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## **What You Must Know Before Signing a Commercial Lease**

Many commercial landlords and tenants negotiate vigorously on the rent, security deposit, length of the lease, leasehold improvements, and options to renew. They often fail, however, to include key terms in their lease that can determine whether they will get the full benefit of their deal. This will outline some of the least discussed issues that each party must address in negotiating an office building or shopping center lease.

### **1. Check Out The Other Party.**

If you are a landlord, you need to know whether the tenant will be able to meet its obligations. Unless the named tenant is a successful business, you should get a guaranty from its owner. Tenants that are Limited Liability Companies (LLCs) or corporations will have no incentive to meet their obligations because their owners are not liable. The landlord's profits from a lease could evaporate if the owners can walk away from the lease without personal liability. As a compromise, the landlord and tenant may agree to limit the time that the guaranty is in place. They may also limit the guaranty to obligations arising while the tenant occupies the property. If your business is leasing commercial space, you should search the title to the property to confirm who is the owner of the property and to find out if the landlord is having financial problems. If the property is subject to many liens, your lease interest could be foreclosed out. If the landlord is having financial troubles, the landlord may not be able to fit out the space or maintain the common areas as you negotiated under the lease.

### **2. Understand CAM Charges.**

Tenants should not agree to common area maintenance (CAM) charges based on their percentage of the building's leased space because the tenant is bearing the burden of the building being empty. Tenants want CAM charges to be based on the percentage of all space in the building. Tenants will also want their share of CAM charges based on usable space (excluding hallways), while landlords will want CAM charges based on rentable space (which includes hallways). Landlords can include capital expenditures amortized over the expected life of the improvement regardless of the term of their lease. If CAM charges are based on expenses for a certain year, the tenant will want to closely examine the costs for that year. Will any of the charges dramatically increase in future years? Tenants should request a deadline on any increase in CAM charges; tenants do not want a surprise bill 5 years later saying that the landlord's books have been audited by the new owner and CAM charges were improperly charged for the last 5 years. Tenant will want the right to audit the landlord's books to assure that CAM charges were properly assessed.

### **3. Clarify Use Restrictions.**

The landlord in a shopping center lease will want a radius clause to prohibit the tenant from opening another store nearby that may siphon business from the store in their shopping center. The tenant will want restrictions on the landlord renting space to competing stores or businesses.

### **4. Negotiate SNDA Agreements Early.**

Most lenders require major tenants to sign Subordination, Non-Disturbance, and Attornment (SNDA) Agreements to assure that their mortgage is superior to the tenant's lease and cash flow from the property will not cease. The landlord should give the SNDA to the tenant early in the loan process. Besides subordination, the lender wants the tenant to notify it of defaults as an early warning system of landlord's possible default under its loan. The lender wants to assure that if it forecloses, the tenant will recognize the lender as the landlord and will only look to it for a return of a security deposit if the landlord turns it over to the lender. The tenant wants to assure that if the lender forecloses, the lender will honor the terms of the lease if the tenant is not in default under the lease. If SNDAs are not negotiated until after the tenant is in possession, then the landlord might not get its loan or the lender may require a guaranty for the tenants obligations. The lease should assure that the tenant has an obligation to negotiate and execute an SNDA and to give an estoppel letter to meet the lender's loan requirements

### **5. Record a Notice of Lease.**

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A tenant will want to record a notice of lease on the land records in the town where the real estate is located. The notice of lease provides evidence to others of the tenant's interest in the real estate and may force a subsequent lender to recognize the interest of a tenant in any foreclosure. The notice of lease should include the commencement and termination date of the lease, any options to renew or extend the lease, the date by which any option to purchase must be exercised, any expansion rights given to the tenant, and any use restrictions negotiated by the parties.

### 6. Research ADA, Technology and Environmental Compliance.

A tenant should hire a licensed architect or engineer to evaluate whether the building complies with the Americans with Disabilities Act and meets the tenant's Internet and wireless needs. The Act may require modifications to entrances, hallways, lavatories, lobbies, etc. to accommodate people with disabilities. Tenants will want the landlord to bear or share the cost of any environmental assessment resulting from underground oil tanks, asbestos or air quality problems. An employee can be liable for the work environment of its employees, and any remediation can be disruptive of the tenant's business.

### 7. Factor in Negotiating Time.

There are many other issues to be raised in a commercial lease depending on the property and the need for leasehold improvements. It is helpful to have sufficient time to address all of the issues before signing. If the parties are unrealistic about the time needed to negotiate the lease, significant issues will be missed and surprises will result. Given the long-term nature of commercial leases, it makes sense to take the time to do it right.

#### Key Tax Figures for 2008

##### Income Taxes

Standard Mileage Rate	50.5¢/mile	
Maximum Exclusion to a 401(k) Plan		\$15,500
Catch Up Contributions for taxpayers over age 49 Roth IRAs Roth 401(k)s and Traditional 401(k)		\$5,000
Highly Compensated Employee Definition for 401(k) plans		\$105,000
High Cost per diem Travel Rate		\$237
Low Cost per diem Travel Rate		\$152
Maximum Section 179 Expense Deduction		\$250,000
Top Income Tax Rate Federal		35%
Connecticut		6%
AMT Exemption Married Filing Jointly		\$45,000
Single		\$33,750
AMT Tax Rate : 25% to \$175,000; 28% thereafter		

##### Estate & Gift Taxes

Gift Tax Exclusion	12,000/person	
Estate Tax Exemption	\$2,000,000	
Top Estate/Gift Tax Rate Federal		45%
Connecticut		16%

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