

Commercial Lease Checklist for Small Businesses

This Checklist is a tool created for small businesses to use when entering into a commercial lease as a tenant. This tool is designed to provide key, easy-to-understand information about common terms or sections of a typical commercial lease.

The KEY to our Checklist:

For each lease section or lease term we will have:

- Definition of key terms. To the extent legal terms are used, we have provided definitions of such terms.
- What to expect in a lease prepared by the landlord. Please be aware that any lease prepared by or provided by a landlord may "favor" the landlord and the landlord's rights and interests, and "dis-favor" the tenant and the tenant's rights and interests. While this is not always the case, it is important to review the lease in its entirety to make sure that it does not overly burden or disadvantage the tenant as compared to the landlord.
- What terms and conditions specified in the lease can the tenant (you) negotiate? You may ask the landlord to revise certain terms and conditions in the lease to reflect agreed-upon deal terms or issues that are of importance to you as the tenant.
- Things to consider and do. This is the checklist of things to consider and do in connection with your review and negotiation of the lease with the landlord.

Please recognize:

- This checklist is simply a guide; it does not contain or should not be relied upon as legal advice.
- Laws and rules can change, and this checklist may become out-of-date.
- This checklist is intended to assist you in providing you explanations of common terms in a commercial lease and help you to identify potential legal questions and problems. If you have a potential problem which you are unsure how to resolve, or have questions on matters not covered in this checklist or that are specific to your situation, we recommend that you consult an attorney. Wayfind may be able to help you with finding an attorney. If your organization needs an attorney, please contact Wayfind at contact@wayfindlegal.org or 1-866-288-9695, to see if your organization is eligible for pro bono legal services.

Table of Contents

	Page
Letter of Intent	3
Condition of the Premises	3
The "Effective Date" vs. the "Commencement Date" vs. the "Rent Commencement Date"	5
Tenant Alterations	6
Tenant Improvement Allowance	7
Subordination of the Lease	9
Assignment/Subletting	10
Tenant "Defaults"	12
Lease Types	13
Taxes and Operating Expenses	14
Landlord's Services	16
Quiet Enjoyment	18
Estoppel Certificate	19
Financial Statements	19
Brokers	20
Authority Representation	21
Parking	21
Options	22
Notice of Construction from Landlord	24

Letter of Intent

■ What is a "Letter of Intent"?

A letter of intent (an "LOI") is a document that includes the important terms of the lease/leasing transaction and consolidates those terms in writing prior to the preparation of the lease. The LOI is designed to ensure the parties are on the same page about major deal points early in the leasing process. LOIs are an important part of the leasing process, because a well written letter of intent will make the overall lease negotiation smoother and more efficient.

An LOI will generally include all material business terms, such as the rent (base rent and expenses), what incentives, like tenant improvement allowances and free rent (aka rent abatement), will be included in the deal, and similar terms that each party wants to see in the final lease. If your business has any specific leasing requirements such as parking, specific sign requirements, particular operating hours, outdoor seating requirements, you will want to make sure those are included in the LOI.

LOIs are very important from a legal standpoint because they are the basis of the lease, but they don't generally include many specific legal terms. Often "legal" terms, like assignment and subletting, insurance and similar provisions, will be included in the LOI to ensure the parties have time to prepare to meet the obligations and when those terms are material to the business operations of the tenant.

Though LOIs generally do not include many specific "legal terms" and are generally non-binding, it is still often beneficial to have a lawyer experienced in commercial leasing review both the LOI and the lease (both during the lease negotiation process and certainly prior to signing the lease) to make sure both are well-drafted.

Condition of the Premises

■ What is "Condition of the Premises"?

The "Condition of the Premises" portion of the lease specifies the condition that the property is to be in when the landlord delivers it to the tenant for tenant's exclusive use and occupancy. When the lease says that the condition of the premises is "as is" that means that the landlord does not have to do anything to prepare the space for the tenant and the tenant is taking it from the landlord in the condition that the landlord delivers it.

■ What to expect in a lease prepared by the landlord:

Most leases provide that the tenant takes the premises "as is".

This means that the landlord is not required to do anything to the premises before delivering it to the tenant.

This also means that the landlord is not obligated to make any representations or warranties to the tenant regarding the condition of (i) the premises, (ii) the building in which the premises are located, or (iii) the land on which the building is located.

What can the tenant attempt to negotiate in the lease?

