



March 3, 2023

The Honorable Kumar P. Barve, Chair
House Environment and Transportation Committee
House Office Building, Room 251
6 Bladen St., Annapolis, MD 21401

Unfavorable: HB 1220 – Commercial Leases – Force Majeure Clauses Required

Dear, Chair Barve and Committee Members:

The NAIOP Maryland Chapters representing more than 700 companies involved in all aspects of commercial, industrial, and mixed-use real estate, recommend your unfavorable report on House Bill 1220.

House Bill 1220 requires all commercial leases include a “Force Majeure” clause that will relieve the parties of the obligation to fulfill their lease obligations if a medical state of emergency has been declared.

Force majeure is a French term that translates to means “greater force.” It is related to the concept of an act of God, an event for which no party can be held accountable.

For an event to trigger a force majeure clause, it must be unforeseeable, unavoidable, external to the parties of the contract, and serious enough that it renders it impossible for the party to perform its contractual obligations.

During the COVID-19 emergency many looked to force majeure clauses as a solution to the economic fallout from the pandemic.

In commercial real estate the impacts of COVID-19 closures were uneven. Warehouse and distribution, construction and some medical uses were essential businesses that stayed open – some at expanded capacity. Other use types adjusted to the necessities of distancing, sanitation protocols and other medical directives to continue operations. Force majeure clauses expect the parties to do everything in their power to mitigate the outside forces and complete obligations under the contract.

The presence of force majeure in during the COIVD emergencies would not have made the difference most people assume. Applying them to a commercial lease would not be nearly as beneficial as including the provision in insurance coverage.

For these reasons, NAIOP respectfully recommends your unfavorable report on House Bill 1220.

Sincerely,

A handwritten signature in blue ink that reads "T.M. Ballentine".

Tom Ballentine, Vice President for Policy
NAIOP Maryland Chapters -*The Association for Commercial Real Estate*

cc: House Environment and Transportation Committee Members
Nick Manis – Manis, Canning Assoc.

The COVID-19 pandemic has brought renewed attention to force majeure clauses in commercial leases, as many tenants have been unable to fulfill their obligations due to government-mandated closures, supply chain disruptions, and other unforeseeable events related to the pandemic. Here are some key considerations related to force majeure clauses and COVID-19:

1. Specificity of language: Since the COVID-19 pandemic is a unique and unprecedented event, force majeure clauses in commercial leases may need to be drafted with specific language that explicitly references pandemics or public health emergencies. This can help to clarify the scope of the clause and provide greater certainty for both parties.
2. Timing of the pandemic: Force majeure clauses typically require that the event in question be unforeseeable at the time of the contract's formation. Given that the COVID-19 pandemic has been ongoing for several years, it may be difficult for tenants to argue that the pandemic was not foreseeable at the time the lease was signed.
3. Impact on tenant's business: Tenants may need to provide evidence of how the pandemic has directly impacted their ability to fulfill their obligations under the lease. For example, if a restaurant was forced to close due to government mandates, it may be easier to argue that the pandemic was a force majeure event than if the restaurant simply experienced a decline in business due to reduced customer traffic.
4. Negotiation of lease terms: Given the unique nature of the pandemic and its ongoing impact on businesses, landlords and tenants may need to negotiate new lease terms that address the impact of COVID-19 on the tenant's business. This could include provisions related to rent abatement or deferral, changes in operating hours, or other modifications to the lease agreement.

Overall, the COVID-19 pandemic has highlighted the importance of force majeure clauses in commercial leases and the need for clear and specific language that reflects the unique nature of pandemics and other public health emergencies. Landlords and tenants should work together to understand their rights and obligations under the lease agreement and negotiate new lease terms if necessary to address the impact of COVID-19 on the tenant's business

