

GUIDANCE ON LEASING OF HOTELS BY GOVERNMENTAL ENTITIES FOR USE AS TEMPORARY SHELTERS FOR QUARANTINING OF HOMELESS PERSONS DURING THE COVID-19 PANDEMIC

Governmental entities across the country are turning to private hotels to provide persons experiencing homelessness with shelter and a place to quarantine themselves during the COVID-19 pandemic.

Booking Blocks of Rooms. In some cases, governmental entities are booking blocks of hotel rooms for this purpose. In general, when a party books a block of rooms at a hotel (even a large block or a block at an extended-stay facility), that party is not expected to carry any specific insurance; the obligation to maintain insurance is borne by the hotel and is reflected in the price of the rooms. The hotel may or may not use a form contract for "group reservations". That contract may or may not require the party reserving the rooms to "indemnify" the hotel (i.e., be responsible for any loss the hotel suffers as a result of the use and occupancy of the rooms). In addition, the hotel may or may not be willing to negotiate the provisions in its form contract. Unless an indemnity is included in the hotel's standard form contract, a governmental entity renting rooms for guests who happen to be currently homeless should not be obligated to provide any special indemnity. The vast majority of people experiencing homelessness simply cannot afford the cost of rent in their area and pose no specific additional risk for the hotel. For the small number of individuals who may create a potential risk of damage to the premises or liability to third parties, it may be appropriate for the governmental entity to assume some further responsibility. Even in the absence of those specific circumstances, however, if it facilitates the rapid placement of people experiencing homelessness into individual housing units, as recommended by the Centers for Disease Control, a governmental entity may want to provide an indemnity to the hotel.

Leasing Entire Hotel. In other cases, governmental entities are leasing entire hotels in order to provide temporary shelter to persons experiencing homelessness. Owners who lease their property to tenants customarily require those tenants to maintain certain insurance and to indemnify the owners.

Governmental entities are often subject to legal restrictions on the indemnities they can provide to third parties. This could conceivably concern the owner of a hotel that a governmental entity desires to use as a temporary shelter. In addition, a hotel owner might be worried about the availability of insurance to protect the owner against liabilities associated with such use. This document will briefly summarize the indemnities and insurance provisions that are customarily found in commercial leases and offer some guidance to governmental entities on possible ways to ameliorate the foregoing concerns.

Background on Standard Indemnity and Insurance Provisions in Commercial Leases

An owner leasing its property (which we can call the “premises”) almost always requires its tenant to:

- **Agree to be responsible for any loss** the owner suffers as a result of things that the tenant does (or fails to do) or things that happen (or do not happen) at the premises. This agreement is sometimes called an “indemnity”. An indemnity generally covers two types of loss:
 - The first type is loss sustained directly by the owner itself. For example, if water is left running at the premises and the water damages the owner's building, the tenant would be responsible for the damage.
 - The second type is loss that the owner might sustain because of any injury or damage claimed by a third party. For example, if a person (say, an employee, a subtenant or a patron of the tenant, or a passerby) makes a claim or files a lawsuit against the owner alleging that a hazardous condition at the premises caused injury to the person or damage to the person's property, the tenant would be responsible for any expense or liability that the owner may incur. The tenant would have to pay the amount of the claim or to hire a lawyer to contest the claim (at the tenant's expense) and then pay the amount of any settlement or award owed to such person.
- **Carry insurance.** The tenant will typically need to maintain:
 - liability insurance protecting the tenant (as a “named insured”) and the owner (as an “additional insured”) against any claim by a third party that the third party suffered injury or damage because of something the tenant did (or failed to do), and
 - property insurance covering its own property at the premises.
- **Help preserve the owner's insurance.** A tenant will often need to pay a share of the owner's insurance premiums for the building. Where the tenant leases the entire property, the tenant may need to pay the entire premium (and may carry the insurance). The lease may prohibit a tenant from using the premises in a manner that jeopardizes or increases the cost of the owner's insurance coverage.

Indemnities

As noted above, it is customary for a tenant to give the owner a standard indemnity of the sort described above.

If a governmental entity is leasing property and is prohibited by applicable law from providing such an indemnity:

- The governmental entity should plan to provide as much of a standard indemnity as the law will permit. For example, even if a governmental entity cannot indemnify the

owner for everything that happens (or does not happen) at the premises, the governmental entity may be able to indemnify the owner for the governmental entity's negligence and for the negligence of those for whom it is responsible (e.g., its employees).

