SAN FRANCISCO BOMA
BUILDING RE-OCCUPANCY TOWN HALL
MAY 27, 2020

FREQUENTLY ASKED QUESTIONS

Q: WHEN DOES THE SAN FRANCISCO “SHELTER IN PLACE” ORDER EXPIRE – WHEN WILL OFFICE BUILDINGS BE ALLOWED TO REOPEN TO OTHER THAN ESSENTIAL OPERATIONS

A: San Francisco’s May 22 Order extended the “stay-at-home” order INDEFINITELY. Unless you are an “Essential Business,” “Outdoor Business” (outdoor plant and nursery, landscaping, surveyors, environmental services), or “Additional Business” (mostly retail), as defined in the May 22 Order, you are mandated to remain closed. Most commercial office buildings remain open because they have essential business as tenants. Office buildings that are open are subject to the City of San Francisco’s notice and social distancing protocols (see below).

See: https://www.sfdph.org/dph/alerts/files/HealthOfficerOrderC19-07d-ShelterInPlace-05172020.pdf.

Q: HAS THE CITY OF SAN FRANCISCO POSTED ANY INFORMATION/REQUIREMENTS FOR BUILDING OWNER REGARDING RE-OPENING?

A: Yes, to the extent a business facility is open within San Francisco, each facility must comply with the posting of a social distancing protocol (as set forth in the May 22 Order). Construction projects have to abide by a separate construction social distancing protocol. Any business must ensure that personnel and customers wear face coverings when entering facilities (except for certain individuals like young children) and adhere to social distancing protocols.

See https://www.sfdph.org/dph/alerts/files/Health-Order-C19-07e-Shelter-in-Place-052220.pdf for a copy of the full May 22 Order and the approved form of social distancing protocol notice.

Q: WHAT IS THE LEGAL STANDARD THAT APPLIES TO A BUILDING OWNER IN RESPONSE TO COVID 19?

A: As a general legal principle, a property owner has a legal duty to exercise reasonable care under the circumstances to prevent injury to tenants, contractors and their employees and other invitees upon its property. An employer’s duty to its employees is somewhat higher and places greater responsibility on the employer to ensure a safe work space for employees.

It is important for every building owner/manager to review and revise work practices to adjust to anticipated post-COVID restrictions and responsibilities before tenants, contractors, invitees and employees start to return in order to fulfill this legal obligation.
Complying with all local, state and federal guidelines is a minimum standard. If a majority of comparable buildings adopt a certain protocol (like temperature scanning, single point of entry, certain HVAC filters), this may be viewed as a “course of conduct.” Therefore, staying abreast of what other comparable buildings are doing is important.

Q: CAN BUILDING OWNERS REFUSE TO ALLOW ACCESS TO THE BUILDING TO A PERSON NOT WEARING A MASK? TO A PERSON THAT IS EXHIBITING SIGNS OF FEVER/COUGHING/SNEEZING?

A: Yes. San Francisco’s Order mandates the wearing of a face covering when entering a business facility, so a building owner/manager may take reasonable actions necessary to not grant access to an individual who fails to comply. Additionally, all persons exhibiting a fever or cough are required to avoid all social interaction outside of their home and, as such, business owners may take reasonable actions necessary to not grant access to a building to such a person. NOTE: building owners and their property managers may not “detain” or “arrest” any one and should follow normal protocols (e.g. – contact police) for persons refusing to comply with building rules.

Q: CAN A BUILDING OWNER REQUIRE TENANTS TO INFORM THE BUILDING OWNER/BUILDING MANAGEMENT OF A CASE OF AN EMPLOYEE TESTING POSITIVE FOR COVID-19 VIRUS? ARE THERE ANY PRIVACY ISSUES?

A: While HIPAA compliance only applies to medical professionals, state and local privacy laws are the key regulations to review. It is important that tenants – especially on multi-tenant floors or in multi-tenant elevator banks – be informed that they need to advise landlords/building management of a positive test result with respect to any employee, contractor or visitor in their premises.

Landlords should adopt and have a contingency plan for heightened cleaning and may wish to inform other tenants using common areas accessed by the infected person. See discussion above as to a landlord’s legal duty of care. NOTE: the name of the individual who has tested positive must remain confidential unless otherwise consented to by the individual and the only information that may be obtained about the particular individual is where he or she may have gone within the building.

Q: WHAT GUIDANCE IS THERE ABOUT CLEANING STANDARDS IN OFFICE BUILDINGS?

A: Multiple governmental agencies have issued guidance for how to disinfect buildings and workplaces and those continue to evolve, so it is important to continue to look for updates. One of the most-comprehensive documents is jointly issued by US EPA and the CDC, at https://www.epa.gov/coronavirus/guidance-cleaning-and-disinfecting-public-spaces-workplaces-businesses-schools-and-homes. This webpage has links to a detailed document on how to
perform disinfections when re-opening and also a short tool/flowchart to inform decision making when planning your disinfection program.

