

## COMMERCIAL COVID-19 FAQs (Updated 5/28/20)

Governor Whitmer has declared real estate activities and construction activities to be permissible resumed activities, effective May 7, 2020. Below are some questions that have come up in the commercial real estate context. Going forward, we will certainly update/supplement these FAQs as we hear from members and/or receive additional information. We have incorporated some suggested changes to our Commercial Showing Certificate and Release form. [Available here.](#)

1.     **QUESTION:**    Can I show commercial property available for sale or lease?

**ANSWER:**       Yes. The Governor has declared that workers in the real estate industry (including brokers and agents) may resume activity as of May 7, 2020.
  
2.     **QUESTION:**    What social distancing and mitigation measures must be followed when conducting a showing of commercial space?

**ANSWER:**       Governor’s Order 2020-96 requires:

  - (i)     All real estate activity conducted at a property must be by appointment;
  - (ii)    No more than four people may be in attendance;
  - (iii)   All persons must maintain a six-foot social distance at all times; and
  - (iv)    Face coverings must be worn in any enclosed public space.
  
3.     **QUESTION:**    Can I show commercial office space that is currently occupied by another tenant? Do I need that tenant’s permission?

**ANSWER:**       Yes, with permission. The Governor’s Order permits showings of commercial property whether or not currently occupied by an existing tenant. The right to show a currently occupied commercial property will be governed by the terms of the existing lease. Note that an after hours showing may be required as the Governor’s Order states that during a showing, there may be no more than four people on the premises at any one time.
  
4.     **QUESTION:**    Can I show a multifamily building that I have listed for sale if it is occupied by tenants? Isn’t this a “commercial” property?

**ANSWER:**       You may not show individual residential units that are currently occupied by tenants. While a multifamily building is “commercial” for tax purposes, it is not “commercial” in the context of land use. Governor’s Order 2020-96 prohibits a showing of a residential property unless the residential property is either owner occupied or vacant. The purpose of such a requirement is to make sure that residential tenants are not required to allow strangers into their homes.

5. QUESTION: Can I reopen my real estate brokerage office?
- ANSWER: Yes. Resumed activities under the Governor's Order are not limited to listing appointments and showings but include "work in the real estate industry." Realtors® who have opened or will open their real estate offices soon will need to comply with the workplace standards that apply to all businesses in the state. [[Download Memorandum.](#)]
6. QUESTION: If I open my real estate office, can I invite clients and potential clients to meet me there?
- ANSWER: No. The framework of the Governor's Order is that it limits the reasons for which any Michigan resident may leave their home. In the real estate "resumed activities" context, the only permissible reason to leave one's home is "to view a real estate listing by appointment." So, while your office may be open to your agents, it may not be open to members of the public.
7. QUESTION: Can I attend a real estate closing with my clients?
- ANSWER: You should first check with the title company as to its policies for conducting closings. A title company is responsible for adopting its own mitigation measures for the protection of its employees and patrons (i.e., buyers and sellers). Assuming that the title company allows you to attend, then you will need to make a determination as to whether you should attend the closing in-person or remotely, keeping in mind the requirement that all types of businesses promote remote work to the fullest extent possible.
8. QUESTION: My buyer wants out of a transaction because of overall uncertainty about the effect of the coronavirus pandemic. Given the circumstances, can my buyer unilaterally terminate the purchase agreement?
- ANSWER: As a general legal matter, there is no right to unilaterally terminate a contract due to a change in circumstances – even a really significant change in circumstances. Of course, the parties' rights will depend on the terms of the purchase agreement and you should advise your buyer to consult with legal counsel.
9. QUESTION: Does a force majeure clause in a commercial lease cover the situation where due to the Governor's Order, the tenant is unable to operate its business in the leased space?
- ANSWER: Force majeure events are uncontrollable events that are not the fault of either party. A party may insert a force majeure clause in a contract, for example a lease, in order to protect itself if it cannot perform under the contract for reasons beyond its control. Whether a force majeure clause will apply in the case of COVID-19 shut down will depend on the terms of the specific clause. Force majeure clauses typically define what events will constitute a force majeure event and the contractual obligations excused by a force majeure event. Often, a force majeure event excuses a missed deadline, but not the payment of rent.
10. QUESTION: I have a lease which requires that the property be used for a bar/restaurant and which does not have a force majeure clause. Is my tenant excused from paying rent for the period during which it cannot operate as a bar/restaurant?
- ANSWER: Some tenants with exclusive use provisions in their leases have argued that COVID-19 orders have made the performance of their lease impossible and/or that the purpose

of the lease contract has been frustrated. Obviously, these theories have not yet been tested in the courts.

11. QUESTION: I heard that the Governor's Order prevents me from evicting my office building tenants, even if they do not pay rent.

ANSWER: The Governor's Order applies to residential evictions only and has been extended until June 12, 2020. The prohibition does not apply to tenants in an office building. That being said, as a practical matter, currently it may be difficult to get a court date. You should contact the specific court as to current scheduling parameters.

12. QUESTION: We are in the middle of negotiating a new lease that requires the landlord to complete certain tenant fit out work. Is there anything we need to do differently considering the COVID-19 pandemic?

ANSWER: While construction is currently a resumed activity, it is certainly possible that construction work could be temporarily halted again sometime in the near future. It is also quite possible the pandemic may cause a delay in obtaining materials and supplies.

Landlords may want to anticipate such delays by including a lease provision similar to the following:

The completion date for the Tenant Improvements shall be extended by such time as shall be occasioned by delays outside of the Landlord's control, such as government closures or restrictions on construction activities, unusually severe and materially adverse weather conditions not reasonably anticipated, unusual delays in transportation, i.e., by strike, fire, casualty, material/supply shortages or other causes beyond the control of Landlord.

13. QUESTION: For future leases, if I wanted to include a force majeure language that more directly covered events such as the COVID-19 pandemic, what would such a clause look like?

ANSWER: An example of force majeure language that specifically covers epidemics and quarantines:

No Party shall be liable for the failure to perform its obligations under this Agreement if such failure is due to unforeseeable events beyond the Party's reasonable control and without such party's fault or negligence, including, but not limited to acts of God, acts of the public enemy, acts of the other party, fires, flood, epidemics, quarantine restrictions, strikes and embargoes, or shortages of materials and delays of contractors due to such causes.

14. QUESTION: Can I hire a photographer to take photographs of my new listing, or am I required to take the photographs myself?

ANSWER: Although photographers are not expressly included as a resumed activity, the Governor's Order does cover workers in the real estate industry generally and specifically refers to photography and videography. We would interpret this to mean that photography work is exempt if it is being performed in the context of a real estate transaction – whether done by a licensee or the licensee's employee or independent contractor.

15. QUESTION: Can I hire a sign company to put up a real estate sign at a property I have listed?

ANSWER: Yes. We would interpret the installation of a real estate sign to be part of “work in the real estate industry” whether done by a licensee or someone else hired by the licensee.

16. QUESTION: Are the rules for real estate services any different in those parts of the state where the Governor has lifted restrictions (e.g., the UP and northwest Michigan). For example, can I show an occupied rental unit in the Upper Peninsula to a potential tenant?

ANSWER: No. The rules for real estate services are uniform throughout Michigan. The different rules for the northern regions only cover restaurants, retail stores, office settings (other than for resumed services) and attending social gatherings.

17. QUESTION: Can I show a duplex if one of the units is occupied?

ANSWER: Yes, but only the vacant unit.