if my agreement is silent on this?

- Alternative theories under contract law
Insurance Claims

- Does my existing policy cover COVID-19 closures, delays, disruptions, etc.?

- Potential Sources of Coverage
  - Business Interruption Insurance
    - Common exclusions (virus or bacteria (SARS), “no direct physical loss or damage,” mere decrease in revenues . . .
  - Contingent Coverage (BI)
    - Supply chains, indirect losses, etc.
  - Enhancements
    - Infectious diseases
    - Civil Authority
    - Political Risks
Litigation

- Litigation in light of COVID-19 is inevitable
- Contract delay / termination claims and damages
- Early mitigation is key
  - Temporary rent abatement/deferral
  - Notice where required
  - Understand the issues affecting all parties (clients, customers, landlords, tenants, contractors, suppliers), and the realities of their individual situations
- Alternative theories under contract
  - Impossibility, impracticability, frustration of purpose, material change, illegality
  - Court closures and administrative issues
• **Know Your Documents** – Review existing leases, contracts, and policies of insurance for risks, protections, NOTICE REQUIREMENTS

• **Immediate Mitigation** – Reach out to affected parties (tenants, landlords, suppliers, etc.)

• **Seek Help** – Reach out to your team of professionals (insurance providers, attorneys, professional organizations) for advice, guidance and updates.
Questions & Answers

• To enter a question simply type your question in the box in the lower left corner of the window and click on “Send”.

• We’ll read as many questions as time allows and respond so that everyone may hear the answer.

• If you are listening to the audio only and do not have access to the chat box, you may submit your questions to boma@commpartners.com.
Thank you for participating in today’s webinar.

BOMA International is actively working to provide commercial real estate professionals with credible information on how to mitigate the potential health and business impacts of the pandemic.

Guidance documents and resources are posted regularly at www.boma.org/coronavirus.