Tenant may ask landlord to:

1. Deliver the premises to tenant in "broom clean" condition, and with all heating, ventilation, air conditioning, mechanical, electrical and plumbing equipment in good working order and condition.
2. Have some improvements made or have the premises cleaned, at the Landlord's expense.
3. Request that the landlord provide tenant with a "Tenant Improvement Allowance" to enable tenant to build-out the premises in the manner most suitable to tenant. See the section below on Tenant Improvements.
4. Make representations and warranties to tenant in the lease that (a) the premises and the building in which the premises are located are in compliance with all applicable laws, (b) that all heating, ventilation, air conditioning, mechanical, electrical and plumbing equipment are in good working order and condition.
5. If it is the tenant's obligation to maintain any or all of the heating, ventilation, air conditioning, mechanical, electrical and plumbing equipment within the premises, that landlord provide a "warranty" on such items for a limited period of time AFTER the tenant has taken possession of the premises. Based on the warranty, if any of the items were to fail or require maintenance or repair within the warranty period (e.g., 2 - 6 months post-commencement date), then landlord would perform such maintenance or repairs at landlord's sole cost and expense.

Things to consider and do:

- Visually inspect the premises to be occupied and, if applicable, the building in which the premises is located. It is the tenant's responsibility to conduct its own due diligence with respect to the premises, including both the building and the property.
- Obtain a copy of the certificate of occupancy for the premises, if available, or, at a minimum, for the building; and

- Order a professional inspection of the premises to be performed by a qualified/knowledgeable party.
- Provide access to the premises for any employees of the tenant who may have expertise with respect to the tenant's operational needs in areas such as communications, electrical capacity and computer systems.
- Have the tenant's contractor (if applicable) inspect premises and review applicable building department records to determine how much work will need to be done to the premises, and the building, in order for the tenant to obtain the necessary approvals for its improvements.

The "Effective Date" vs. the "Commencement Date" vs. the "Rent Commencement Date"

■ What is the "Effective Date"?

The Effective Date is typically the date that the lease is signed by both parties and delivered to each party and the date upon which there is a "contract" between landlord and tenant. In other words, even though the "Commencement Date" and "Rent Commencement Dates" may be much further into the future, the parties may sign the lease to "bind" each other to a contract in order to preserve rights to the premises (for the tenant) and rights to require that the tenant occupy the premises and begin paying rent on the Rent Commencement Date (for the landlord).

■ What is the "Commencement Date"?

The Commencement Date is typically the date that the premises is delivered to the tenant with landlord's work, if any, is substantially completed, however this date may also be conditioned on the date tenant substantially completes its work in the premises or the date when tenant has obtained certain approvals, permits and/or licenses, such as liquor licenses, construction permits or a conditional use permit. This date may be the same date that the tenant starts paying rent. It may, however, diverge from the "Rent Commencement Date" if the landlord has offered the tenant any "free-rent" period or "rent abatement" for a limited period of time after the tenant has taken possession of the premises.

■ What is the "Rent Commencement Date"?

If the landlord has not/does not require the tenant to start paying rent on the "Commencement Date", then the Rent Commencement Date will be the date that is typically either (i) a specified date (e.g., after the "free-rent" or "rent abatement" period), or (ii) the date that the tenant commences business at the premises.

■ What to expect in a lease prepared by the landlord:

Depending on the circumstances and on any improvements that either the tenant or the landlord intend to make to the premises, the tenant may seek a "free rent" or "rent abatement" period up-front that will provide time to the tenant/landlord to make such improvements prior to the obligation to pay rent. As an additional consideration, it is typical that a landlord will be required to make the "landlord improvements" to the premises BEFORE the Commencement Date.

■ What can the tenant negotiate?

The tenant may negotiate a "free rent" or "rent abatement" period, particularly in situations where either the tenant or the landlord plans to make improvements to the premises prior to the Commencement Date. In such circumstances, it is typical for the landlord to complete its "landlord improvements" BEFORE the Commencement Date. If the parties agree on a "free-rent" or "rent abatement" period, the "Rent Commencement Date" will be the date when the tenant begins paying rent. The difference between "Commencement Date" and the "Rent Commencement Date" will be the "free rent" or "rent abatement" period.

■ Things to consider and do:

- Be sure to understand when your Rent Commencement Date is, so you know what date your first rent payment is due.
- Have your Rent Commencement Date align with the date that you're ready to commence paying rent. As discussed above, consider if you need time to complete tenant improvements AFTER the landlord has delivered the premises to you with all "landlord improvements" completed and ready for the tenant's occupancy.

Tenant Alterations

■ What are "Tenant Alterations"?

This is the part of the lease that talks about what changes the tenant can make to the premises during the term of the lease.

