



# HOW TO NEGOTIATE A COMMERCIAL LEASE



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Continuing Legal Education

# HOW TO NEGOTIATE A COMMERCIAL LEASE



Diane Schottenstein, Esq.  
212-362-0553

[schottenstein@schottensteinlawfirm.com](mailto:schottenstein@schottensteinlawfirm.com)



## The Beginning of the Story

- The Lease will impact your client's business over several years
- Make sure it meets your client's current needs (use provisions, electric, hvac)
- Make sure it is flexible enough to meet future needs (sublet and assignment rights, change of control provisions, renewal and expansion rights)



## Letter Of Intent

- Non binding agreement
- Only formal executed lease binds
- Sets out basic terms
- Can be brief or details
- Useful to see if there is agreement
- Helpful if attorney is involved



## Preliminary Matters

- The landlord's standard form
- Identify Parties
- Identify Demised Premises

Useable v. rentable

Add an exhibit

Include deemed rental square feet



## Use of Premises and Building Use Restrictions

- Landlord desire for building character and uniformity
- Landlord's use restrictions
- Non compete provisions
- Tenant wants broadest possible use for self and successor – general office use and customary incidental uses for Tenant and employees including training, childcare, food service.



## Rent

- Rent
- Base Rent a fixed amount generally paid in advance each month
- Additional Rent can include operating expenses, real estate taxes, and more



## Tenant's Share of Operating Expense

- Tenant's Percentage Interest – (what is it based on, building area, leased space, leasable space)
- Increases in Operating Expenses
- Inclusions – salaries and related employee costs, depreciation, financing expenses, insurance, heat, hvac, water and electricity to the common areas, cleaning and service contacts, repairs, painting, maintenance, supplies, certain capital expenditures, management fees, administrative costs, legal and accounting costs, landscaping, leasing commissions
- Exclusions – costs not related to building, items paid for directly by other tenants, certain capital improvements
- Caps
- Audit rights and procedures





## Tenant's Share in Increases in Taxes

- Base Year
- What are taxes – inclusions and exclusions
- Tax certiorari rights



## Other Costs

- Escalations – CPI, porter wages
  - Electric – inclusion factor with Landlord right to survey or convert to submeters
  - Extra, Extra – after hours HVAC, changing light bulbs
- Read the lease



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## Lease Term

- Lease Commencement Date – if Landlord is doing work – provide for notice after tenant improvements completed
- Rent Commencement Date – any free rent
- Lease Expiration Date



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## Delivery of the Premises

- Premises occupied by another Tenant
- Work required to prepare Premises – who does work and who pays
- Coordination of Landlord Work and Tenant installations
- Need for permits and certificates
- Effect of Delay of delivery on the Lease term and rent commencement
- Representations regarding the premises, i.e., in compliance with all law applicable to new construction without regard to variances or grandfathered rights



## Alterations

- Distinguish Initial Alterations and later alterations
- Decorative or cosmetic alterations
- Structural alterations or alteration impacting building systems
- Approval Submission Process
- Labor harmony and restricted contractor lists
- Compliance with law issues
- Environmental issues



## Repairs Obligations

- Should apply only after Landlord's Work
- Tenant responsible for within demised premises
- Distinction between structural and non structural repairs and between repair and replacement
- Tenant responsible for Building only if Tenant, its employees, agents, systems, etc. cause the damage
- Landlord is responsible for the exterior and structural portions (roofs, walls and foundation) of the Building, the common areas, and the Building's plumbing, electric, hvac systems not modified by Tenant
- Landlord may restrict who can work on building – pick from approved contractors
- Responsibility for changes in law or regulation
- Rent Abatement if premises untenable or no access



## Subordination Non-Disturbance & Agreements

- Benefit to Tenant
- Carve – outs – security deposit, landlord failure to complete work.
- Limited ability to modify standard form
- Availability of protection for sub-tenant or assignee



## Insurance

- Types of insurance – fire and other casualty, liability
- Acceptable insurance – insurer's ratings, blanket policies, umbrella coverage, self insurance, waiver of subrogation
- Certificates of Insurance and designation as additional insured
- Show provision to the insurance broker before agreeing to terms





## Casualty Loss

- Real Property Law § 227. When tenant may surrender premises. Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenable, and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his or her fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he or she is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender. Any rent paid in advance or which may have accrued by the terms of a lease or any other hiring shall be adjusted to the date of such surrender.



## Casualty Loss

- Who is obligated to repair and when
- Complete or partial destruction
- What happens if your premises are ok but there is no access
- Rent Abatement
- Cancellation Rights



## Condemnation

- Exercise by government of power of eminent domain
- Complete or partial
- It can happen –think of the new second avenue subway or new grand central district



## Restrictions on assignment and subletting

- Owner's Interest in limiting assignment
- Change of control constituting assignment
- Exclusions – affiliates, successors, casual use.
- Defined acceptable replacements – required financial strength and reputation, no government agencies or diplomats
- Conditions –reimbursing costs for brokers, work allowances and legal fees
- Procedures – process and time periods
- Profit or Space Recapture
- Continued Tenant Liability
- Termination Rights



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## No Reasonableness Required

- Under New York Law, a landlord does not have to act reasonably and can arbitrarily withhold consent.
- This includes right to place conditions as a prerequisite for landlord consent
- Add to lease that landlord will not unreasonably withhold, condition or delay consent



## Owner Access to Premises and Incidental Intrusions

- Reasonable times and with notice
- Agree not to interfere with use
- Emergency access



## Building Services

- Elevator
- HVAC
- Electricity
- Telecommunications
- Security and access
- Cleaning, include schedule and specify what is included
- Directories and signage



## Security Deposit

- Amount
- Form: cash or letter of credit
- When will security be returned





## Options for Renewal or Expansion

- Time frame applicable to renewal option
- Apply to all or part of space
- Renewal Rent
- Scope of expansion; Owner right to relocate
- Strict enforcement of time frame



## Arbitration

- Where applicable? Generally or specific matters only?
- Types of Arbitration - single arbitrator, panel, baseball arbitration
- Time frames and costs



## Building Rules

- Review to see if there are any red flags
- Any limits on rule changes?



## End of Lease Term

- Removal of alterations
- Condition of Premises
- Return of security deposit



## Guaranties

- Full Guaranty covers monetary obligations and full performance of all terms of lease
- Good Guy Guaranty
- Caps on the Guaranty
- Termination of the Guaranty



## Thank You

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