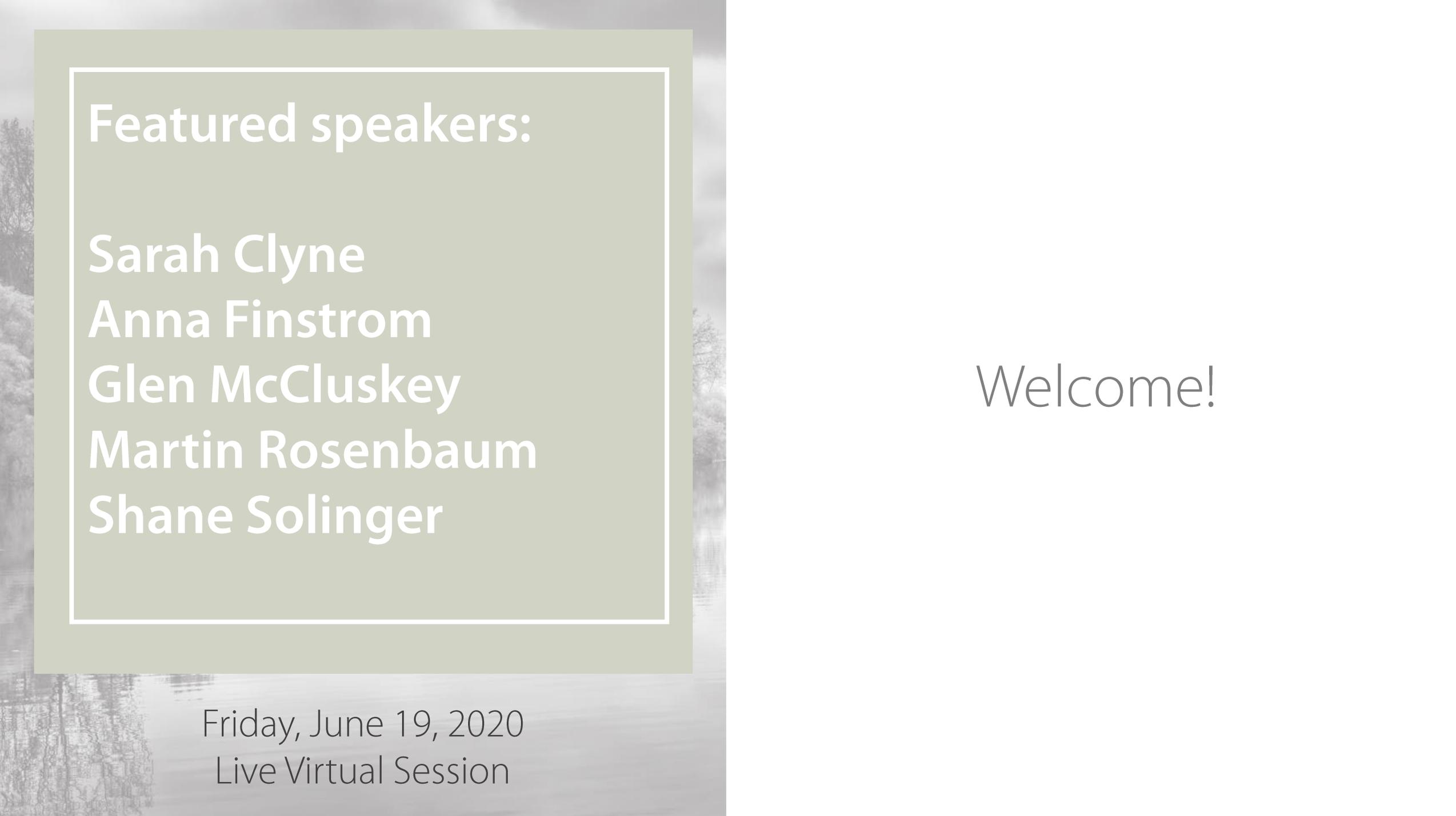


Negotiating Contracts & Leases When the Unexpected Hits: a Conversation with LegalCORPS



JUNE 19, 2020



Featured speakers:

Sarah Clyne

Anna Finstrom

Glen McCluskey

Martin Rosenbaum

Shane Solinger

Friday, June 19, 2020
Live Virtual Session

Welcome!

