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## 10 Legal issues to Worry About in Negotiating a Commercial Lease

You are looking for a new home for your business. You worry a lot about the usual stuff—location, rental rates, term, renewal options, tenant improvement allowances, etc. Once you think you have a deal, the Landlord unceremoniously presents you with a phone book entitled "Lease Agreement", which you hold far away from your body as if it were radioactive. You promptly dispatch the phone book to your attorney with the one-word instruction to "just take a quick look and let me know if there are any landmines I should be concerned about". After a "quick" review, your lawyer lectures you in a language which you think may not be of human origin. Your vision blurs, the room starts spinning, and just before you slip into a coma, it occurs to you that the Lease will never be signed.

We sympathize. But keep in mind that a careful review of the legal terms of the lease can be vitally important to protect your business. Following are ten important legal issues you should consider in negotiating your lease:

**1. Rent Abatement.** The "Rent Commencement Date" does not necessarily have to start on the "Lease Commencement Date". Consider asking for a few months of rent abatement. A period of free rent can mitigate the delay, down-time and cost associated with a build-out process or move.

**2. Condition of the Premises; Tenant Improvements.** If the Landlord agrees to make tenant improvements, the specifications should be clearly defined, as well as who is picking up the tab. In fact, it's not unusual to attach actual construction drawings to the lease as an exhibit. Depending on the extent of the build-out, you may want to hire your own contractor or architect. Remember, an "oral lease" is not worth the paper it's written on. If the Landlord's obligations are not in writing, you may not be entitled to the build-out you were promised.

Ultimately, it is up to you to ensure that space is suitable for your intended use. Make sure there will be adequate wiring,

plumbing and floor load capacity to accommodate your business needs.

**3. "Drop Dead" Commencement Date.** Make the landlord commit to have you in the space by a certain date. The lease may give an estimated "Commencement Date", but proceed to state that the landlord has no liability if that date is not met. Understandably, the landlord wants some wiggle room to allow for adverse weather conditions, dilatory contractors and existing tenants holding over. But after a certain "drop dead" date, you should have the right to terminate the lease or receive a per diem payment or abatement to cover your costs (e.g., penalties charged by your current landlord if you remain in your existing space beyond the term).

**4. Common Area Maintenance (CAM) Charges.** In addition to base rent, you may have to reimburse the landlord for costs of operating and maintaining the common areas of the building or shopping center. These so-called "CAM" charges may include snow and ice removal, landscaping, security, insurance premiums, legal and accounting fees, management fees and real estate taxes.

Be careful you do not agree to pay costs that should be the sole responsibility of the landlord or another tenant, including rent concessions to other tenants, the landlord's mortgage payments, or the cost of capital improvements. If capital improvements are included, they should at least be properly amortized over the life of the improvements. Make sure you are allocated a fair percentage of costs based on your share of the total rentable (not rented) space.

Require the landlord to maintain records of CAM costs, and ask for the right to inspect those records. To get an idea of the CAM charges, ask to review the last year's CAM statement.

**5. Use of the Premises.** The lease will probably limit the purposes for which you may use the premises (i.e., to an



office, a restaurant, a warehouse, a store, etc.). You will want this clause to be as broad and as flexible as possible, since you do not know the future direction your business may take.

Beware of any clause restricting you from competing with other tenants. Any such provision should be reviewed carefully with legal counsel to ensure it does not go too far. In contrast, you may want the landlord to agree not to allow competing businesses in the building or shopping center.

**6. Insurance.** You will probably be required to insure your own equipment and tenant improvements against fire or other casualties. The landlord may have insured the building and common areas, but almost never the contents of your space. The lease will also require that you carry general liability coverage against common risks, such as personal injury to individuals who visit your premises. The landlord will want to be named on your policy as an additional insured, with the right to receive notice if the policy is ever cancelled or modified.

After a casualty, you may be temporarily unable to operate your business. Ask the landlord to agree to abate rent while the space is being repaired. Make sure you also have business interruption insurance to cover lost revenue during reconstruction.

Lawyers are not typically insurance experts. Consult your commercial insurance agent as to the type and amount of coverage you need. Also, ask your agent to review the insurance provisions to ensure your policies are in compliance with the lease and that any required endorsements are included naming the landlord as an additional insured.

**7. Maintenance.** The landlord is responsible for maintaining and repairing the common areas of the building or shopping center, while you must maintain the interior of your space. Make sure these obligations are spelled out. At a minimum, make certain the landlord is responsible for all structural, mechanical, electrical and plumbing elements.

**8. Assignment and Subletting.** Many tenants consider the lease a liability, but it can also be one of your company's

most valuable assets. If you ever sell your business, the buyer may want to acquire your lease. The lease probably states it not assignable without the landlord's written consent. In the best of all tenant worlds, your lease would be a freely transferable. But the landlord has an interest in having the space occupied by a financially sound tenant. Ask if the Landlord will at least agree not to unreasonably withhold or delay its consent to a proposed assignment.

See if the lease provides that a transfer of any interest in your entity will be considered as a lease assignment. You should be free to transfer ownership interests internally, at least so long as majority control does not change.

**9. Default.** The lease will describe certain acts or omissions by the tenant which give the landlord the right, among other things, to repossess the premises and sue for damages. These "events of default" include failure to pay rent when due, as well as breach of non-monetary provisions of the lease.

Make sure you have the right to receive written notice of the default and a reasonable opportunity to cure. After all, checks really can get lost in the mail. If a rent payment is late due to an honest mistake on your part, it's only fair that you pay a late fee. You should not, however, be subject to eviction.

**10. Personal Guaranty.** Just say no to personal guarantees. If that doesn't work, be prepared to propose creative alternatives to at least limit your personal liability. For most of us, being personally liable for many years' worth of rental payments is frightening. Consider offering additional security deposit in lieu of a guaranty. Or, perhaps the landlord will cap the amount of your liability, or have the guaranty terminate or phase out after a certain number of years, after you've established a track record as a good tenant.

Above all, try to see things from the landlord's point of view; and be prepared to propose creative compromises. After all, you have possession of the landlord's property. All the landlord has is a phone book and a security deposit.