

Client Alert

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Declaration of State of Emergency - Impact on Real Estate Business

- General
- Local Authorities' Request or Instruction
- Use of Properties as Temporary Medical Centres
- Prohibition on Using Properties and Transportation under the Act on Prevention of Infection and Medical Care for Infectious Patients
- State of Emergency Q&A for Shopping Malls

Declaration of State of Emergency - Impact on Real Estate Business

General

The Japanese government, through Prime Minister Shinzo Abe, declared a state of emergency (*Kinkyu jitai sengen*) on 7 April 2020, effective for one month from 8 April 2020 until 6 May 2020. This declaration was made pursuant to Article 32 of the Act on Special Measures for Pandemic Influenza and New Infectious Diseases (Act No. 31 of 2012) (the "Act").

Local Authorities' Request or Instruction (Article 45(2)(3) of the Act)

As explained in our office's client alert regarding [the declaration](#), this declaration empowers the governors of designated local governments to implement certain measures to prevent the spread of COVID-19, protect people's life and health, and avoid economic disruption in Japan. They may also make a "request" (*yousei*) to restrict or prohibit the use of, or holding of events at, certain designated facilities where a large number of people may congregate and stay, under Article 45(2) of the Act, or as a next step, issue an "instruction" (*shi-ji*) under Article 45(3) of the Act. These measures will have an impact on the real estate industry, including various businesses that own, use, manage or operate such facilities.

Such facilities are listed under Article 11 of the Enforcement Order of the Act (Order No. 122 of 2012) (the "**Order**"), and include (i) schools, (ii) child care facilities, (iii) universities, (iv) movie theatres, (v) public halls, (vi) exhibition halls, (vii) department stores and supermarkets, (viii) hotels or inns (limited to banquet rooms and similar venues which can hold large numbers of people), (ix) gymnasiums or swimming pools, (x) museums or libraries, (xi) night clubs or dance halls, (xii) barber shops, and (xiii) private supplementary schools. Tokyo Governor Yuriko Koike has publicly announced that the Tokyo Metropolitan Government, as a designated local government, will designate which facilities will be restricted on or around 10 April 2020.

Measures which may be implemented by request or instruction are also listed under the Order, including: (i) controlling people's entry to prevent COVID-19 transmission, (ii) prohibiting access by those with fever-like symptoms due to COVID-19, (iii) providing means of sanitization, (iv) sanitizing the facility, (v) asking people who are entering the facility to wear masks, and so on.

Neither the Act nor the Order specify the potential addressee of (i.e., who may receive) a "request" or "instruction" under the Act. Accordingly, we understand that the addressee or recipient will be determined on a case-by-case basis and that the key factor in making such determinations may be who effectively manages the facility or the event. The Q&A below illustrates how a request or instruction might be implemented in the case of shopping malls.

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In terms of legal effect, while a "request" would generally not be considered to be legally binding, an "instruction" may be. Nevertheless, the Act does not provide any specific penalty for failure to comply with a request or instruction under the Act.

Use of Properties as Temporary Medical Centres (Article 49 of the Act)

Article 49 of the Act allows the governors of designated local governments to use certain properties (land, building or other facilities) as temporary medical centres. They are required, in principle, to obtain the consent of the owner or occupier of such properties. However, they may, in the case of an emergency, have the power to use such properties without obtaining consent.

We are aware of one hotel chain has already been designated for use as a temporary medical centre. COVID-19 patients exhibiting mild symptoms are being moved from the hospitals where they are currently receiving treatment to this temporary medical centre.

Prohibition on Using Properties and Transportation under the Act on Prevention of Infection and Medical Care for Infectious Patients

Effective from 1 February 2020, COVID-19 was designated as an infectious disease under the Act on Prevention of Infection and Medical Care for Infectious Patients (the "**Infection Prevention Act**") pursuant to certain orders regarding prevention of infectious diseases. As a result, the governors (or their delegated municipal level local governments) may "order" the closure or preservation of properties and/or prohibit the taking of anything from properties (including movables) that are contaminated or possibly contaminated by COVID-19. The power to issue such "orders" extends to restricting traffic around such properties. Unlike a "request" or "instruction" under the Act, breaches of the order under the Infection Prevention Act are subject to penalties.

Following is a brief Q&A regarding shopping malls under the state of emergency declared under the Act.



<State of Emergency Q&A for Shopping Malls>

1. Upon the declaration of a state of emergency, can the local government force me, an owner and manager of a shopping mall, to close my building?

Yes. The designated local government may request or instruct a building owner or manager to close a building, if necessary, to prevent the spread of COVID-19. As explained above, while a "request" is not legally binding, an "instruction" does have mandatory legal effect even though there is no penalty for breach of the instruction. However, the local government will publicly disclose any request and instruction that it makes or gives. The specific name of the building may also be disclosed. As such, failure to comply with a request or an instruction may entail reputational risk for the owner and the building.

2. If I follow a request or instruction from the local government and close my building, will the local government or the national government indemnify me from damages and costs arising from building closure?

No. Neither the local government nor the national government has an obligation to indemnify building owners in respect of damages or costs from building closure.

3. While the building remains closed in response to the local government's request or instruction, am I entitled to receive rent from tenants? Can tenants refuse to pay rent?

Article 611, Paragraph 1 of the Civil Code prescribes that if the leased premise cannot be used by the lessee due to damage or any other event that is not the lessee's fault, the rent must be reduced in proportion to the area that the lessee can no longer use.

However, there may be a provision in the lease agreement or the building rules that all tenants have to comply with and which allows the lessor to temporarily close the building for a reasonable cause, such as inspection or repair, etc.

Such provisions would need to be carefully reviewed to understand how they would apply to a closure based on a local government request or instruction.

4. Do I have to compensate tenants during building closure in response to the local government's request or instruction?

No. As the building closure is not attributable to the lessor, the lessor does not have to compensate tenants unless otherwise required under the lease agreement.

5. My building is still open. However, a tenant is asking for a rent reduction because their business has been severely affected by COVID-19 and state of emergency. Do I have to accept the rent reduction request?



This question bears careful consideration including in light of recent government pronouncements.

Legally, under the Act on Land and Building Leases, a lessee may "claim" rent reduction if the rent becomes "unreasonable" due to changing economic and other extraordinary circumstances, etc. However, there are no clear standards for determining whether or not rent has become "unreasonable" under the Act. Please refer our [client alert on rent reduction](#) for a more detailed discussion of this issue.

On 31 March 2020, the Ministry of Land, Infrastructure, Transport and Tourism requested major real estate industry groups to grant a moratorium on [rent payments](#). However, compliance with this request also is not mandatory.

6. Some of my building guests tested positive for COVID-19, requiring us to sanitize and temporarily close the building. Do I need to obtain the tenants' consent to close the building?

No. Under Article 606, Paragraph 2 of the Civil Code, a lessee cannot reject a lessor's use of the leased premises where the use is to preserve the building.

7. Can I charge tenants for sanitization costs?

Under Japanese law, it is the lessor's obligation to keep the leased premises available for the use of the lessee. Accordingly, unless an infection is attributable to a tenant, or unless otherwise provided under the lease agreement, the lessor cannot charge tenants for sanitization costs.