

**ARTICLES**

## **HVACs in the Age of COVID: Safety, Lease Obligations, and More**

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*By Howard Jeruchimowitz and Michael Hass – May 10, 2021*

COVID-19 is commonly thought of as a severe respiratory disease reaching into your respiratory tract, and it can cause a range of breathing problems. For some, COVID-19 also has more serious health ramifications as a systemic disease causing other health complications. According to the Centers for Disease Control and Prevention (CDC), COVID-19 is most commonly spread by close person-to-person contact with someone who has COVID-19, which has been defined as within a range of six feet. The virus typically spreads by respiratory droplets released when an infected person coughs, sneezes, breathes, sings, or talks, and the droplets are inhaled or land in the mouth, nose, or eyes of a nearby person. Though less common, there is evidence to suggest the virus can be transmitted to a person exposed to small droplets or aerosols that stay in the air. Also less common, the virus can sometimes spread when a person touches a surface or object with the virus on it and then touches his or her mouth, nose, or eyes. *See generally* CDC, [How COVID-19 Spreads](#) (updated Oct. 28, 2020).

Given the virus's easy transmission through the air, there has been considerable focus on the ventilation systems in the work environment, making sure it is safe for employers and employees to return to work. Such focus has led to guidelines published by the CDC, the [Occupational Safety and Health Administration](#) (OSHA), the U.S. Environmental Protection Agency (EPA), and other organizations and agencies. According to the CDC,

[t]he risk of spreading SARS-CoV-2, the virus that causes COVID-19, through ventilation systems is not clear at this time. Viral RNA has reportedly been found on return air grilles, in return air ducts, and on heating, ventilation, and air conditioning (HVAC) filters, but detecting viral RNA alone does not imply that the virus was capable of transmitting disease. . . . There may be some implications for HVAC systems associated with these findings, but it is too early to conclude that with certainty. While airflows within a particular space may help spread disease among people in that space, there is no definitive evidence to date that viable virus has been transmitted through an HVAC system to result in disease transmission to people in other spaces served by the same system.

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Non-healthcare (e.g., businesses and schools) building owners and managers should, at a minimum, maintain building ventilation systems according to state and local building codes and applicable guidelines. Ensuring appropriate outdoor air and ventilation rates is a practical step to ensure good indoor air quality.

CDC, Ventilation in Buildings (updated Mar. 23, 2021), [Ventilation FAQs, Can COVID-19 be transmitted through HVAC \(ventilation\) systems?](#)

As a result of the pandemic, landlords and tenants may be pondering the impact of ventilation systems on the safety of their buildings and implications for their leases. This article examines typical lease obligations regarding ventilation systems, as well as the current agency guidelines and recommendations and implications they could have for leases.

### **Overview of Lease Obligations**

Commercial leases will vary, of course, as to who bears the responsibility for the HVAC systems servicing the tenant's space. Buildings are commonly served by a large HVAC system, and individual commercial tenants are permitted to install supplemental systems that they control. For these situations, the two parties will each be fully responsible for the HVAC system over which they have rights to install—the supplemental system being the tenant's obligation to maintain and the main HVAC system being the landlord's. Some leases place the onus solely on the landlord to install, service, and upgrade (as necessary) the HVAC system. This is found typically in office buildings serviced by a unitary, building-wide HVAC system. Yet other leases will place the responsibility largely on the commercial tenant, especially larger, more sophisticated tenants that have specific HVAC needs or in smaller shopping centers with different tenants having different needs and desires.

Both commercial landlords and tenants alike should review their leases to determine who bears responsibility for each of these distinct obligations—installation, repair and maintenance, and compliance with laws. Generally, if the party bears an obligation, responsibility, or exclusive right to install an HVAC system (which the party then exercises), that same party will likely be obliged to maintain it, ensure it meets with all legal requirements, and upgrade it as necessary. Following from this, potential liability for any defects in an HVAC system—such as an inability to properly filter out contaminants or COVID-19 virus particles—will fall on the party that bears the responsibility for the system.