The American Industrial Hygienic Association also has an excellent guidance document for cleaning workspaces for COVID-19 on their COVID-19 resources page, at https://www.aiha.org/public-resources/consumer-resources/coronavirus_outbreak_resources.

Q: WHAT GUIDANCE IS THERE ABOUT AIR CIRCULATION, HVAC AND OTHER BUILDING SYSTEMS?

A: The American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) has provided resources, including a FAQs section on their website of COVID-19 resources. See https://www.ashrae.org/technical-resources/frequently-asked-questions-faq. This provides guidance to building owners and operators on good practices for HVAC systems when re-openings buildings.

The SF PUC has issued guidance on flushing building water systems to ensure they are safe after long periods of relatively low flow. See: https://sfwater.org/index.aspx?page=1327.

Q: WHAT STATE AND LOCAL RULES APPLY TO RENT ABATEMENT/RENT DEFERRAL?

A: As of today, there is no California state-wide statute or regulation addressing commercial rent abatement or rent deferral. There is a proposed bill in the California Senate that would modify commercial lease for small businesses, restaurants, bars, and entertainment venues by providing tenants with the ability to walk away from their leases if they cannot enter into an agreement in good faith with their landlord for a deferred rent plan, but that law is still being revised and its passage is uncertain at this time (it is known as SB 939).

Locally, San Francisco enacted an automatic rent deferment for any business that has less than $25 million in global gross receipts for 2019. That rent deferment went into effect on March 17 and has been extended through June 16 such that any rent that became due during that time for a qualified tenant is automatically deferred by 30 days following the expiration of the rent deferral order. Qualified tenants are entitled to an additional 30 days to repay upon request provided that they give documentation to the landlord that their business has been materially impacted by COVID 19 and they cannot make rent payments as required. This process may be extended for a total of 6 months following the expiration of the rent deferral order. Qualified tenants may not be evicted for a failure to pay rent during the applicable deferral and cure periods.

The California Judicial Council has also enacted emergency rules prohibiting the issuance of summons related to new foreclosure and unlawful detainer cases. These rules, until modified, state that no summons will be issued until 90 days following the expiration of the California state shelter-in-place order. Nothing in the rules, however, prevents landlords from issuing default
notices of three-day notices to quit in San Francisco, so long as the tenant is not a qualified tenant per the San Francisco rent deferral order.


Q: WHAT HR/EMPLOYEE RELATIONS ISSUES ARE RAISED BY REOPENING?

A: This is potentially a high-risk issue. In reopening offices, (including fully integrated real estate asset management/property management/investment management offices of national companies), care must be taken to avoid indirect retaliation, harassment or discrimination in calling back employees. Reasonable accommodations must be made for employees with “high risk” of exposure health conditions. Companies need to adopt/develop “neutral criteria” for calling back employees.

If not obvious, using re-opening as a pretext to terminate employees that are of a certain race, sexual orientation, disability or age will likely result in risk of a lawsuit.

In addition, it is possible that COVID-19 may cause long-term effects that could limit major life activities, meaning that infection could be considered a “disability” under the Americans with Disabilities Act (“ADA”). Each company’s Human Resources Department (or equivalent) should manage the intake of employee test results and the disclosure of positive results to building owners/management and ensure the privacy of employee information – pursuant to the ADA and the tenant’s applicable ADA-related policies and procedures.


Q: CAN PROPERTY MANAGERS OR RECEPTION STATION PEOPLE ADMINISTER TEMPERATURE TESTING? IS THAT CONSIDERED A MEDICAL PROCEDURE?

A: Yes, assuming a “touchless” system is implemented, adequate notice is given to tenants and to visitors, and testing is performed on a non-discriminatory basis. NOTE: any invasive testing may require a medical professional.

To the extent temperatures are taken, it is recommended that any individual exhibiting a higher-than-average temperature be directed to a secondary testing area (with social distancing) and re-tested ten minutes later. Outside ambient temperature along with physical activity can raise an individual’s temperature beyond what is considered “average” even if they are not in any way ill. This double-screening process will help eliminate false positives and limit liability for building owners who might have otherwise inadvertently restricted access to someone who is completely healthy.
WHAT ADVICE ARE YOU GIVING TO PROPERTY MANAGERS AS TO HOW BEST TO COMMUNICATE NEW PROCEDURES?

A: We recommend that building owners and managers develop and issue a written “re-opening” protocol that is implemented in accordance with the Lease as new “Building Rules and Regulations”. Tenant should be given written notice of the new protocol and advised that all tenants and their visitors and contractors will need to comply with the protocol as a condition to access.

In the unlikely event that a tenant refuses to comply, the tenant’s communications should be confirmed in writing and record of non-compliance created. At some point, if the non-compliance is material, the building owner/manager may need to report the violation to the San Francisco Public Health Department for enforcement.

For further information, contact

Manuel Fishman, Buchalter (real estate): (415) 227-3504, mfishman@buchalter.com
Jonathan Epperson, Buchalter (environmental): (415) 227-3549, jepperson@buchalter.com
Jonathan August, Buchalter (eviction moratorium/rent relief): (415) 227-3558, jaugust@buchalter.com