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## **Issues When Considering Lease Modifications in a COVID-19 Business Environment**

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In this current environment, many tenants are seeking relief on rent and other monetary obligations under leases. Landlords are weighing the alternatives: negotiating short term relief versus pursuing eviction and other enforcement action, retaking possession, and then marketing and re-leasing the recovered, vacant premises. There are several matters to be considered by both sides in structuring any short term lease modification, and any modification should be written by all parties to a lease, including guarantors. Factors to consider include:

1. Should the relief be an abatement or deferral? Should it involve only the “base” rent, or extend as well to the common area maintenance (CAM), operating expenses and/or other charges under the lease? How long should the relief extend, and if characterized as a deferral, over what time period should the repayment occur?
2. As noted in Governor Ducey’s Executive Order 2020-21, which addresses leases with small businesses and temporarily suspends (presently, through May 31, 2020) lease eviction actions, any tenant receiving government funded relief should apply at least a portion of such relief to any rent obligations then due. (Note: This EO also encourages the parties to communicate and attempt to resolve issues and the difficult circumstances.)
3. Should the amount deferred be characterized as a credit obligation of the tenant or merely as additional “rent” payments due over time during the remaining term of the lease? Should the amount deferred or abated be due (i.e., accelerated) in the event of a default by the tenant?
4. Does the landlord have any restrictions or impediments to modify a lease, under the terms of any mortgage loan encumbering the landlord’s real property?

Finally, if a lease termination is recognized by the parties as a mutually better arrangement, landlords need to be careful in the drafting of such an agreement in order to avoid a characterization of the termination as a fraudulent conveyance (should the tenant file for bankruptcy protection following the termination), leaving the landlord potentially liable for alleged “market value” of the lease (i.e., for the then remaining term of the lease).