

## Negotiating New York Restaurant Leases in the Wake of COVID-19



Jeanne M. Hamburg, Esq.  
jhamburg@norris-law.com



Sharyn A. Tritto, Esq.  
satritto@norris-law.com

# The Law

- **Int. No. 1932-A** – signed by Mayor DeBlasio on May 26, 2020
  - Amended the **NYC Administrative Code** (NYCAS) with **section 22-1005** (“Personal Liability Provisions in Commercial Leases”)
  - Amended the definition of “commercial tenant harassment” under **NYCAS 22-902(a)** to include any attempt to enforce a guaranty that the landlord knows or should know is not enforceable under NYCAS 22-1005

# The Intent of the Law

- To protect guarantors of small retail businesses in New York City – with particular reference to restaurants – from liability incurred by loss of business from state and city executive orders related to COVID-19 that forcibly curtailed or suspended operation of those businesses

# The Two Conditions for NYCAS 22-1005 to Apply to Commercial Tenants

1. The tenant satisfies the conditions of subparagraph (a), (b), or (c):
  - a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020
  - b) The tenant was 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 the governor on March 18, 2020
  - c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020
2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020, and September 30, 2020, inclusive

Must meet conditions of **both** paragraphs 1 and 2

# A Key Point

- This is **not** a moratorium delaying collection
- Landlords are **permanently** enjoined from attempting to enforce qualifying guarantor liabilities caused by defaults or other events that occurred between March 7 and September 30, 2020

# What Kind of Guarantor Is Absolved?

- Must be one or more **natural persons** (not business entiti(es))
- Must **not** be the actual tenant under the lease

# Of What Liabilities Is a Qualified Guarantor Absolved?

- Personal liability, upon occurrence of default or other event, for:
  - “payment of **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 under such agreement”

# What Sorts of Businesses Are Covered?

- **In addition to restaurants**, the bill (Int. No. 1932-A) was intended to cover guarantors for:
  - **Bars, movie theaters, gyms, personal care services** (barber shops, hair and nail salons, tattoo and piercing parlors)
  - **Other retail businesses that were required to close or subject to in-person restrictions**
- Guarantors for **office space** leases are **not** covered

# What Kinds of Landlords Are Subject to NYCAS 22-1005 and NYCAS 22-902(a)?

- No distinction is made regarding different kinds of landlords (individual, corporate, other institutional, etc.)
- All are subject if the commercial tenant qualifies

# Harassment

- The Landlord must **not attempt to enforce a guaranty** that s/he knows (or should know) is not enforceable under NYCAS 22-1005
- Any such attempt is “commercial tenant harassment,” as per an amendment to NYCAS 22-902(a)

# Possible Legal Changes

- The Real Estate Board of New York (REBNY) has already raised challenges to the new law that pertain to:
  - Unconstitutionality
  - Imprecise Drafting

# Constitutional Challenges

- This is a unilateral amendment of an existing, valid contract
- Does the NY City Council – or any state agency – have the authority to amend private contracts?
- More broadly: Do the police powers of any U.S. state or jurisdiction to protect the public extend to allowing the impairment of private contract rights? Does this violate Article I, section 10, of the U.S. Constitution?
- Would the law be less subject to challenge if it mandated a moratorium on execution rather than permanent evisceration of contracted terms?

# Imprecise Drafting Challenges

- The law refers to “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;” but most lease guarantees are separate instruments from the underlying lease in question
- The law refers to guarantors who “become, upon the occurrence of a default or other event, wholly or partially personally liable”
- Most lease guarantees provide that the liability of the guarantor is in effect from the delivery of the guaranty, and not deriving from future events and contingencies
- Does the ban on enforcement apply to all personal liability arising between March 7 and September 30, 2020, or only to payment obligations missed during this time period?

# Drafting Commercial Leases During the Pandemic – Reinterpreting “Force Majeure”

- Most commercial leases contain a **force majeure** clause, which allocates relief and risk between the parties in the event of a major upheaval such as natural disaster, war, government order, or prohibition of business. In theory, this affords a basis to extend timeframes or otherwise excuse temporary non-performance of contractual agreements by one or both parties.
- HOWEVER, it is usually specified that the clause does not absolve the tenant from paying rent. Moreover, courts have tended to rule that the clause does not excuse non-performance in events that are not enumerated in the wording of the clause.
- Nevertheless, the intent of a force majeure clause is to insure against failure to perform due to an intervention beyond the foresight or control of the parties. In this case, a business is unable to meet its rent obligations not because of any intrinsic business failure, but because an order of the state has explicitly prevented it from *conducting* business.

# Possible Adaptive Provisions

- Rent deferral
- Rent abatement
- Extension equivalent to deferral period
- Allowance for improvements or refurbishment by tenant during “down period”
- Early termination
- Rent deferral coupled with percentage-rent agreement
- Rent deferral coupled with new corporate guaranty

# Landlord Considerations

- If the property is encumbered with a mortgage, the current policy climate may afford the landlord access to loan forbearance; this should afford the landlord more flexibility in allowing the tenant to work out an arrangement to meet the lease obligations

# About Jeanne & Sharyn



**Jeanne Hamburg** is a transactional attorney and litigator with over three decades of experience in trademark and copyright prosecution before the U.S. Trademark and Copyright Offices, counseling on brand availability, managing global portfolios, litigating complex intellectual property matters, and drafting contracts common to the food and beverage industry. She practices out of Norris McLaughlin's New York City office and is a member of the firm's Food, Beverage & Hospitality Industry Group, which serves clients in the industry with all their legal needs. For more information about Jeanne, please see [https://norrismclaughlin.com/attorney\\_profiles/jeanne-hamburg/](https://norrismclaughlin.com/attorney_profiles/jeanne-hamburg/).



**Sharyn Tritto** is a real estate attorney, specializing in all aspects of real estate litigation, particularly landlord and tenant law. She also handles leasing and transactional matters. Sharyn has practiced in all courts at both the trial and the appellate levels. In addition, she handles matters before various administrative agencies, including but not limited to the Environmental Control Board and the Division of Homes and Community Renewal. Prior to joining Norris McLaughlin, Sharyn acted as in-house counsel, where she handled everything from nonpayment proceedings to complex real estate litigation matters in the Supreme Court. For more information about Sharyn, please visit [https://norrismclaughlin.com/attorney\\_profiles/sharyn-tritto/](https://norrismclaughlin.com/attorney_profiles/sharyn-tritto/).