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Rent Abatement Clause Frequency Up Nearly 50% Since 2019

By **Andrew McIntyre**

Law360 (June 23, 2021, 5:31 PM EDT) -- The use of rent abatement clauses in commercial leases has jumped by nearly 50% since 2019 as tenants and landlords continue to spar over the question of how the COVID-19 pandemic factors in, while pandemic-related force majeure clauses are also on the rise, according to Practical Guidance.

Data from Practical Guidance show that 40% of leases signed in 2019 provided a rent abatement right for a tenant in the event the landlord could not provide essential services. But 59% of leases signed in the fourth quarter of 2020 and the first quarter of 2021 have a rent abatement clause, a jump of nearly 50% from that earlier 40% mark.

The insights come from Practical Guidance's **ongoing survey** of commercial leases, which is gathering data on nonpublicly filed commercial leases at retail, industrial and office properties.

Percentage of Leases That Have Force Majeure Clauses for Pandemics or Pandemic-Related Events



Source: Practical Guidance • Created with
Datwrapper

Meanwhile, roughly two-thirds of leases signed in the second half of 2020 and the first quarter of 2021 contained one or more of the following four force majeure clauses: government shutdowns, new laws rendering performance unlawful, pandemics, and public health crises. By contrast, only half the leases signed in the second quarter of 2020 had one or more of those clauses.

Force majeure clauses, common in contracts, allow parties to get out of or delay certain obligations in the wake of extreme or unforeseeable events. Many use the term Act of God to describe the event.

"It's as broad as can be defined," Andrew Raines, founding partner of Raines Feldman LLP said about the various types of pandemic-related force majeure language he is seeing in leases. "I think that's going to continue to be there. ... This will just add to a lease form."

Rent abatement clauses had seen a jump in frequency in 2020 at the onset of the COVID-19 pandemic, with that figure rising to 55% in the first quarter of 2020, including 85% of leases signed in **March 2020** as the virus rapidly spread across the U.S. But by the third quarter of last year,

frequency of use had fallen below that earlier 40% mark to 38%, according to Practical Guidance.

Percentage of Leases That Have a Rent Abatement Clause

2019	40%
.....	
Q1 2020	55%
.....	
Q3 2020	38%
.....	
Q4 2020 – Q1 2021	59%

Source: Practice Guidance • Created with
Datawrapper

Experts say that while the provision is becoming more prevalent in commercial leases, it does still remain a major point of negotiation.

"Most of the institutional landlords are not offering that ... off the bat," Raines said. "It's done on a case-by-case basis."

Practical Guidance's more recent rent abatement data also track whether or not the landlord had control over the loss of services. Among the leases signed in the third quarter of 2020, 15% provided rent abatement in the event the loss of service was out of the landlord's control.

By contrast, 34% of leases signed in the fourth quarter of 2020 and the first quarter of 2021 provided rent abatement in the event the service disruption was beyond the landlord's control.

While rent abatement is one strategy, John Goldstein, an officer at Greensfelder Hemker & Gale PC, said he is also seeing landlords and tenants take the approach of having the tenant actually set up and pay for the service the landlord has failed to provide and then later bill the landlord.

As an example, he said if a tenant loses air conditioning in July, a lawsuit filed at that point that results in the air conditioning coming back in January isn't particularly helpful. In that case, the tenant might instead come up with a temporary air conditioning solution and send the bill to the landlord.

There can be provisions in the lease that set out a procedure. Some leases, Goldstein said, require there to be a loss of service for four consecutive days before the tenant can take action.

On the question of force majeure, experts say the key still is whether it applies to nonpayment of rent. Force majeure traditionally has not applied there and still largely doesn't, although more parties are now trying to negotiate that.

"It's a tough, tough, tough battle, whether we can carve out the monetary requirements under the lease," Goldstein said.

Experts say force majeure is particularly important now in the construction context, given that landlords are experiencing delays in doing improvements for tenants.

Practical Guidance's latest survey shows various other changes in commercial leases, including an increase in business interruption insurance in new leases.

In 42% of leases inked in the second quarter of 2020, landlords required tenants to carry business interruption insurance, and that figure has risen to 48% for leases signed in the second half of 2020 and the first quarter of 2021, according to Practical Guidance.

In the retail context, the presence of exclusive use in contracts has soared. For retail leases signed in the first half of 2020, 48% had that clause. By contrast, 71% of retail leases signed in the second half of 2020 and the first quarter of 2021 had an exclusive-use provision.

The provision most often appears in leases for space at malls and gives tenants assurance that the landlord will not bring in other tenants operating in the same sector.

And on the office side, Practical Guidance's data show desk sharing and subleasing are on the rise. Fourteen percent of leases inked in the first half of 2020 had a provision that allowed office tenants to shift to a desk-sharing model without the need for landlord consent, while for leases signed in the second half of last year and the first quarter of 2021, that number had risen to 19%.

Percentage of Leases That Allow for Subleasing Without Landlord's Consent



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And tenants are also getting more sublease rights. One-third of leases signed in the first half of last year included a right for the tenant to sublease space without the need of landlord consent, while half of leases signed in the second half of 2020 and first quarter of 2021 had the provision.

Those additional provisions, coupled with extensive force majeure language, are making commercial leases longer and longer.

"We used to tuck it in the back," Goldstein said, speaking of force majeure. "Now it's in the term sheet. What's the rent, what's the term and what's the force majeure language?"

--Editing by Orlando Lorenzo and Jill Coffey.

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