

What Landlords Should Consider Before Reopening Gyms

By **Angie Daniele and Patrick Abell** (June 22, 2020)

As the national economy gradually reopens in the face of COVID-19, commercial landlords are tasked with the challenge of reopening their gyms and fitness center facilities in a way that is both compliant with public health regulations and viable as a business model. This article aims to provide practical, targeted guidance to such landlords.



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Assessing Landlord's Obligation to Reopen

If the landlord has granted the right to use a gym or fitness center pursuant to a lease or other occupancy agreement, as an initial consideration, the landlord should review such documents to understand whether they have an obligation to continuously provide such services to their tenants or other occupants.

This may be a relevant consideration for office building landlords and hotel operators offering use of a fitness center facility as an amenity. Below are a few key areas of consideration.



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Leases

As a lease inducement, some landlords may have agreed to provide certain amenities (such as fitness center memberships) to tenants and their employees throughout the term of their lease. While it is preferable for landlords to maintain broad discretion over the management and operation of such facilities, the exact language in the lease should be evaluated to understand the landlord's obligations with respect to such amenities.

Landlords may be temporarily excused from offering such amenities if their lease includes a force majeure clause that extends to a pandemic, such as COVID-19, but force majeure clauses are likely to be narrowly construed by courts and interpretation of such clauses vary from state to state.

Partial or Full Reopening

As landlords review their leases for operating covenants and other requirements related to the operation of their gyms, they should also assess whether a fitness center needs to be fully operational, or if a limited selection of gym equipment will allow the landlord to fulfill its contractual obligations.

For example, landlords may wish to only allow access to every other treadmill (not all treadmills) in order to comply with social distancing requirements, and/or suspend ancillary services, such as snack bars or certain spa services, not deemed critical for reopening. In addition, if landlords offer multiple fitness facilities within a close proximity, landlords should consider reopening only one facility at a time in order to focus compliance efforts.

Customer Demand

While some gym members patiently wait for their gyms and fitness centers to reopen,

others are eager to resume their normal workout routines. In such cases where the landlord is under no contractual obligation to reopen, landlords should weigh customer demand for the fitness center against the potential risks of reopening.

No landlord wants to unnecessarily expose themselves to liability, but some landlords may consider reopening their gym or fitness center during COVID-19 to be an acceptable risk in order to satiate their tenants' demands. On the other hand, some landlords may find that low customer demand, coupled with additional cleaning and maintenance costs and procedures, does not justify voluntarily reopening a gym or fitness center.

For those landlords who have concluded that keeping their gym closed outweighs the benefits of reopening it, such landlords could consider offering incentives to members to compensate them for the COVID-19-related closure. Such incentives could include extending memberships to cover the period of time the gym was closed or refunding membership dues to customers who have made such requests.

Steps for Reopening

Individual cities and states have rolled out unique guidance with respect to reopening various businesses in their jurisdictions, including gyms and other fitness centers. Landlords should consider hiring a local attorney to carefully review such orders and other regulations and provide guidance on the applicability to their commercial property. Below are a few key areas of consideration.

Determining and Assessing Applicable Regulations

A thorough review of applicable federal, state, county and city regulations is essential to determine how landlords can lawfully reopen and operate their gyms and fitness centers. As this article describes below, guidelines vary from state to state. Local regulations will dictate when and how gyms and fitness centers can resume operations, and as with all government orders during the COVID-19 pandemic, this guidance may change over time.

Staffing

Landlords should carefully review the requirements related to staffing and consider hiring additional staff during the pandemic to monitor gym members and implement rigorous cleaning requirements.

Even if landlords have historically not hired staff to operate their unsupervised gyms or fitness facilities (such as in hotel fitness facilities), it may be difficult to ensure the facility complies with any new COVID-19-related regulations without the presence of a staff member. Landlords, or their property managers, if applicable, should review the need for staff and its impact on the financial viability of the fitness center.

Liability Waivers

Courts have not yet fully processed the impact and effectiveness of COVID-19 liability waivers. Some fitness centers have required that patrons sign a waiver acknowledging the inherent risk of contracting the virus while utilizing the fitness equipment and releasing the landlord from all liability.