■ What to expect in a lease prepared by the landlord:

The provisions in the lease that address the tenant's rights to make alterations to the premises can be strict and limiting for the tenant and favorable to the landlord. While it is appropriate for the landlord to have sole and absolute discretion over alterations to the building structure (e.g., the roof, load-bearing walls and foundation) and building systems (e.g., the heating, ventilation, air conditioning and mechanical, electrical and plumbing systems), the landlord's approval of all other alterations should be limited to its reasonable discretion.

■ What can the tenant negotiate?

The landlord should be required to respond to requests for alterations and approval of plans within specified time periods and to state reasons for the rejection of any plans presented to landlord for review and approval. Following such rejection, the tenant should have the right to re-submit revised plans and commence the process again. The tenant may also want to negotiate for the right to construct certain "cosmetic alterations" which do not affect the building structure or building systems and below a certain cost threshold without first obtaining landlord's consent (e.g., painting or adding-in an internal door below an aggregate total cost of \$10,000).

The landlord will want the tenant to assume responsibility for the preparation of plans and the construction of the alterations done by tenant. This responsibility includes ensuring that the plans and alterations comply with legal requirements, including, for example, fire and building codes, as well as ensuring that all required permits and certificates of occupancy are issued with respect to the tenant's work.

■ Things to consider and do:

- Make a list of the changes you will want to do to the space to make it work for your business.

For example:

- Do you want to build or move walls?
- Does the ventilation system need to be moved or changed for your kitchen?
- Will you need to build any additions or changes to the space?
- Be sure to get accurate plans of the premises from the landlord (with utility locations) in order to plan out and budget for your alterations. You will also need to give these plans to your consultants, contractors and architects as well.

Tenant Improvement Allowance

■ What is a "Tenant Improvement Allowance"?

A Tenant Improvement Allowance is money given from a landlord to a tenant to help pay for the improvements to the tenant's premises, or sometimes other expenses associated with moving into a new space. The specific amount of this allowance is negotiated into the lease, along with a detailed outline of what it can be spent on.

- A Tenant Improvement Allowance is a number generally referred to in dollars per square foot. For example, your lease may say something like:
 - Tenant's actual "Tenant Improvement Costs" (i) the sum of \$1,000,000.00 (based on \$50.00 per rentable square foot of the Premises), to be used toward Building Improvement Costs with respect to the Premises.
 - Because a Tenant Improvement Allowance typically does not have to be repaid (it is a function of the other deal terms in a lease such as rental rate and term length), it can be a major incentive for a tenant to sign a lease. If you are planning to do renovations to your new space, securing a TI allowance is an important negotiating point

What the Tenant Improvement Allowance covers:

Landlords will usually allow the Tenant Improvement Allowance to be spent on the hard costs and soft costs of the project.

Hard costs are the result of improvements that will be left behind once the tenant leaves, which could be a direct benefit to the landlord.

While soft costs may not be as directly beneficial to the landlord, they are a necessary part of the build-out process (such as a construction management fee). Whereas hard costs are generally accepted, soft costs typically need to be individually defined within the Tenant Improvement section of the lease.

Some examples of hard costs are:

- Framing, walls
- HVAC, electric, plumbing
- Doors, windows
- Paint and carpet
- Kitchen exhaust

Why the Tenant Improvement Allowance does not cover everything:

There are some caveats to Tenant Improvement Allowances that tenant should consider. A common misunderstanding is that the Tenant Improvement Allowance is intended to cover all the costs associated with a space. While negotiating a sizable allowance can be beneficial, you can be almost certain that it will not cover absolutely everything. The tenant must factor in costs like data cabling, furniture and decorations, the landlord is only concerned with the improvements that will increase the value of the building. Unlike furniture, improvements like new walls and doors will leave lasting value on the building that the landlord will potentially benefit from down the road. Because of this, most landlords restrict what the Tenant Improvement Allowance can be used for.

Things to consider and do:

- If the landlord provides the tenant with a Tenant Improvement Allowance, this is often factored in to the rental rate paid by the tenant. In other words, if the tenant is not asking for any Tenant Improvement Allowance, the rental rate may be \$12.00 per rsf, but if the tenant requests a Tenant Improvement Allowance, the landlord may ask that tenant pay a higher rental rate, e.g. \$14.50 per rsf.

Subordination of the Lease

What does "Subordination of the Lease" mean?

"Subordination" means "to be subject to." Typically, the lease is automatically subordinate to any mortgage which may be recorded against the entirety of the building in which the premises is located, by virtue of the subordination clause contained in the lease.

