

June 2, 2020

## **UPDATE: New York City Eliminates Personal Liability of Individual Guarantors under Certain Retail Leases, for Payment Defaults Occurring during the Coronavirus Pandemic**

### **Key Takeaways**

- New York City has eliminated the personal liability of individual guarantors under certain retail leases for defaults occurring between March 7, 2020 and September 30, 2020.
- The new law applies to leases for restaurants, bars, certain gaming facilities, gyms, fitness centers, movie theatres, barbershops, hair salons, tattoo and piercing parlors, personal care service providers and certain other non-essential retail establishments.
- The new law is likely to be challenged.

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On May 26, 2020, New York City Mayor Bill de Blasio signed into law Intro. 1932-A / Local Law 2020/055 (the “Law”), which became effective immediately.<sup>1</sup> The Law prohibits the enforcement against individual guarantors of obligations under commercial leases for certain establishments affected by the COVID-19 pandemic with respect to defaults occurring during a specified period.<sup>2</sup> A follow-on to the [Abandonment of Leases and Abatement of Rent During the Coronavirus Pandemic](#) memorandum issued March 23, 2020, [UPDATE: New York State Legislature Considers Bill Affecting Certain Rents and Mortgage Payments During the Coronavirus Pandemic](#) issued March 25, 2020 and [UPDATE: New York State Extends Eviction and Foreclosure Moratoria, and Provides Certain Additional Benefits to Residential Tenants, during the Coronavirus Pandemic](#) issued on May 12, 2020, this alert briefly summarizes the Law.

### **Summary**

The Law makes unenforceable any provision in a commercial lease or other rental agreement that imposes on one or more natural persons who are not the tenant thereunder, personal liability for the tenant’s obligation to pay rent, utility costs, taxes, or fees and charges relating to routine building maintenance,

<sup>1</sup> See <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4424954&GUID=C2A4AC16-7409-465E-B5A4-A84F6E7989FB&Options=&Search=>.

<sup>2</sup> See <https://www1.nyc.gov/office-of-the-mayor/news/377-20/transcript-mayor-de-blasio-holds-hearing-signs-intros-1898-a-1908-b-1914-a-1916-a-1932-a->.

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following a default by the tenant thereunder, so long as (a) the default triggering such liability occurred between March 7, 2020 and September 30, 2020 and (b) the tenant is any of the following:

1. A restaurant, bar, facility authorized to conduct video lottery gaming or casino gaming, gym, fitness center or movie theater;<sup>3</sup>
2. A barbershop, hair salon, tattoo or piercing parlor, or related personal care service provider (including one that employs nail technicians, cosmetologists or estheticians or that provides electrolysis or laser hair removal services);<sup>4</sup> or
3. A retail establishment that was subject to in-person limitations pursuant to Executive Order 202.6 issued by Governor Andrew Cuomo on March 18, 2020 because the establishment was not considered essential under guidance issued by the New York State Department of Economic Development.<sup>5</sup>

The Law also designates as commercial tenant harassment – and so prohibits – “attempting to enforce a personal liability provision that the landlord knows or reasonably should know is not enforceable” pursuant to the Law.<sup>6</sup>

### Notes and Questions

The guarantor of a retail lease frequently signs a guaranty instrument that is separate from the lease or rental agreement signed by the landlord and tenant. The Law applies only to provisions contained “in a commercial lease or other rental agreement.” While one might assume that the City Council did not intend to distinguish between guaranties incorporated into leases and those contained in separate instruments, it is unclear from the text of the Law whether it would apply to a stand-alone guaranty.

There may also be confusion or disagreement as to exactly which defaults triggering personal liability are covered by the Law. For example, if a retail tenant failed to pay rent on March 1, 2020, but the tenant had

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<sup>3</sup> New York City Admin. Code § 22-1005 (1)(a). *See also* State of New York, Executive Chamber, Executive Order 202.3, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, March 16, 2020.

<sup>4</sup> New York City Admin. Code § 22-1005 (1)(c). *See also* State of New York, Executive Chamber, Executive Order 202.7, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, March 19, 2020; <https://esd.ny.gov/guidance-executive-order-2026/>.

<sup>5</sup> New York City Admin. Code § 22-1005 (1)(b). *See also* State of New York, Executive Chamber, Executive Order 202.6, Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, March 18, 2020; <https://esd.ny.gov/guidance-executive-order-2026/>.

<sup>6</sup> New York City Admin. Code § 22-902 (a)(14).

a 10-day grace or cure period before the failure constituted an “event of default” or allowed the landlord to exercise some or all of its remedies, did the “default or other event” triggering personal liability occur prior to or after March 7, 2020?

It is clear, however, that the Law only applies to guaranties made by natural persons and so does not affect guaranties made by corporations or other business entities. This limits the reach of the Law and means that small retail businesses are more likely to benefit from it than chain retailers.

Given the financial impact and novel nature of the Law, one would expect legal challenges. For example, landlords may argue that the Law violates the contracts clause of the United States Constitution, which prohibits states from passing any law “impairing the Obligations of Contracts.”<sup>7</sup> Although states have broad police powers to act during emergencies, permanently prohibiting the enforcement of a universe of contracts – even if only for breaches occurring during a temporary period of time – is likely to invite a challenge.

We will continue to monitor developments and keep clients apprised of pertinent information.

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<sup>7</sup> U.S. CONST. art. 1, § 10, cl. 1.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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