Working with LegalCORPS: Legal Assistance for 501(c)(3) Nonprofit Organizations

Glen R. McCluskey
Attorney At Law

Disclaimer

- ❖ Today's information is not legal advice and may not be construed as legal advice
- ❖ It is not tax advice either
- ❖ You are encouraged to seek advice from your own legal and financial counsel

How Can LegalCORPS Assist Your Nonprofit?



LegalCORPS Services

- ❖ **Legal Needs Assessment Program**
- ❖ **Clinics**
- ❖ **Brief Advice (with social distancing)**
- ❖ **Full representation about a specific matter**



Legal Needs Assessment Program

- ❖ **Provides your organization with a legal checkup and recommendations**



Clinics

- ❖ **Are scheduled occasionally**
- ❖ **Volunteer attorneys are on-site to meet one-to-one with COVID-19 considerations**
- ❖ **This is really not an attorney-client relationship**

Brief Advice

- ❖ You can talk with attorney and get advice on a specific issue
- ❖ This may be enough to provide you with the advice you need
- ❖ This is a very short-term relationship



Full Representation Assistance

❖ **LegalCORPS recruits volunteer lawyers to provide free legal assistance in legal matters such as:**

- ❖ Insurance matters
- ❖ Leases review
- ❖ Contracts
- ❖ Employment advice
- ❖ Real estate
- ❖ Construction law
- ❖ Debt issues
- ❖ A wide variety of evolving COVID-19 matters

Nonprofit issues may include

- ❖ **Incorporating and receiving tax-exempt status from the IRS**
- ❖ **Governance**
- ❖ **Maintaining tax-exempt status**
- ❖ **Intellectual property (trademarks, patents, copyrights)**
- ❖ **Debt issues**
- ❖ **General business advice**

Special nonprofit issues

- ❖ **Special state and federal reporting requirements**
- ❖ **Lobbying expenditures limits**
- ❖ **Regulations directed at mitigating conflicts of interest and monitoring executive compensation**
- ❖ **Tax-related issues around unrelated business income (UBITI)**

How it Works

- ❖ **After you apply and are accepted by LegalCORPS, your matter will become part of the list of opportunities sent to pro bono attorneys in the LegalCORPS program**
- ❖ **Attorneys that work with you will have seen a brief anonymous overview of your matter and offered to work with you**

Scope of Representation

- ❖ **Attorney will be assigned to work with you on the specific agreed-upon matter.**
- ❖ **Attorney will not be available for other matters, UNLESS you so agree with LegalCORPS and the attorney.**



How it Works

- ❖ **LegalCORPS Screening**
- ❖ **Eligibility**
- ❖ **Attorney conflicts check**
- ❖ **Connecting attorney with you**
- ❖ **Engagement letter**
- ❖ **Work with attorney to perform needed services**
- ❖ **Try to keep within scope**
- ❖ **Communication between Client and attorney**
- ❖ **End of representation letter**
- ❖ **End of representation report to LegalCORPS**



Nonprofit Eligibility

- ❖ **For existing 501(c)3s: Not more than \$250,000 yearly revenue**
- ❖ **For new nonprofits: A three-year projection. No more than \$50,000 yearly revenue**
- ❖ **Note: With COVID-19 and unrest issues, LegalCORPS will review applications slightly out of these ranges if there are extenuating circumstances**

Tips for working with Pro bono Attorney

- ❖ **Agree upon clear written expectations of the work to be done and work output**
- ❖ **Should be in accordance with your application to LegalCORPS**
- ❖ **Agree on how much time each party has and will spend going forward**
- ❖ **Attorney will put all this into engagement letter**
- ❖ **Setting these expectations from the start makes everything better**

