

## Coronavirus and business rent - Does the rent have to be paid (in full)?

Many companies are being hit hard by the renewed tightening of measures against the spread of the coronavirus. Depending on the industry, this may result in a major slump in orders or even total loss of business. The COVID-19 Ordinance 2 of the Federal Council provides in Art. 6 for the complete closure of shops, restaurants, bars, discos, nightclubs, museums, sports centres, hairdressing salons, wellness centres, swimming pools and other facilities. The only exceptions are medical facilities, banks, grocery stores, pharmacies, and other facilities or shops that are urgently needed for everyday life. Although the companies affected can apply for short-time working compensation for their employees, there are other significant fixed costs in addition to personnel costs, namely rent. For many companies, the question arises as to how they could reduce this considerable block of costs or whether the rent for affected companies will continue to be owed. This question is of great, even existential importance for both tenants and landlords. However, since the current situation is completely unprecedented, we are entering new legal territory. The purpose of this article is to outline some possible legal implications and to show which measures are currently most appropriate for tenants and landlords.

### I. Rent reduction

In accordance with the statutory provisions, any deviation of the condition of the rental object from the condition owed under the contract constitutes a defect. The nature of the deviation or whether there is a material defect or a defect of title is irrelevant. In particular, the disturbance of the contractual use of the leased property constitutes a defect, as the lessee has the right to use the leased property without disturbance. Art. 259a of the Swiss Code of Obligations (CO) grants the lessee the right to demand a reduction of the rent in accordance with Art. 259d CO in the event of a defect, provided that the lessee is not responsible for the defect or is not required to remedy it.

The central issue here is the already highly controversial question of whether the closure of the affected shops by order of the authorities constitutes a defect in the aforementioned sense. On the one hand, the undisturbed use of the premises for business operations is made impossible. On the other hand, the leased property itself is still in order and its use is still permitted. Only the type of use by certain businesses is officially prohibited. In addition, losses in turnover, as many business tenants will probably have in the last few days and coming weeks, are generally part of the operating risk that the tenants have to bear. An argument in favor of the tenant could be included in the clause on the purpose of the lease: If the use of the premises, e.g. as a hairdressing salon or beauty salon, is stipulated in the contract, it could rather be argued that there is a defect in the sense of the Code of Obligations. In view of the statements made by business tenants' and industry associations and the difficult financial situation of many companies, it is to be expected that tenants will make corresponding requests for rent reductions and - depending on the circumstances - it cannot be ruled out that courts will qualify the closure ordered by the authorities as a defect that entitles the tenant to a rent reduction. However, a rent reduction to zero is not realistic and would also contradict the facts as long as the tenant still keeps his furniture and other infrastructure in the rooms. It should also be borne in mind that there are also landlord interests which must be taken into account: The landlord also needs income to cover the costs and many properties are owned by pension funds which manage the employees' money.

The tenant must request a request for (complete) reduction of the rent from the landlord. Although the content of the Federal Council's ordinance is likely to be known to all, the claim for a reduction only arises from the time of notification to the landlord. Various associations, such as GastroSuisse, have posted sample letters for rent reduction applications on their websites.

## **II. Impossibility of performance of the contract**

A further legal remedy can be found in Art. 119 CO concerning the impossibility of performance if the rental use is considered impossible. Strictly speaking, however, both relevant performances are still possible: the performance of paying the rent (because there is never impossibility in the case of monetary payments, as this is theoretically always possible) and the performance of making the rented premises available (which is also still possible, but not for certain purposes). However, if the purpose of use is clearly defined in the lease agreement, it could be argued that this type of use has become impossible. Thus, the landlord's obligation to make the rented premises available would cease and, since there is a contract with mutual performance obligations, the tenant's obligation to pay rent would also cease. However, the tenant would then also have to vacate the rented property.

## **III. Termination of the tenancy for good cause or due to bankruptcy of the tenant**

Legally, the possibility of extraordinary termination in accordance with Art. 266g CO still remains, because there are important reasons which make the fulfilment of the contract unacceptable for the tenant. Art. 266g CO allows to terminate the lease for business premises with a period of notice of six months to any time. The financial consequences of early termination are determined by the judge.

Important reasons for early termination of the lease are deemed to exist if the circumstances invoked were not known or foreseeable when the contract was concluded and there is no fault on the part of the terminating party (in this case probably the tenant). The circumstances must be so serious that the tenant can no longer be expected to continue the lease. The losses must be long-term and not merely temporary. In addition, the rent is still owed for the duration of the six-month notice period. In other words, the effect may not be felt until the "Corona crisis" is hopefully over.

From the landlords' perspective, the bankruptcy of their tenants represents a considerable risk: If the tenant goes bankrupt, the landlord's rent claim is at risk. However, in the event of bankruptcy, the landlord can demand security for future rent payments. He must set a reasonable period of time in writing for this purpose for the tenant and the bankruptcy administration (Art. 266h para. 1 CO) and may terminate the contract without notice if the security is not provided (Art. 266h para. 2 CO). However, the whole procedure also involves effort and costs for the landlord and it is hardly possible to sublet the property until the bankruptcy proceedings are concluded.

## **IV. Recommendation**

The current situation creates a lot of legal uncertainty. Against this background, it is advisable to seek dialogue and find cooperative solutions as early as possible. A legal dispute lasting for years does not help either party in this situation.

We are happy to support you in the legal analysis, the solution finding and the negotiations between tenant and landlord.

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Utoquai 43  
8008 Zürich

maja.baumann@reberlaw.ch  
julia.gschwend@reberlaw.ch  
roberto.hayer@reberlaw.ch