

COVID-19 Relief Package: Temporary relief for personal guarantors under commercial leases

25 SEPTEMBER 2020

CATEGORY:
ARTICLE



UPDATED: September 25, 2020

Overview

On May 26, 2020, Mayor De Blasio signed into law Int. 1932-2020-A ¹ (the “Legislation”), thereby amending the administrative code of the City of New York (the “Code”) to add new Section 22-1005 which temporarily prohibits the enforcement of personal liability provisions in commercial leases in New York City and amends Section 22-902 of the Code to broaden prohibitions on landlords attempting to enforce personal guaranties.

Summary of the Legislation

The Legislation applies to certain businesses that were impacted by mandated closures and service limitations in the Governor’s Executive Orders. Specifically, the Legislation grants temporary relief to personal guarantors (as distinct from corporate guarantors) under commercial leases or other rental agreements for (1) businesses that were required to stop serving food or beverages on-premises; (2) businesses that were required to cease operations altogether (e.g., gyms, fitness centers, movie theaters); (3) non-essential retail businesses that were required to close and/or subject to in-person restrictions; and (4) businesses that were required to close to the public (collectively, “Impacted Tenants”). This temporary relief relates to events of default for failure to pay rent, utility expenses or taxes or fees and charges relating to routine building maintenance owed by Impacted Tenants under their respective commercial leases, occurring between March 7, 2020 and September 30, 2020.

On September 23, 2020, the New York City Council passed a measure to extend this time period, so that the Legislation now applies to defaults that occur through March 31, 2021.²

In addition, the Legislation amends Section 22-902 of the Code to prohibit landlords from threatening to or attempting to enforce personal liability provisions and declared any such threats or attempts a form of harassment in instances where Impacted Tenants were affected by COVID-19.

Application to Stand-Alone Guaranties

While it is believed that the intent of the Legislation was meant to include all personal guaranties, the Legislation does not expressly include stand-alone guaranties. Rather, the text of the Legislation states in relevant part that “a provision in a commercial lease or other rental agreement involving real property located within the city that provides for one or more natural persons who are not the tenant under such agreement to become...wholly or partially personally liable...shall not be enforceable against such natural persons...”. In this regard the legislation is rather lacking since, generally speaking, while a lease might reference a related guaranty, most lease guaranties are separate agreements between landlords and guarantors. Therefore, it remains to be seen whether stand-alone guaranties are covered under the broad term “other rental agreement”.

Challenges to the Legislation

Prior to being signed into law, the Legislation was expectedly challenged by commercial landlords and many trade organizations. From a practical perspective, commercial landlords often rely on guaranties as a material inducement to enter into a lease with a tenant having less substantial financial means, and particularly where the tenant is a limited liability company with no other assets. Going forward, it is likely that the Legislation will encounter substantial pushback from commercial landlords who now find themselves with limited recourse during an Impacted Tenant’s default. Additionally, the Real Estate Board of New York, a leading real estate trade organization in the City of New York, challenged the

constitutionality and authority of the Legislation highlighting the Legislation's seemingly impermissible, unilateral amendment of existing, valid contracts. Based on the foregoing, we anticipate that there will be a number of challenges to this new Legislation.

Withers Bergman LLP is an international law firm with substantial experience with diverse leasing from anchor tenancies in shopping centers to large office leases, luxury brand single city retail leases and multiple city retail rollout programs, warehouse occupancies as well as residential portfolios. For additional guidance on this recently passed legislation and other COVID-19 related matters, please reach out to our New York Commercial Real Estate Team to develop a legal strategy to plan for near- and long-term solutions tailored to achieve your specific goals.

To read more about how we can help please [click here](#).

FOOTNOTES

1 <https://legistar.council.nyc.gov/>

2 <https://therealdeal.com/>

Authors

Vasiliki Yiannoulis-Riva

PARTNER | NEW YORK

Real estate

 +1 212 848 9866

 vasi.yiannoulis-riva@withersworldwide.com

Dimitri Tournas

ASSOCIATE | GREENWICH, NEW YORK

Real Estate Construction

 +1 203 328 2228

 dimitri.tournas@withersworldwide.com