More Tips

- ❖ **Work together effectively on the agreed upon matters within the scope**
- ❖ **Be sure you have mutual understanding**
- ❖ **Be flexible and agree upon any needed changes to scope and timeline**
- ❖ **Attorney is expected to be responsive to Client**
- ❖ **You should be responsive to the attorney**

Resources

- ❖ **This area is rich in pro bono resources**
- ❖ **LegalCORPS and other nonprofit organizations can provide you with many of these resources**



How to apply for LegalCORPS services

[Application for Full Representation for Nonprofit Organizations](#)

❖ **Call 612-752-6687**



Thanks

Glen R. McCluskey
Attorney At Law

Northside Funders Group

- COVID-19 response shifted to expand and include impact of uprising
- Partnering with West Broadway Business and Area Coalition—unique partnership and support mechanism, community driven response, bold philanthropic response/action
- Any organization with a tax exempt, charitable status (in most cases, 501c3) has to meet many legal obligations
- Donations can be restricted or unrestricted. Restricted funds have to be used in the way the donor intended and **cannot be diverted for other uses**. Invest in infrastructure of organizations to do the work.
- Insurance navigation and expertise-high needs as a result of the damage to small businesses
- Current systems perpetuate inequities and **will not** lead to economic recovery for BIPOC owned and led small businesses and non-profits
- Cannot do more of the same and expect different results. Processes and systems need to be re-imagined and overhauled to center BIPOC community needs, not just policing, it is disease across ALL systems that touch our lives.
- Anti-racist response needs to center black led organizations and black owned small businesses; call to action for reparations
- Cannot be a one-time investment and allocation of resources including legal support, momentum for support **MUST** stay at this level
- Our work in North Minneapolis is critical. It's a community that has suffered from decades of deliberate divestment, natural disasters, and in 2020 COVID-19 and damage from the uprising.
- Cross-sector response to ensure that business corridors can restore (philanthropy, government, private sector)

Contractual Obligations in the COVID-19 Crisis

Presented by
Marty Rosenbaum & Shane Solinger
Maslon LLP
June 19, 2020

Topics

- Contractual Obligations in the COVID-19 Crisis
- Role of Contracts and Business Lawyers
- Force Majeure Clause
- Other Defenses to Performance

Role of Contracts and Business Lawyers

- Contracts define the legal aspects of relationships – promises (obligations) of the parties
- The world has changed – have the parties' obligations changed with it?
 - Would a court (or arbitrator) enforce the promise?
 - Threat of bankruptcy
 - Workouts – short of bankruptcy, can the parties agree to amend?
- Contract considerations are a starting point for negotiations
- Business lawyers can help strategize and set the stage for negotiations – set up a “win-win”

Non-Profit Considerations for Excusing Performance

- Event Cancellation
 - Can be tricky
 - First step is to look at the contract
 - Second step is to look at the facts

Excusing Performance – Force Majeure

- Often contracts contain a clause either delaying or excusing performance upon the happening of certain events
 - “Force Majeure events”
 - Whether performance is excused or delayed depends upon the contractual language
- Force Majeure clauses are generally raised in defense to a claim that the delay or failure to perform constituted a breach

Example – Magic Words

- A party ***shall not be held liable for failure of or delay in performing its obligations*** under this Agreement ***if such failure or delay is the result of an [act of God/event outside of the party's control], [such as/including but not limited to]*** earthquake, hurricane, tornado, flooding, or other natural disaster, or in the case of war, action of foreign enemies, terrorist activities, ***civil disturbances***, labor dispute or strike, ***acts of government***, blockage, embargo, or failure of electrical service. The non-performing party must make every reasonable attempt to minimize delay of performance. In the event force majeure continues longer than 120 days, either party may terminate the Agreement, repaying the full amount of the deposit within 10 days of termination notice.