Given the nature of COVID-19 transmission, plaintiffs would likely have difficulty establishing that the virus was contracted while using a specific fitness center. Nevertheless,

landlords should consider revising their standard liability waivers to include a provision relating to COVID-19 exposure.

Expertise in Gyms and Fitness Center Operations

Many of the questions surrounding the safe reopening and operation of a gym or fitness center in the age of COVID-19 are best addressed by those with expertise in facilities management and equipment sanitization. Landlords should consider looking to resources from their applicable regional trade association in order to best determine, and meet, the standard of care for operating a gym or fitness center under the new requirements. Below are a few key areas of consideration.

Standard of Care

Leases may obligate landlords to operate their commercial property "in keeping with the standards of other first-class facilities" in the given metropolitan area. In the event that a landlord becomes subject to a negligence claim that occurred in a fitness center facility on that landlord's property, the landlord will then need to establish whether its actions in running the facility were in line with the appropriate standard of care for a comparable facility located in the same region.

Trade Associations

In order to determine the appropriate standards for operating a gym or fitness facility, landlords should consider seeking operational guidance from regional trade associations who help establish best practices for their given industry. One such trade association, the American Institute of Industrial Hygiene, has published useful guidelines for reopening fitness centers.[1]

Industrial Hygienists

Landlords can hire industrial hygienists to help them understand how to implement best practices for routine cleaning of high-touch surfaces and deep cleaning of the entire fitness center. Understanding and following these procedures is critical for lawful compliance with regulations and for meeting the landlord's standard of care. Further, a clear understanding of the cleaning requirements will help landlords assess staffing needs for the fitness center.

Clear Signage

In order to facilitate social distancing in compliance with applicable requirements, landlords may want to post clear signage throughout the fitness center to help educate people about new protocols. The public is still getting used to new behaviors (i.e., wearing of masks, maintaining six feet of social distance, one-way foot traffic lanes, etc.), so landlords can help users of the fitness center stay healthy and safe with clear messaging about such requirements.

State-by-State Sampling

Each state is taking its own unique approach to reopening its economy, and as a result, national landlords may be subject to separate and distinct protocols for reopening their gyms and fitness centers located across the U.S. Prior to reopening, landlords should research, understand and be able to effectively implement the requirements imposed upon them by applicable authorities to minimize their liability. Below is a small sampling from a

few states.

Florida

On May 18, Florida entered phase one of its reopening plan, which permitted the reopening of gyms and fitness centers. Notably, the Florida regulations do not allow fitness centers to operate at more than 50% occupancy.[2]

Ohio

On May 26, Ohio announced that gyms and fitness centers could reopen to the public, and on May 29, the Ohio Department of Health issued a set of both mandatory regulations and suggested guidelines. Facilities must maintain proper spacing of equipment, users must check in when using the gym and landlords must ensure that equipment is cleaned at regular intervals.[3]

New York

Though New York City remains in phase one and will likely be slower to reopen than other parts of the state, as of June 10, parts of New York entered the phase three stage of reopening, which did not explicitly reference fitness centers. Accordingly, fitness centers remain closed in New York until further notice.[4]

California

On June 12, California permitted individual counties to reopen fitness centers as part of the stage two reopening if the individual counties could attest that the county had adequate regulations in place to regulate the facilities. Whereas many states have produced guidance and regulations at the state level, California has delegated much of the regulation authority to individual counties.[5]

Conclusion

In conclusion, commercial landlords will continue to face unique challenges in the weeks and months ahead as they begin to reopen gyms and fitness centers to their tenants and/or the public at large. Careful attention to state and local regulations, combined with diligent reviews of all active leases and other relevant documents, should guide landlords' decision-making process with respect to safe operation of fitness center amenities located on their commercial properties.

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[1] https://aiha-assets.sfo2.digitaloceanspaces.com/AIHA/resources/Reopening-Guidance-for-Gyms-and-Workout-Facilities_GuidanceDocument.pdf.

[2] A copy of the "Re-Open Florida Task Force" report, which includes the "Phase One"

guidance on fitness centers, can be found by clicking [here](#).

[3] A copy of the Ohio guidelines can be found by clicking [here](#).

[4] A copy of the New York reopening program, including "Phase Three" guidance, can be found by clicking [here](#).

[5] A copy of the California reopening program, including "Stage Two" guidance for fitness centers, can be found by clicking [here](#).