

New York City Passes New Legislation Prohibiting The Enforcement of Personal Guaranties For Businesses Affected By Covid-19

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Last month, Mayor Bill de Blasio signed new legislation intended to provide relief to businesses in New York City which are facing financial difficulties as a result of the COVID-19 pandemic. In part, the aim of this new legislation is to increase protections for commercial tenants that are struggling to pay their rents in light of the widespread economic impact of the coronavirus outbreak. The two pieces of legislation that assist commercial tenants are Intro. 1932-A and Intro 1914-A.

Intro. 1932-A amended the New York City Administrative Code by adding § 22-1005 which temporarily prohibits the enforcement of personal liability provisions in commercial leases. Pursuant to § 22-1005, in order for a personal liability provision in a commercial lease to be unenforceable against an individual, a tenant must either: **(1)(a)** have been required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by Governor Cuomo on March 18, 2020; (b) been a non-essential retail establishment subject to in-person limitations under guidance issued by the New York State Department of Economic Development pursuant to executive order number 202.6 issued by Governor Cuomo on March 18, 2020; or (c) required to close to members of the public under executive order number 202.7 issued by Governor Cuomo on March 19, 2020; **and (2)** the event causing the individual to become partially or wholly personally liable must have occurred between March 7, 2020 and September 30, 2020. If a commercial tenant satisfies these two conditions then any individual who personally guaranteed “payment for rent, utility expenses or taxes owed by the tenant under such agreement or fees and charges relating to routine building maintenance owed by the tenant . . .” will not be liable for these expenses.

The types of businesses that Intro. 1932-A seeks to assist include: restaurants, bars, gyms, fitness centers, movie theaters, barbershops, hair salons, tattoo or piercing parlors, and other retail businesses and personal care services that were forced to close to the public.

In addition, Intro. 1932-A amends § 22-902 of the New York City Administrative Code – Commercial tenant harassment – to now prohibit a landlord from attempting to enforce a personal liability provision that the landlord “knows or reasonably should know” is unenforceable pursuant to the newly enacted § 22-1005. NYC Admin Code § 22-902(a)(14). Further, Intro. 1914-A amends § 22-902(a)(11) to include language which would prohibit landlords from threatening commercial tenants based on “the commercial tenant’s status as a person or

business impacted by COVID-19, or the commercial tenant's receipt of a rent concession or forbearance for any rent owed during the COVID-19 period" The "COVID-19 period" is defined as March 7, 2020 through the latter of "(i) the end of the first month that commences after the expiration of the moratorium on enforcement of evictions of any tenant, residential or commercial, set forth in executive order number 202.8 . . . and extended thereafter, (ii) the end of the first month that commences after the expiration of the moratorium on certain residential evictions set forth in section 4024 of the . . . CARES [act] and any subsequent amendments to such section or (iii) September 30, 2020" NYC Admin. Code § 22-902(a)(11)(a). For an individual, "impacted by COVID-19" is defined as a person who has experienced one or more of the following situations:

1. such person was diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis; provided that for the purposes of this subparagraph, the term "COVID-19" means the 2019 novel coronavirus or 2019-nCoV;
2. a member of such person's household was diagnosed with COVID-19;
3. such person was providing care for a family member or a member of such person's household who was diagnosed with COVID-19;
4. a member of such person's household for whom such person had primary caregiving responsibility was unable to attend school or another facility that was closed as a direct result of the COVID-19 state disaster emergency and such school or facility care was required for the person to work; provided that for the purposes of this subparagraph, the term "COVID-19 state disaster emergency" means the state disaster emergency declared by the governor in executive order number 202 issued on March 7, 2020;
5. such person was unable to reach their place of business because of a quarantine imposed as a direct result of the COVID-19 state disaster emergency or because such person was advised by a health care provider to self-quarantine due to concerns related to COVID-19;
6. such person became primarily responsible for providing financial support for the household of such person because the previous head of the household died as a direct result of COVID-19;
7. such person's business is closed as a direct result of the COVID-19 state disaster emergency

A business is "impacted by COVID-19" if "(i) it was subject to seating, occupancy or on-premises service limitations pursuant to an executive order issue by the governor or mayor during the COVID-19 period or (ii) its revenues during any three-month period within the COVID-19 period were less than 50 percent of its revenues for the same three-month period in 2019 or less than 50 percent of its aggregate revenues for the months of December 2019, January 2020, and February 2020 and such revenue loss was the direct result of the COVID-19 state disaster emergency. A revenue loss shall be deemed to be the direct result of the COVID-19 state disaster emergency when such disaster emergency was the proximate cause of such revenue loss." NYC Admin Code § 22-902(a)(11)(c).

While Intro 1932-A and 1914-A benefit commercial tenants, it is likely that landlords and property owners who have been negatively affected by COVID-19 and can be harmed further by these new pieces of legislation will challenge them on a constitutional basis. Since there is uncertainty as to how these new laws will hold up to a challenge in court, any landlord or commercial tenant thinking of acting on them should consult with an attorney before doing so.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. Feel free to contact Thomas S. Baylis at 516.357.3748 or via email at TBaylis@cullenllp.com, Ariel E. Ronneburger at (516) 296-9182 or via email at aronneburger@cullenllp.com, or Justin DiCicco at (516) 296-9104 or via email at

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Practices

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