Legal Test for Force Majeure Clause

- Generally, a four-step analysis applies
- **Event** – does it meet the definition in the contract?
 - Was the event contemplated? (Not as simple as it may seem.)
 - Non-exhaustive lists: “such as” or “including, but not limited to”
 - Some states – broad interpretation
 - Others (NY, TX) – unlisted event must be similar to listed events
 - Minnesota – unclear

Legal Test for Force Majeure Clause, cont.

- **Event** analysis – application to Covid-19
 - Important to check contractual language
 - Look for “pandemic” or “epidemic” or “virus” or “disease”
 - If not listed, important to consider whether it is similar to anything listed
 - Factual analysis
- **Causation/Beyond Reasonable Control**
 - Causation
 - Who/what caused the event to occur
 - Party is unlikely to be excused from performance if it caused the event
 - Beyond reasonable control – factual issue

Legal Test for Force Majeure Clause, cont.

- **Effect of the event**
 - Must in fact have caused delay or failure
 - Typically, mere economic effect is insufficient
- **Procedural requirements**
 - Must give notice in accordance with contractual language
 - Generally set forth in the contract
 - Critical component

Legal Test for Force Majeure Clause, cont.

- Event Cancellation
 - Does the clause contemplate allowing delay or cancellation?
 - What event actually occurred and did it render performance impossible?
 - E.g., couldn't have been done over Zoom or Webex

Excusing Performance – Common Law

- Court-created doctrines can also excuse performance
 - Legal Impossibility
 - Commercial Impracticability
 - Frustration of Purpose

Common Law Doctrines – Conclusion

- High bar for all three
 - Likely require professional legal assistance
- Useful in negotiations

Special Considerations for Non-Profits

- Event cancellation
 - What level of burden would it be to continue with the event?
 - Would performance be excessively difficult?

Presenters



Marty Rosenbaum

Marty has more than 35 years' experience advising public and privately held companies on securities and corporate matters. His practice is concentrated in securities and corporate finance, including public offerings, private placements, venture capital financings, and mergers and acquisitions involving public and private companies. Marty regularly advises public companies of all sizes regarding preparation of public reports and proxy statements, public disclosures, insider trading, securities regulatory compliance, corporate governance matters, executive compensation, and stock plan issues. He provides business legal services to privately held corporations, partnerships, and limited liability companies in all stages, from organization through their initial public offering or sale. He is also an active volunteer business attorney with LegalCORPS, providing pro bono business law advice, is a past president of the board of LegalCORPS and was named Volunteer of the Year in 2019.

Presenters



Shane Solinger

Shane counsels clients on corporate matters, including mergers and assets acquisitions, contract issues, and corporate governance. With experience spanning a broad range of industries, he has particular depth advising closely held corporations to help them meet their goals throughout all stages of the business cycle—from corporate formation to the sale of the business. Shane is highly skilled at simplifying the complex for his clients—always with the goal of creating a clear actionable path to a meaningful solution.



Negotiating Leases When the Unexpected Hits

Presented by LegalCORPS and Minnesota Council of Nonprofits

June 19, 2020

Anna Finstrom

Getting (re)acquainted with your lease

- **Make sure you have the right lease.**
 - Are you sure you are reading the current lease?
 - Have there been amendments or assignments?
- **Make sure you know who the parties to the lease are.**
 - Do you know who you need to negotiate with?
 - Is it a simple landlord-tenant lease or is it a sublease?
 - If a sublease is involved, you may need to read multiple leases carefully to understand who negotiates with whom.
- **Does your lease prescribe a method of communication?**
 - Is there a management company involved for maintenance or building issues?
 - Who are the required recipients for written communications regarding the lease?

Getting (re)acquainted with your lease, cont.

