

Tenant Issues in Commercial Leases

Many commercial tenants, especially smaller companies, accept lease forms provided by their landlords, with only a few modifications. These tenants would benefit if they were to make a greater effort to make the leases more tenant friendly, and to tailor the leases to fit their particular businesses and to provide flexibility to deal with future circumstances. The following is a list of some of the issues a tenant might consider when negotiating with its landlord.

Alterations and Improvements

Limit the requirement for prior consent to major items and require that consent not be unreasonably withheld or delayed.

The tenant should have the right to contest or bond over any mechanics liens resulting from claims by its contractors and vendors.

If the landlord is to make the alterations or improvements, there should be specifications as to the condition in which the premises is to be delivered, including being in compliance with all laws and regulations.

Be sure to address any special issues as to telecommunications equipment and services.

Assignments and Subletting

Try to have the absolute right to assign. However, if landlord's consent is required, provide that it will not be unreasonably withheld or delayed. The consent requirement should not apply to assignments to a parent or subsidiary or to changes in ownership or control of the tenant.

Provide that the original tenant will be released if the new tenant meets certain specified financial requirements and assumes the lease in writing.

When subleasing, make certain that the sublease terms and conditions are consistent with the lease.

An assignor (unless released) and a subtenant will want the landlord to give them notice of a tenant default, the right to cure, and sufficient time to cure.

Casualty

The tenant may want the right to terminate if a substantial casualty occurs near the end of the lease term.

If the landlord is to restore, it should be obligated to do so promptly and rent and rental increases should be abated during the period of restoration. Consider whether the force majeure clause allows the landlord to unreasonably delay restoration even though there are no truly extraordinary circumstances.

The landlord should not be able to terminate for a casualty not affecting the premises without compensating the tenant.

Default

The remedy of termination, as opposed to the recovery of money damages, should be limited to substantial defaults. The landlord should not be able to recover consequential damages.

There should be a reasonable time to cure non-monetary defaults.

The tenant should avoid having acceleration of rent as a landlord remedy, or at least discount such rent at a high rate.

The tenant should be given notice and extra time to cure a default caused by its subtenant.

Expiration

The lease should be specific as to the types of items and fixtures the tenant can remove from the premises on expiration, and as to the types it must remove. The lease should also specify the condition to which the premises must be restored and provide ample time for restoration.

The tenant may want the right to post signs for a reasonable period after expiration announcing its new location.

Any holdover rent should be limited to the actual period of continued occupancy.

Landlord Services

The lease should identify the services the landlord will provide, such as janitorial, utility service, refuse disposal, security, snow removal and maintenance. The tenant should make certain that such things as access, HVAC, and freight elevators will be available when and as needed by the tenant.

In some cases there should be standards for the landlord's services, such as an obligation to maintain the building as a Class A office building.

Operating Expenses - Common Area Maintenance Charges and Taxes

Consider the year used as the base year. Is the base year reflective of a full array of expenses? Is the base year one in which there was an acceptable rate of occupancy? Is it a year in which all the improvements had been completed and fully assessed for property tax purposes?

Credits, refunds and adjustments should pass through, not just charges. Be wary of items that may be padded such as management and other fees and of duplicate charges. Watch for the treatment of capital items as operating expenses. Exclude costs covered by insurance; advertising, marketing and brokerage expenses; and costs incurred for a particular tenant rather than for the common benefit. The methodology for determining expenses should be consistent from year to year.

The lease should obligate the landlord to provide a detailed statement of charges and adjustments and to bill at least annually.

The tenant should have the right to audit and to recover its costs if the audit reveals a discrepancy in excess of a stated sum or percentage.

The CAM charges should be properly allocated among the separate spaces in the building and the treatment of common areas should be consistent.

The tenant may want to cap the amount or percentage of increase in any given year.

Rent

The lease should be clear as to how the amount of any increase in rent is to be calculated. If the increase is to be based on the CPI or another index, the index and base must be specifically identified. If the increase is to "market rent," the market should be defined both geographically and with respect to the type of property and its use, and should consider factors such as term, allowances, and brokerage fees. There must be an objective mechanism for determining market if the parties cannot agree, such as by appraisal or arbitration. Make sure that there is sufficient time for this process to work.

If there is percentage rent the lease should be clear about what is included in gross sales and how measured and verified, and sales taxes, refunds, exchanges, collateral services, credit card fees and the like should be excluded.

Use Restrictions

The broader the description of permitted uses the better, but at a minimum make certain that the description is broad enough to fit the tenant's business, including any anticipated changes.

Consider whether restrictions and requirements imposed on the operation of the tenant's business with respect to such matters as access, signs, lighting, hours of operation, and external appearance of the premises are reasonable given the nature of the business.

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