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## **DMOC CLIENT ALERT**

### COMMERCIAL BUILDING OWNERS

As the world responds to the COVID-19 Pandemic, the following is guidance for our clients who are owners of multi-tenant, commercial and/or mixed use buildings in Connecticut:

**Governor Lamont's Executive Order.** Pursuant to the Governor's Executive Order 7H issued on March 22, 2020, all businesses and nonprofit entities in the State of Connecticut are to utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely employ. Moreover, effective March 23, 2020 at 8:00 PM, all non-essential businesses and nonprofit entities in the State of Connecticut shall reduce in person workforce at all locations in the State of Connecticut by 100%. The full text of the Governor's Executive Order 7H can be found here:

<https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7H.pdf>

**Meaning of "Essential Businesses".** Executive Order 7H provided a representative list of essential businesses which would be deemed exempt from the in person workforce limitation, and specifically empowered the Connecticut Department of Economic and Community Development (the "DECD") to provide legally binding guidance about which businesses are "essential". On March 22, 2020, the Commissioner of the DECD designated the following as essential businesses/sectors:

1. Essential Workers in the 16 Critical Infrastructure Sectors as defined by the US Department of Homeland Security;
2. Healthcare and related operations (doctor and dentists offices, physical therapy, etc.);
3. Infrastructure (including airports, commercial trucking, etc.);
4. All manufacturing and corresponding supply chains;
5. Retail (pharmacies, grocery stores, etc.);
6. Food and Agriculture;
7. Services (child care, legal and accounting services, etc.);
8. Providers of basic necessities to economically disadvantaged populations;
9. Construction;
10. Services necessary to maintain the safety, sanitation and essential operations of all residences and other buildings;
11. Vendors that provide essential services or products; and
12. Defense.

The full text of the DECD designation of "essential businesses" is below:

<https://portal.ct.gov/DECD/Content/Coronavirus-for-Businesses/Coronavirus-for-Businesses>

## Answers to Common Questions

Note, specific answers to these questions will depend upon a careful reading of the particular lease(s) in question, however, the following is intended as general guidance:

1. **Does the Governor's Executive Order 7H require the closure of all commercial buildings if those buildings do not contain essential businesses?** No. The Governor did not order the closure of any commercial office, retail or mixed use buildings that do not contain essential businesses.
2. **As a building owner, should I bar tenants engaged in non-essential businesses from operating in the building?** No, for two (2) primary reasons: (1) the Governor's Executive Order does not designate landlords as enforcement agents; and (2) the definition of "essential business" is subject to interpretation and modification. Moreover, upon application to the DECD, it is possible that a business can achieve "essential business" status.
3. **If tenants are engaged in a non-essential business and are violating the Governor's order, is that not a violation of most leases requiring tenants to comply with law?** As a general matter, the answer is Yes. However, that violation does not offer landlords self-help rights in most commercial leases. Without waiving rights and remedies against tenants, see no. 4 below.
4. **What should we tell tenants?** Our advice to all similarly situated building owners in this context is as follows:
  - Send a notice to each tenant (or a general notice to all tenants) advising them of the Governor's Executive Order.
  - Remind tenants of their obligation to use their premises in a lawful manner (which includes compliance with the Governor's Executive Order 7H).
  - Poll tenants to determine whether or not they intend to have personnel in the building (note, this will help inform landlord's staffing procedures with respect to building operations).
  - Maintain regular contact with tenants to mitigate reputational risk issues associated with the inevitable modification and disruption of building services.
5. **Should shuttle buses and cafeteria service be suspended?** To some extent this depends on the number of tenant employees who continue to function in the building, as well as decisions made independently by outside vendors who might otherwise staff these amenities. A temporary suspension of these services due to lack of need, or to further mitigate the risk of contagion would not be imprudent given the circumstances.
6. **If services are suspended, or if building closure is required, are we liable to tenants for breach of the lease, or are we protected by Force Majeure provisions?** We encourage all of our clients to review their leases carefully for provisions which may serve to address this issue and to discuss the same with legal counsel. COVID 19 is a rare and infrequent public health threat which may not be specifically contemplated by modern commercial leases, though we assume that this will impact negotiations and drafting of future leases.

7. **Are tenants still required to pay rent even if they are not using their premises in compliance with the Governor's Executive Order 7H?** Absent express language in the lease to the contrary, the legal requirement to cease operations in the building in accordance with the Governor's Executive Order 7H does not excuse a tenant from its obligation to continue to pay rent.
8. **Should cleaning procedures be modified?** Landlords are encouraged to review the guidance promulgated by the Centers for Disease Control and Prevention with respect to cleaning protocols designed to mitigate the risk posed by COVID 19. That link can be found here:

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>

9. **What happens if I receive a report that a person who has tested positive for Coronavirus has been in the building?** If a tenant, invitee or landlord employee or agent has tested positive for Coronavirus and has been present in the building, the following is recommended:

- Contact the local city or town health department or district having jurisdiction over the building and provide the details and seek current guidance;
- Contact the Connecticut Department of Public Health and provide details and seek current guidance;
- Immediately notify building staff;
- Notify tenants, adopting an informational and factual tone, and encourage tenants to report any positive COVID 19 test results; and
- Following the guidance of local health authorities, determine the most appropriate course of action which could range from targeted cleaning and sanitizing of any potentially impacted areas to full building closure for building-wide cleaning and disinfecting with such closure to continue for the period recommended by health professionals.

COVID 19 presents a unique set of challenges for building owners as well as tenants. The foregoing should be viewed as general guidance only. Every situation is different, and the COVID 19 pandemic is an extremely fluid situation. As circumstances develop, we will issue supplemental guidance which may modify or reverse the foregoing recommendations. At Diserio Martin, we remain steadfast in our support of our property owner clients in this difficult time and look forward to engaging with you to help navigate this crisis.

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