- **Know your lease term.**
 - When does the lease end?
 - Duration of the lease may affect the cost-benefit analysis in deciding how to navigate problems with the lease agreement.
 - Know whether you have time constraints on renewing or canceling a lease, or for other forms of notice.
- **Leases are contracts, so most of what you just heard about contracts also applies to leases.**

Basic principles for negotiating

- **Know what your lease says, but keep an open mind to practical, creative solutions.**
 - In commercial leases (as compared with residential leases), there are fewer default requirements that govern the relationship between landlords and tenants.
 - Parties to a commercial lease are generally free to make their own agreements.
 - The default agreement is the written contract—the lease. But parties to a lease are generally free to renegotiate and memorialize a new agreement.
- **Document your communications.**

Lease provisions to consider

Rent abatement

- The lease may provide that some of all of the rent is not owed if the premises is significantly damaged or otherwise not available for use for some period of time.
- Note the obligations of each party during a period of rent abatement. For example, if the premises has been damaged by fire, many leases will require the landlord to repair the premises and the tenant to temporarily vacate and then to restore its own furnishings, fixtures, equipment, etc. to the preexisting condition.

Lease provisions to consider

Defaults and cures

- What events or occurrences trigger default for each party? For example, the most common default by a tenant is failure to pay rent. A common default by landlords is failure to complete timely repairs. The lease will tell you what constitutes default.
- How can each party cure a default? Again the lease will tell you. For example, a tenant might be able to cure a default by paying all amounts currently owed. A landlord might cure by making certain good-faith efforts to complete repairs.
- Note whether there are provisions for or prohibitions against tenants engaging in self-help with regard to maintenance issues.
- If a default by either party goes uncured, what are the rights of the other party? Are they entitled to some compensation, or simply to walk away?

Lease provisions to consider

Operating covenants

- Many commercial leases require tenants to actively occupy a rented space during certain hours or days.
- Tenants: If you believe you should be excused from an operating covenant due to the pandemic, social unrest, or other factors, it may be a good idea to put your landlord on notice. Otherwise, you may face penalties down the road for breach of the lease. Check the lease to see what is required for notice.
- Landlords: If you are not strictly enforcing an operating covenant, it may be a good idea to specify in writing what it is that you're allowing, why, and for how long. Otherwise, you may run the risk of waiving additional enforcement rights under the lease. Check the lease to see what is required for notice.

Lease provisions to consider

Go-dark and recapture rights

- Some leases allow a tenant to cease operations, while continuing to pay rent, without going into default. This is known as a “go-dark” provision. Some tenants might chose to “go dark” when finances are tight, because, while not offering any savings on rent, it does allow the tenant to cut costs in personnel, to liquidate merchandise, etc.
- A lease that includes a go-dark provision for the tenant is likely to include some recapture rights for the landlord. This is to avoid the appearance of abandonment (or actual abandonment), which may be harmful to other tenants or the property overall.

Lease provisions to consider

Access rights

- Both parties must be aware of what the lease allows in terms of access to the premises.
- When is a landlord permitted to enter? Usually with reasonable notice or in case of emergency.
- Is the landlord ever permitted to restrict the tenant's access, such as in the case of a pandemic or other public threat?

Lease provisions to consider

Co-tenancy or occupancy requirements

- When negotiating alternative lease arrangements in a multi-tenant space, all parties must consider whether there are applicable requirements that a certain number or certain kinds of co-tenants will occupy the neighboring spaces.
- In a multi-tenant space, it may be necessary to obtain consent from neighboring tenants for any modifications to the existing lease structure.



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Anna Finstrom is a commercial litigator with Dorsey & Whitney LLP. She helps clients achieve their best possible outcomes in dispute resolution. Anna's work includes a wide range of healthcare, environmental, real property, construction and other business disputes, as well as employment-based immigration appeals. She practices in state and federal courts in addition to arbitral forums, drawing valuable perspective from her experience as a judicial clerk at the Minnesota Court of Appeals. Anna maintains an active pro bono practice with a focus on asylum and other immigration matters.

Q & A

Thank You



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