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COVID-19 Relief for Commercial Real Estate Businesses

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The COVID-19 crisis has created unique challenges for commercial real estate. The pandemic's impact on business operations is producing uncertainty under leases regarding the obligations of all parties to the lease.

Industrywide, landlords are being contacted by tenants requesting rent abatements, concessions or free rent. In these cases, some concessions may be justified. There may be a provision in the lease contract to provide relief. As tenants lack the cash flow to pay operating expenses, with rent being a significant item for most small businesses, this is not an unexpected development.

The U.S. Small Business Administration (SBA) is offering Economic Injury Disaster Loans (EIDL) to all states and territories. These low-interest federal disaster loans provide working capital to small businesses suffering substantial economic injury as a result of COVID-19. These loans are administered directly by the SBA. Tenants are eligible if they are a small business or private, non-profit organization (as defined by SBA size standards) that is directly affected by the disaster, offer services directly related to the declaration, or are indirectly related to an industry that is likely to be harmed by losses.

Eligible entities must have a credit history acceptable to SBA, a demonstrable ability to repay the loan, be physically located in the United States, and have suffered working capital losses due to the disaster. Eligible entities may qualify for loans up to $2 million based on the reduction in revenues during the affected period. The funds can pay fixed debts, payroll, accounts payable and other operating bills. As of this writing, the loans have been limited to $10,000 for initial funding within three days of the application plus an additional $15,000 if approved by the SBA.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act has allocated $350 billion to help small businesses keep workers employed amid the pandemic and economic downturn. Known as the Paycheck Protection Program, the initiative provides 100% federally guaranteed loans to small businesses that maintain their payroll during this emergency. Loans can be up to 2.5 times the borrower's average monthly payroll costs, not to exceed $10 million. These loans may be forgiven if borrowers maintain their payrolls at 75% of the loan amount for the eight-week period following the day of funding and maintains the same number of full time equivalent employees. These loans will be administered through approved lenders.

Businesses are eligible if they are either a small business with fewer than 500 employees, a small business that otherwise meets the SBA's size standard, an IRS Section 501(c)(3) organization with fewer than 500 employees or an individual who operates as a sole proprietor or independent contractor. To qualify, the business must have been in operation before February 15, and must have paid salaries and payroll taxes or paid independent contractors. A good faith certification that the uncertainty of current economic conditions makes the loan request necessary to support ongoing operations is required, as well as a guarantee that the borrower will use the loan proceeds to retain workers and maintain payroll and make mortgage interest payments, interest on other debt prior to February 15, lease and utility payments. The borrower must also certify that it does not have an application pending for a loan duplicative of the purpose and amounts applied for here.

There is also an Employee Retention Credit for Employer Subject to Closure due to COVID-19 in which an eligible employer is allowed a credit against employment taxes for each calendar quarter equal to 50% of "qualified wages" for each employee taken into account for such calendar quarter. Credits are available for qualifying wages paid after March 12, 2020, and before January 1, 2021. To take advantage of this credit, employers may not have taken a PPP loan.

In addition to the options provided through the federal government's relief bills, landlords and tenants can consider lease modifications that could be a "win-win" for both parties.

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