CONTRACT & LEASE ISSUES FOR BUSINESSES DURING COVID-19

MONDAY, MAY 18
@ 6:30-7:30PM
WHO WE ARE

The Coalition is a diverse group of community stakeholders who are dedicated to increasing family self-sufficiency and prosperity through financial education and asset-building.

MISSION

Promoting equitable opportunities for financial health to build wealth and economic prosperity.
Our Mission

Legal Services of Eastern Missouri advances justice through legal representation, education and supportive services. We partner with the community to improve lives, promote fairness and create opportunities for those in need.
Contract & Lease Issues Facing Businesses During Covid-19

By Tracy James
May 18, 2020
Contracts & Leases
A **contract** is an **agreement** between 2 or more parties.

- To do **what** (provide a product or service)
- For what **price** (cost per item/bulk price/all that’s needed)
- For **how long** (month-to-month, 6 months, 1 year, etc.)

A **lease** is contract + possession of property where the **agreement** between 2 parties is:

- To do **what**: landlord provides space/tenant occupies space
- For what **price**: monthly/yearly rent
- For **how long**: month-to-month, 6 months, 1 year, 1+ years

When one party does not hold up their end of the agreement, that is a **breach of contract**.
#2 Where are You in Completing the Contract/Lease?

- Have all parties signed the contract?
- Has one party already performed on the contract?
- Have the parties met all the conditions of the contract?
- Have you already missed a deadline, an order, a delivery, etc.?
- What about payment? Missed a payment?
- Has a breach of the contract occurred?
It depends where you are in fulfilling the contract when Covid-19 affected your business SO THAT you can see what kind of legal protection you have and how to react so you can lower your risk and liability.
#3 You Want To Avoid Breaching the Contract

Breach of a Contract Can Hurt Your Business & Cost You $$$

Breach exists when:

--Complete or substantial failure to perform
- Substantial but not complete performance
- Repudiation
  - Words or conduct that would be reasonably interpreted as refusal to perform
- Anticipatory Breach
  - Repudiation of the contract by either party prior to the time of performance
- Changed Circumstance (Depends)
  - When it becomes impossible to fulfill the conditions of the contract
#3 You Want To Avoid Breaching the Contract

**Default**

= General term for failing to fulfill the terms of contract but often more specifically refusal to pay a debt when due.

**Breach of Contract**

=A broken promise or failure of one or both parties to complete a term of the contract without a legal excuse. Breach can lead to default.

Examples:

Default: If Buyer does not pay for the entire shipment by May 15th, Buyer will be in default of the contract and Seller will have immediate recourse for recovery of all amounts due.

Breach: The rent shall be due by the first of the month but no later than the 10th of the month with a 10% late fee. If payment has not been paid by the 15th of the month, it will be considered a breach of the lease. Upon Landlord’s option, nonpayment is a major breach of the lease and default of the entire lease.
#4 Defenses to Breach of Contract: When a Contract/Lease May Be Unenforceable

**Excused Performance**

Conditions that legally excuse you from having to perform or fulfill the duties of the contract. *Note*: Inability to pay in and of itself is not a legal excuse.

**Impracticability**

*Subjective* belief that an unforeseen condition has occurred that made it very difficult or expensive for the party who was to perform.

**Impossibility**

*Objective* belief triggered by the occurrence of a condition which prevents one party from fulfilling the contract. The condition excuses performance. Party seeking this defense must have explored every possibility within its powers to perform the contract.

**Frustration of Purpose**

After the contract is made, an unforeseen event not caused or foreseen by either party undermines a party’s main reason for contracting so that the party does not get any value from performing the contract. That party’s remaining duties are discharged from being carried out.

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Ex: The singer Xyla is contracted to perform in Atlanta on Friday night, but it will be impracticable for him to do so if his entire 42-person crew needs to be tested for the virus and cleared 24-hours and arrive in Atlanta ahead of the concert time.

Ex: Xyla is under mandatory quarantine after testing positive for Covid-19 and cannot perform the concert in Atlanta on Saturday.

Ex: ACME Concert Performances Inc. has contracted with Xyla to do a 3-hour performance on May 1st but due to a stay-at-home order by City of St. Louis Department of Health due to the coronavirus, Xyla cannot perform in St. Louis for the foreseeable future.
#4 Defenses to Breach of Contract: When a Contract/Lease May Be Unenforceable

**Unforeseeable Circumstances:** Not expected and usually goes with the term “reasonably foreseeable” meaning the average person would not expect it.

Ex: Fire: If the entire premises is destroyed by fire unforeseen nor caused by either party, and if premises is completely destroyed, then the Landlord will send notice to Tenant within 30 days of fire stating that Landlord will not rebuild, and that the lease is now null and void, absent any payments already made...