Complications may arise, however, when the obligations are shared. For instance, a landlord who maintains a general building HVAC could face liability for failing to outfit a building HVAC system with advanced filtration sufficient to filter out COVID-19 virus particles, but a tenant might *also* share in the liability if its supplemental system that services its suite is defective. Where such overlapping obligations and potential liabilities exist, questions of indemnity may get pushed to the forefront and send the parties scrambling to determine who will be facing the danger from a poorly performing HVAC system. Moreover, the type of building at issue will play a large role: A shopping center with myriad temporary visitors (and a comparatively small number of employees) will have obligations and liabilities that look vastly different from a building full of office tenants with a static population (and a comparatively small number of visitors) governed by OSHA rules and regulations. Buildings that have a significant residential component will often bring with them *additional* obligations (whether in the residential leases or at common law) surrounding the habitability of the residential spaces and common areas serving them.

Finally, even where one party in a lease bears the responsibility to maintain or upgrade an HVAC system, there may still be an obligation under the lease (or at common law) for the opposite party to promptly report any issues. For example, a landlord may control the HVAC system, but the tenant might be expressly responsible for bringing to the landlord's attention any issues with its operation, and a failure to do so may absolve the landlord from its responsibility to repair or upgrade the HVAC system.

In the end, obligations pertaining to the building environment may appear simple on the face of the lease, but the many different scenarios from which problems can arise can cause these obligations (and the liabilities extending from them) to be highly complex.

### **Challenges to Leases Based on HVAC and COVID**

There have not been many cases yet in which tenants have sought relief in court on the basis that an HVAC system is not compliant or safe during the COVID-19 pandemic. In one such case—*GWC Injury Lawyers, LLC v. One East Wacker Partners, LLC*, No. 2020CH04606 (June 2020), in the Chancery Court of the Circuit Court of Cook County, Illinois—GWC sought to void the lease and to obtain injunctive relief to enjoin enforcement of the rent provisions of the lease. GWC's basis was that the office was unsafe for its employees due to the HVAC system and COVID, alleging the following:

28. Epidemiological studies into workplace outbreaks by the CDC and other authoritative bodies have underscored the grave risk to office workers, particularly in an enclosed environment where with limited air exchange and/or where the air is recycled through HVAC systems.

29. The official position of The American Society of Heating, Refrigerating and Air-Conditioning Engineers reflects the reality of prevailing COVID-19 science: "Transmission of SARS-CoV-2 through the air is sufficiently likely that airborne exposure to the virus should be controlled. Changes to building operations, including the operation of heating, ventilating and air-conditioning systems, can reduce airborne exposures."

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32. On March 17, 2020, the National Institute for Health (NIH) concluded that "scientists found that severe acute respiratory syndrome coronavirus 2 was detectable in aerosols for up to three hours."

33. Other studies of documented "super-spreader" events by the CDC and other authoritative bodies underscore the grave risks associated with closed environments with minimal ventilation where COVID-19 can be transmitted through airborne particles. See, e.g., 2020 CDC Publication, Vol. 26, No. 7, "COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020"; Dr. Joseph Allen, Director of

Healthy Buildings Program, Harvard University, “Your Building Can Make You Sick or Keep You Well, New York Times, March 4, 2020.

34. In light of the overwhelming body of competent evidence demonstrating the risks associated with COVID-19 transmission through HVAC systems, REHVA recommended “no use of recirculation” in any building with a mechanical ventilation system insofar as “[v]irus particles in return ducts can also re-enter a building when centralized air handling units are equipped with recirculation sectors.”

35. In discussing the feasibility of return air filters in HVAC systems, REHVA noted that, “. . . most of these filters, even HEPA filters may not filter out virus size particles effectively. Ultraviolet light can be used to disinfect indoor spaces and could be installed to destroy viruses, but has not yet been proven effective against COVID-19.

Even though the tenant raised with the landlord safety concerns about the HVAC system, the landlord informed the tenant that the HVAC system was not an issue or a transmitter of the virus and that it was not willing to make any changes thereto and demanded full rent. The case languished for procedural reasons and was subsequently dismissed without the court reaching the merits.

There are currently no reported cases deciding to what extent a faulty or inadequate HVAC system can impact a tenant’s obligations under its lease with respect to COVID. The only reported cases have been in the prison context, where inmates were challenging the prison conditions during the pandemic, which the courts have rejected, finding that the prisons have adjusted and are following the necessary guidelines. *See, e.g., Butcher v. Howard*, 2021 U.S. Dist. LEXIS 825 (M.D. Pa. 2021); *James v. Ramsey*, 2020 U.S. Dist. LEXIS 92683 (S.D. Fla. 2020).