- In addition, the governmental entity may be able to agree to arrangements – other than a formal indemnity – that provide the owner with many of the protections that a formal indemnity would have afforded.
 - For example, the governmental entity may be permitted to agree to be responsible for all costs, expenses, losses, damages and liabilities resulting from its use and occupancy of the premises. Even without a formal indemnity, the owner can sue the governmental entity (for money) under a provision like this one if the owner suffers costs, expenses, losses, damages and liabilities as a result of the governmental entity's use and occupancy.
- The most difficult element of a standard indemnity to capture in a provision like this is the “second type” of loss described in the “Background” section above – namely, the tenant's obligation to hire a lawyer and pay the costs of contesting any claim that a third party makes against the owner as a result of the tenant's use of the premises. However, if the governmental entity can agree to bear costs and expenses generally (including legal fees) that result from its use, such agreement would put the owner in an economic position substantially similar to the one the owner would have enjoyed if it had received a standard indemnity.
- The broader this agreement, the closer it will come to replicating a formal indemnity. Here is a sample of broad language:

Notwithstanding the existence of any insurance carried by or for the benefit of the landlord or the tenant, and without regard to the policy limits of any such insurance, the tenant shall be responsible for all losses, damages, injuries, liabilities, claims, causes of action, costs and expenses (including without limitation reasonable attorneys', consultants' and experts' fees and expenses), imposed upon or incurred by or asserted against the landlord by reason of (i) the use (or misuse or non-use) or occupancy of the premises by the tenant, (ii) any failure on the part of the tenant to perform or comply with any of the terms of this lease, (iii) any negligence, malpractice or misconduct committed or alleged to have been committed by the tenant, or (iv) any violation by the tenant of a legal requirement. The foregoing provision is intended to apply to losses, damages, injuries, liabilities, claims, causes of action, costs and expenses suffered directly by the landlord (or its property) or suffered by the tenant or any third party (or, in either case, its property). For purposes of this paragraph, any acts or omissions of the tenant, any of its assignees or subtenants, or any of their respective employees, agents, contractors, subcontractors, licensees or invitees shall be strictly attributable to the tenant. It is understood and agreed that

payment by the landlord shall not be a condition precedent to enforcement of the foregoing provisions of this paragraph.

Insurance

The governmental entity should carry its own insurance, or be self-insured, for its liability, including general liability and (if any healthcare services are being provided to guests) professional liability. This should give the owner additional comfort that resources will be available to cover claims by third parties arising from any alleged negligence by the governmental entity in its use of the premises.

- If the governmental entity obtains liability insurance from an insurance company, the owner can be designated as an "additional insured". If the owner is designated as an additional insured and is dragged into a lawsuit by a third party who alleges negligence in connection with the governmental entity's use of the premises, the insurance company will be obligated to "defend" the owner – that is, either pay the amount of the claim against the owner or hire a lawyer to contest the claim and then pay the amount of any settlement or award owed to the third party. (This is the same protection that the owner would be entitled to receive from the governmental entity under a standard indemnity.)
- The governmental entity should also carry its own insurance, or be self-insured, with respect to its own property. It should expect to waive, and (if it obtains coverage from an insurance company) to have its insurance company waive, claims against the owner to the extent that insurance (or self-insurance) is available to cover any damage to the governmental entity's property. This minimizes the risk that the owner will bear responsibility for such damage.

As noted above, the governmental entity may have to pay a share (or all) of the owner's insurance premiums for the hotel. In order to minimize costs, or in order to provide comfort to an owner concerned about the impact on the owner's insurance program of using its hotel as a temporary shelter, the governmental entity may want to maintain itself insurance that the owner would otherwise carry as part of the owner's program (or self-insure against the applicable risks).

In the event that governmental entities encounter broad resistance among insurers who provide (or are asked to provide) insurance for hotels being used as temporary shelters, governmental entities may consider creating a reinsurance program to absorb some of the perceived risk giving rise to that resistance, but such a program may need to be implemented on a large scale in order to be feasible.

Resources

CA sample occupancy agreement:

<https://www.joinbuiltforzero.org/wp-content/uploads/2020/04/County-Hotel-Occupancy-Agreement-April-3.docx.pdf>

CDC Guidelines:

<https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/plan-prepare-respond.html>

Additional Questions?

Please reach out to our partners at the National Law Center on Homelessness and Poverty. You can contact:

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