**Contract/Lease Terms to look for:**

**Force Majeure:** A common contract clause that frees both parties from liability and obligation when an **extraordinary** event or **circumstance beyond the control of the parties** occurs.

**Act of God:** Is a kind of Force Majeure. **Normally not caused by humans/unexpected:** tornadoes, plague, riots, etc. Often spelled out in contracts but not always.
#5 Other Terms to Look for in Leases

**Continuous Operation**
Means that a tenant must remain open for businesses under normal circumstances or face breaching the lease.

**Example Language**: “Tenant agrees to be open for business during normal business hours and agrees to be in continuous operation during the lease unless giving Landlord advanced notice and subject to preapproval.”

**RIGHT OF RE-ENTRY**
Term in a lease that gives the landlord a right to enter the leased space and do something with it.

**Example Language**: “If Tenant abandons the property, Landlord has the right of re-entry to the leased premises upon discovery or Tenant’s notice.”
#6 So What Can You Do?

Depends where you are in performing the contract:

- If haven’t signed the contract = **hold off**.

- **Signed contract but neither party has performed** = let the other party know now of problems due to COVID. Limit your liability.

- If 1 party has performed but the other hasn’t. Have all the conditions been met? Can the 1 party still complete the contract? = Look to see if any of those terms are mentioned. Does the COVID crisis trigger any of those terms? Inform the other party now.

- **What if none of those terms are in the contract?** = Missouri state law has some “gap fillers” to fill in what is left unsaid.

- **What if we have been doing business together for a while?** = Look at what your custom has been between the parties. Ignoring clauses in the past might either help or hurt you.
#7 Yikes! What If It’s Too Late?!

Limit your damages.
Seek other remedies.
#7 Yikes! What Kinds of Remedies for Contracts?

- Suspend or delay performance/payment – wait until businesses can reopen.
- Terminate the agreement - notify and end the contract.
- Look at other clauses in the contract for relief.
- Compensation – asking for damages ($$$).
- Specific Performance – forcing the other party to perform the contract usually with the help of the courts.
- Restitution – benefit to make up what was owed.
- Liquidated Damages – contract clause stating a fixed amount of money to be paid in the event of a breach.
- Substitution – right to have goods repaired or replaced.
#8 Yikes! What Kinds of Remedies for Leases?

- **Obligation to pay rent/right of tenant to terminate** – Don’t have to pay rent if impossibility or frustration of purpose occurs but landlord can’t evict either.

- **Rent Deferral** - Negotiate for paying rent later without penalty.

- **Rent Abatement** – Suspend paying rent until crisis averted.

- **Abandonment** – Does the lease state when it happens? What’s the tenant’s intent? Does the tenant intend to “abandon” or is it only temporary? Does the tenant not pay rent, collect mail or fails to visit? Look out for notices and mailings by the landlord.

- **Eviction** – No self-help by landlords allowed in Missouri. Only courts can allow evictions. Tenant not paying the rent does not prohibit tenant’s right of access to the space. Landlords illegally resorting to self-help evictions by changing locks or entering leased premises or taking over the space could face heavy court-imposed penalties. Courts are closed now and may not be kind to landlords evicting tenants based on the virus/stay-at-home orders.
Take Away: Don’t Assume Anything

These Acts of God or Force Majeure clauses are taken narrowly:

- Often the clause listing events to excuse fulfilling the contract might not mention viruses, pandemics, government order or labor disruption.

- Be aware of “catch-all” phrases as the contract will be enforced only if virus/pandemic is like the other examples.

- These clauses only apply to events that neither party could reasonably foresee or guard against in the contract.

It all depends on the facts, language of the contract and the timing of where the parties are in the contract.

Best bet: have an attorney look at the contract.
The Microenterprise Program

Free legal assistance for small businesses and non-profits

– Existing businesses and new businesses
– Non-profit organizations

• Services We Offer
– One-on-one legal help (but we don’t go to court)
– Business legal workshops
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Interested in Becoming a Client?

Contact us at ced@lsem.org or call 314-256-8752.

• Inform us if your business or nonprofit has been affected by COVID in some way.

• Is it a for profit business? Clients can’t make more than 300% above the federal poverty level for family size and no more than $7,500 in savings.

• For nonprofits, we accept clients who serves underserved individuals in Eastern Missouri & show the nonprofit cannot afford to pay for legal help.

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Questions?
Facebook Live: Info for Small Businesses and NonProfits as they Re-open

Wednesday, May 27, 2-3pm
Thank you!

Additional COVID-19 updates available online at:
https://lsem.org/covid-19-updates/