

COVID-19



CORONAVIRUS: DEALING WITH A POSITIVE COVID-19 TEST – GUIDANCE FOR COMMERCIAL LANDLORDS AND PROPERTY MANAGERS

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Foulston has produced a series of issue alerts as we continue to monitor the evolving COVID-19 situation and provide additional guidance. Please find all updates and our latest resources available [here](#).

Every commercial landlord and property manager is at risk of learning at any time that a tenant's employee, contractor, or customer has tested positive for COVID-19.

- Do you need to notify anyone?
- Who will pay for the additional cleaning recommended by health officials?
- What proactive steps might have helped?

DO I NEED TO NOTIFY OTHER TENANTS, SERVICE PROVIDERS, OR MY LENDER OR INSURANCE COMPANY?

- Carefully review with counsel your lease agreement(s), service and vendor contracts, loan documents, and insurance policies to determine if they include any notification obligations. Every agreement is different, but pay special attention to provisions requiring you to notify counterparties of safety or security risks and material adverse changes to the premises. Whether or not those types of provisions apply will depend on your specific facts (the language in your agreements; whether the infected individual(s) entered the premises, another tenant's space, or common areas available to multiple tenants; etc.) and also on the risks posed by the virus, as our understanding of COVID-19 evolves.

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- Review the current status of governmental COVID-19 requirements, as well as industry standards on how others in your shoes are handling similar issues. At this time, there are no federal or Kansas governmental requirements that building owners or property managers of Kansas real estate notify others of a positive test, but rules and requirements related to the pandemic are changing rapidly. In addition, you always have a legal duty to act with reasonable care (essentially, how an ordinary landlord/property manager would act in a situation similar to yours). Keeping in line with industry standards and how landlords/property managers in your geographic area are dealing with similar issues will help you to reduce the risk of liability.
- Finally, even if you are not obligated to do so, you should consider whether it makes business sense to notify other tenants and service providers as a matter of public health and social responsibility and to keep lines of communication open with your contacts. **If you decide to notify others of a positive test**, please be aware of applicable privacy laws and the detrimental impact your notification may have on the reputation, business activity, and relationships of your tenants and your property if word leaks that tenant X or company Y has an infected employee. In short, you should avoid using the infected individual's name, the tenant's/company's name, and other personal information that would identify the particular company or individual.

*The above recommendations apply to your tenants and service providers who are independent contractors. **If you employ anyone who works at the property** (maintenance or cleaning staff, front desk staff, etc.) you may have additional legal responsibilities in your capacity as employer. For more information, see the following alerts:

- Coronavirus: Employer Tips for Managing COVID-19
- Coronavirus: Tax and Employee Benefit Considerations

WHO PAYS FOR ADDITIONAL CLEANING AND COVID-19 PREPAREDNESS EFFORTS?

- If a user of your building tests positive, there will undoubtedly be increased cleaning and other costs to prevent the further spread of the virus and make sure your building and the tenant's space remains usable (a deep clean of a tenant space and common area, for example).
- Your lease agreement(s) will typically address who is responsible for cleaning the premises and any common area shared by multiple tenants, what types and levels of cleaning are required, and who is responsible for those costs. Other than obvious maintenance provisions, keep an eye out for the following:
 - indemnification provisions, which may require tenant to indemnify you for any expenses you incur resulting from a tenant breach, tenant's negligence, etc.;
 - "compliance with laws" provisions, which often require tenants, at their cost, to comply with all applicable governmental laws and orders;
 - if you are responsible for maintenance of some or all of the property and pass through those costs to one or more tenants, provisions that place limits on the costs and expenses that you can incur, often expressed in terms of "reasonableness" or caps on common area maintenance costs over previous years.

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- Regardless of how your lease agreements allocate costs, keep in mind the financial hardships your tenants are enduring. It may make business sense to play the long game and take on additional cleaning costs in the short term to maintain viable, rent-paying tenants and your valued tenant relationship.

PROACTIVE STEPS YOU CAN TAKE TODAY TO PREPARE FOR A POSITIVE TEST.

- Review all documents affecting your property, including leases, service contracts, covenants, loan documents, and insurance policies, so that you have a better understanding of your rights and obligations.
- Communicate your cleaning and other preparedness expectations with tenants and service providers, and keep all parties updated on the steps you are taking to deal with COVID-19.
- Implement a system so that tenants and service providers notify you if they know or suspect any infected individuals used your property.
- Keep clear records of communications, particularly any waivers of or modifications to your existing agreements.
- Stay informed of updates to governmental requirements and public health mandates. For resources and links to CDC, regional, and state-specific updates, click [here](#).

FOR MORE INFORMATION

If you have questions or want more information regarding guidance for commercial landlords and property managers dealing with a positive COVID-19 test, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. For more information, contact **Robert Smith** at 316.291.9779 or rsmith@foulston.com, or **Wes Kimmel** at 316.291.9500 wkimmel@foulston.com. For more information on the firm, please visit our website at www.foulston.com.

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RESOURCES

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PRACTICE AREAS

- Real Estate
- Litigation & Disputes