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Redefining "Class A" Office Buildings in the Age of COVID

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by Geoffrey F. Fay

As we know, COVID-19 has changed in-person work. Future generations may be horrified to learn the handshake was once a customary greeting, having seen it relegated to the dustbin of history alongside the tavern spittoon. In a year or so the commercial real estate community may view certain aspects of today's typical office lease as similarly outdated and wholly unresponsive to the concerns of employers and employees who yearn to return to a safe office environment.

The following advisory suggests not just ways for tenants to protect their employees, but also a way for landlords to distinguish their properties and help redefine what "Class A" office buildings will mean in the new normal.

The Centers for Disease Control and Prevention (CDC) tell us "infections with respiratory viruses are principally transmitted through three modes: contact, droplet, and airborne." Although many landlords are operating buildings in ways that reduce transmission, commonly used lease forms do little to address tenant concerns about what the landlord is obligated to do to address safety in a health crisis. This advisory addresses how proactive landlords can attract tenants by amending today's typical lease provisions to assure tenants that the office environment will not present a risk to the health of their employees or to the viability of their companies. Landlords who are resistant to adopting these changes risk losing market share.

Although recent CDC guidance has prioritized the risk of airborne, over contact, transmission, let's nonetheless first consider the risks of contact transmission. The typical multi-tenant office building has many 'high-touch' common areas: door handles, elevator buttons, light switches and cafeteria, reception and lavatory surfaces, to name a few. The CDC has issued extensive guidance as to how, and how often, work places should be disinfected (not just cleaned). But

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how do the CDC guidelines match up with typical office building cleaning specifications, which are usually set forth in a separate lease exhibit? Most office cleaning standards require a landlord to clean common area lavatories nightly (and not at all on weekends). Typical cleaning standards require *weekly* removal of finger marks and smudges from all vertical surfaces, including doors, door frames, around light switches, private entrance glass, and partitions. Try and find the word “sanitize” in these standards. And note these standards are taken from Class-A office leases.

Clearly, to entice companies back to the office environment, savvy landlords will update their lease requirements to respond to CDC guidelines. Frequently touched surfaces should be sanitized, not just cleaned, several times each workday – not just once each evening – or once a week. Many landlords are already providing hand sanitizers in common areas; consider adding what the market will require anyway to the lease.

As noted, the CDC now considers droplet and airborne transmission as the greatest risk. How does the typical office lease address this risk? It does not. In multi-tenant office buildings landlords typically provide heating, ventilation and air-conditioning (HVAC) service to the leased premises during "Normal Business Hours," which is usually defined as 8:00 a.m. to 6:00 p.m. Mondays through Fridays and, maybe, 9:00 a.m. to 1:00 p.m. on Saturdays, exclusive of holidays. If a tenant desires so-called “after hours” HVAC, the tenant typically must request it in advance and pay for it as an “extra service.” And, with remote learning a part of daily life, “Normal Business Hours” in an office building for parents could be any hours. Everyone who has worked late or on weekends in an office building understands what happens when HVAC is shut off. The problem is not so much the rising or plummeting temperature, but the lack of ventilation leading to stale air. Before COVID-19, this was simply uncomfortable. Now it is dangerous.

To mitigate the airborne transmission of the COVID-19, CDC guidelines recommend increasing and improving building ventilation with the goal being to “*Increase the percentage of outdoor air that circulates into the system.*” Specific engineering guidance on this topic is provided by The American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) in a position document titled “ASHRAE Position Document on Infectious Aerosols.” While the engineering may be complex, the logic seems self-evident. We now know that outdoor dining is much safer than indoor dining. It stands to reason, therefore, that increased ventilation – exchanging indoor air for outside air – will reduce indoor airborne transmission of pathogens. So, the entire commercial real estate community must rethink the way we have historically addressed HVAC service to office tenants. Ventilation from 9:00 to 5:00 may no longer be adequate to prevent lingering airborne viruses after Normal Business Hours. Other steps that can be taken to mitigate air-borne transmission include the installation of HEPA filters.

We recognize that increasing the flow and duration of ventilation may entail increased heating and cooling costs and upgrading HVACs to accommodate better filters will be costly, but these are issues that must be confronted and addressed at the outset in lease negotiations and set forth clearly in the deal letter of intent. Certain changes should be an easy win for landlords as increased cleaning costs will be included in Common

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Area Maintenance Expenses paid by the tenants who should accept they may have to pay a little extra for the safety of their employees and the continuity of their business.

This is intended as the first of an on-going series of articles suggesting negotiating strategies for parties to commercial real estate leases in the age of COVID-19. Please feel free to call me directly if you should wish to discuss this further.

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