### **New OSHA and State Guidelines and Their Potential Lease Implications**

For landlords and tenants in commercial spaces (anyone having employees), OSHA regulations are an oft-forgotten aspect of legal compliance, especially as it relates to an HVAC system or the building’s environment more generally. Typically, OSHA is thought of as the domain of factories, construction, or other heavy or light industry where workplace accidents (and dangerous workplace conditions) can lead to sudden, and sometimes catastrophic, injury. However, OSHA’s reach extends into all workplaces. *See* EPA, [Summary of the Occupational Safety and Health Act](#). At present, there is no greater “recognized hazard” to human safety and health on the forefront of people’s minds than COVID-19; accordingly, it is critical that landlords and tenants keep an eye on OSHA regulations and guidance related to HVAC systems.

OSHA’s workplace safety guidance, however, as it relates to HVAC systems is very general. In addition to the general workplace safety practices that have become standard in the past year (such as social distancing where possible, not allowing sick persons to come to work, minimizing contact between employees, and regular cleaning), OSHA recommends that employers “improve ventilation” in the workplace, including the following as it relates to HVAC systems:

- Ensure ventilation systems operate properly and provide acceptable indoor air quality for the current occupancy level for each space.
- Increase ventilation rates when possible. . . .
- Disable demand-controlled ventilation (DCV).
- Reduce or eliminate recirculation, for example by opening minimum outdoor air dampers. In mild weather, this will not affect thermal comfort or humidity. However, this may be difficult to do in cold or hot weather.
- Improve central air filtration to the MERV-13 (the grade of filter recommended by ASHRAE) or the highest compatible with the filter rack, and seal edges of the filter to limit bypass.
- Check filters to ensure they are within service life and appropriately installed.
- Keep systems running longer hours, 24/7 if possible, to enhance air exchanges in the building space. . . .
- Generate clean-to-less-clean air movement by re-evaluating the positioning of supply and exhaust air diffusers and/or dampers (especially in higher-risk areas). . . .
- If ventilation cannot be increased, reduce occupancy level in the building. This increases the effective dilution ventilation per person.

OSHA, [Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#).

Though some guidelines are relatively easy to follow (i.e., checking and changing filters), some are more difficult to interpret (e.g., providing “acceptable indoor air quality” or “increasing ventilation rates”). OSHA is currently revisiting these guidelines and is set to release more detailed emergency rules that address what employers are expected to do to maintain an HVAC system that minimizes the risk of COVID-19 transmission.

Some states, such as California, have already codified COVID-specific regulations. Under California’s COVID-19 emergency temporary standards, employers are required to “maximize the quantity of outdoor air” and “increase filtration efficiency to the highest level compatible with the existing ventilation system.” *See* Cal. Code Regs. tit. 8, § 3205(c)(2)(E) and (c)(8)(B). Failure to comply, or at least make a good-faith effort at compliance, may subject employers to a citation and potential fines from the Division of Occupational Safety and Health of California’s Department of Industrial Relations (Cal/OSHA). *See* Cal/OSHA, [COVID-19 Emergency Temporary Standards Frequently Asked Questions](#) (updated Mar. 26, 2021). Employers in jurisdictions that have already enacted similar rules will need to ensure they are following these laws and regulations, while employers in other jurisdictions should proactively look to OSHA’s guidance or to other states’ already-enacted rules as these, or ones similar to them, will likely be codified more broadly.

Critically, these guidelines apply to *employers*, most often tenants under a lease (though it would include a landlord to the extent the landlord has employees in the building). For that reason, employers will need to ensure they comply with the applicable guidance, rules, or regulations.

To the extent the tenant is responsible for HVAC maintenance, the landlord should ensure the tenant is taking these steps; to the extent the landlord is responsible for HVAC maintenance, the tenant may need to safeguard against potential OSHA violations by pressing the landlord to provide a safe work environment, including an HVAC system that properly mitigates the risk of COVID-19 transmission.

### **Conclusion**

Parties entering into or renegotiating leases may want to augment their current agreements on HVAC installation, maintenance, and upgrades to reflect more than just the identification of responsibility and to ensure that the party with such responsibility is engaging in the practices best suited to minimize the risk to building occupants from COVID-19 or the next airborne pathogen. Forethought now may avoid legal expense down the road.

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