

To Our Clients and Friends

Memorandum

May 26, 2020

COVID-19 Client Alert: N.Y.C. Council Int. No. 1932-A (2020) and N.Y.C. Council Int. No. 1914-A (2020) Enacted to Protect COVID-19 Impacted Tenants

On May 26, 2020, Mayor De Blasio signed into effect N.Y.C. Council Int. No. 1932-A (2020) and N.Y.C. Council Int. No. 1914-A (2020) (collectively, the “Legislation”) in furtherance of the city’s response to the COVID-19 pandemic and its impact on small business activity. The Legislation seeks to (i) insulate natural persons (as opposed to business entities) that are guarantors of commercial lease obligations from personal liability, (ii) temporarily prohibit the enforcement of personal liability provisions in commercial leases or rental agreements involving a COVID-19 impacted tenant, and (iii) broaden the scope of what constitutes prohibited tenant harassment in the wake of the pandemic. However, the Legislation does not prohibit landlords from terminating tenancies if the tenant thereunder is in default, or from refusing to renew leases, and does not impair the obligation of commercial tenants to continue paying the rent owed under leases.

We expect the Legislation to be challenged as a violation of the Contracts Clause of the US Constitution and the Takings Clauses of both the US Constitution and New York State Constitution, which generally prevent legislatures from impairing rights in existing contracts through new legislation. However, state legislatures “retain the power to safeguard the vital interests of their people” and therefore have the ability to abrogate preexisting contractual obligations in certain circumstances (*Matter of Buffalo Teachers Fed’n, Inc. v. Elia*, 162 A.D.3d 1169, 1176 (3d Dep’t 2018 (citation omitted)); the United States Supreme Court has held that where there is a “public emergency,” and where “the relief afforded was temporary and conditional,” the legislative impairment of contractual obligations can be upheld. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 434-435, 440-442 (1934). Additionally, the statute may be susceptible to challenge under the First Amendment as an impermissible infringement on free speech. The statutory language is exceptionally broad and it is unclear what speech is prohibited under the statute.

The Legislation is comprised of two parts.

- First, the Legislation adds a new section 22-1005 to the Administrative Code of the City of New York (the “Code”) that renders unenforceable commercial lease provisions obligating one or more natural persons to become “wholly or partially personally liable” for a tenant’s “payment of rent, utility expenses or taxes...or fees and charges relating to routine building maintenance,” subject to the below two conditions existing:
 1. The default or event which caused such natural person(s) to become liable must have occurred between March 7, 2020 and September 30, 2020; and

2. The tenant must satisfy one of the below three conditions:
 - a. The tenant was required under Executive Order No. [202.3](#) issued by Governor Andrew Cuomo (the “Governor”) on March 16, 2020, to cease operation, and in the case of a restaurant or bar, to cease serving food or beverage for on-premises consumption. This order applied to restaurants, bars, gyms, fitness centers and classes, movie theatres, and any facilities authorized to conduct video lottery gaming or casino gaming;
 - 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 No. [202.6](#) issued by the Governor on March 18, 2020. Examples of *essential* retail establishments under this guidance include grocery stores, pharmacies, convenience stores, farmers markets, gas stations, restaurants/bars (for take-out/delivery), hardware/appliance stores, and pet food stores; or
 - c. The tenant was required to close to members of the public under Executive Order No. [202.7](#) issued by the Governor on March 19, 2020. This order applied to all barbershops, hair salons, tattoo or piercing parlors, and related personal care services.

N.Y.C. Council Int. No. 1932-A, § 1.

- Second, the Legislation amends section [22-902](#) the Code, which prohibits landlords from engaging in “commercial tenant harassment” as described below.
 1. The Code previously set forth thirteen acts and omissions, any of which if taken by or on behalf of a landlord would constitute commercial tenant harassment if such act or omission “would reasonably cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease or other rental agreement or under applicable law in relation to such covered property....” The Legislation amends the Code by adding as a fourteenth prohibited act “attempting to enforce a personal liability provision that the landlord knows or reasonably should know is not enforceable pursuant to section 22-1005 of the code [i.e., the first component of the Legislation summarized above].” N.Y.C. Council Int. No. 1932-A, § 2.
 2. The Legislation amends one of the originally prohibited thirteen acts to include “threatening a commercial tenant 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.”
 - a. The Legislation defines “COVID-19 period” as March 7, 2020 through the later of (i) the end of the first month that commences after the expiration of the ninety-day moratorium on enforcement of tenant evictions forth in Executive Order No. [202.8](#) issued by the Governor on March 20, 2020 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.
 - b. The Legislation provides that 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 issued by the Governor or [Mayor De Blasio] 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.”

- c. The Legislation also provides that a person is “impacted by COVID-19” if: (i) such person was diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis, (ii) a member of such person’s household was diagnosed with COVID-19, (iii) such person was providing care for a family member or a member of such person’s household who was diagnosed with COVID-19, (iv) 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 “COVID-19 state disaster emergency” means the state disaster emergency declared by the Governor in [Executive Order No.] [202](#) issued March 7, 2020, (v) 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 healthcare provider to self-quarantine due to concerns related to COVID-19, (vi) 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 or (vii) such person’s business is closed as a direct result of the COVID-19 state disaster emergency.

N.Y.C. Council Int. No. 1914-A, § 1.

3. Notwithstanding the above, nothing in the Legislation is intended to limit any of the rights or obligations of landlords or commercial tenants under the existing harassment law as set forth in [chapter 9](#) of title 22 of the Code, including but not limited to (i) the right of a landlord to terminate a tenancy, refuse to renew or extend a lease or other rental agreements, or reenter and repossess property under section [22-902\(b\)](#) and (ii) the obligation of a commercial tenant to continue paying rent owed under section [22-903\(b\)](#). [Committee Report-Stated Meeting of the Committee on Small Business](#) (May 13, 2020). While these safe harbors are not explicitly referenced in the Legislation, they remain in place and unaffected under the Code.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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