What to expect in a lease prepared by the landlord:

Typically, the landlord, and its prospective mortgage lenders, will require that the lease contain an unconditional subordination provision, which provides that the lease is subject and subordinate to any mortgages then or thereafter encumbering the property. This means that the bank's or mortgage lender's rights to the Building are superior to the tenant's leasehold rights in the premises.

For example, if the landlord does not pay its mortgage payments to the bank and the bank decides to foreclose on the property, the bank will want to have the right to either honor the lease with the tenant or not. This is because the bank might decide to sell the property to another buyer who may not want the tenant in the building, and they want to be able to sell the property. That means the bank can evict the tenant when they take over the ownership rights of the Building.

What can the tenant negotiate?

Unless accompanied by a non-disturbance provision, the unconditional subordination provision permits the foreclosing bank or mortgage lender to eject (the foreclosure equivalent of eviction, only better for the mortgage lender) the tenant, even if its tenant is not in default of its obligations under the lease. The tenant can protect itself from such a harsh result by having the lease provide that subordination of the lease and the tenant's rights thereunder is conditioned upon the tenant's nondisturbance right, or upon the mortgage lender's delivery of an acceptable "Subordination, Non-disturbance and Attornment Agreement" (an "SNDA"). By obtaining nondisturbance rights, either in the lease or in a separately negotiated SNDA, the tenant will ensure that, so long as it is not in default of the terms of its lease, it will not be ejected or evicted.

■ Things to consider and do:

- Check the lease to see if there is a subordination provision and make sure you understand the subordination, so you are not surprised if the event happens that changes your rights.

Assignment/Subletting

■ What is "assignment and subletting"?

In an assignment, the tenant "assigns" its rights under the lease to someone else. In other words, the tenant steps-out of the picture and the landlord, in essence, allows a "new" tenant to step-in to the shoes of the initial tenant. This is similar to replacing the initial tenant under the lease with a "new" tenant under the same lease.

In a "sublease", the tenant finds someone else to "sublease" the premises (or portion of the premises) directly from the tenant for the remainder of the term. In the case of a sublease, the initial tenant remains under contract with the landlord pursuant to the terms in the initial lease for the remainder of the term of such lease, but the "subtenant" steps-in and performs the obligations of the initial tenant pursuant to the terms of the lease (as may be adjusted or modified pursuant to the terms of the sublease agreement negotiated between the initial tenant and the subtenant).

■ What to expect in a lease prepared by the landlord:

The landlord will want as much control as possible over a tenant's ability to assign/sublet the premises.

The provisions in the lease that address assignment and/or subletting can change depending on the length of the lease term and the size of the premises. To the extent that a tenant enters into a lease for a longer term or for a larger space than desired, the tenant will want to have flexibility to assign and/or sublet its space.

The landlord's desire to control the premises will increase to the extent that the rent provided in the lease is below market and/or if the other provisions in the lease are tenant-favorable. To this end, the landlord's preferred language will not allow assignment and subletting without landlord's consent and provide that such consent may be withheld in landlord's sole and absolute discretion. In some instances, a landlord-oriented lease will permit the landlord to terminate the lease or recapture the portion of the premises which is proposed to be subleased, upon tenant's request to landlord that it approve a proposed assignment sublease. Depending on how it is drafted, this right to terminate the lease (also known as a "recapture right") can be particularly hard for the tenant if the "recapture right" allows the landlord to take back the entire premises even if the tenant wishes to sublease only a portion of the premises.

Additionally, if the tenant is making a profit from the sublease, the landlord will likely want all or a portion of that profit. The landlord will want the lease to provide that the landlord is entitled to some portion, if not all, of the amount by which the assignment proceeds/sublease rent exceed the rent payable by the tenant pursuant to its lease. The tenant will typically permit the landlord to retain fifty to seventy-five percent of the excess assignment/sublease proceeds. This is usually a fair compromise from most landlords' perspectives as well.

What can the tenant negotiate?

The ideal "assignment/sublet" provision from a tenant's standpoint is one that provides the tenant with the right to assign the lease or sublet the premises without the landlord's consent. This is not typical and should not be expected.

At a minimum, a tenant should request a right to assign and/or sublet subject to landlord's consent, which will not be unreasonably withheld, conditioned or delayed.

An event more favorable provision for the tenant is one that lists the factors to be considered by a landlord in order for the landlord's decision to be considered reasonable. The provision that lists those factors, which, if satisfied, obligate the landlord to provide consent, is even more favorable for the tenant. Ideally, the tenant will want the consent provision to list the criteria which, if satisfied, allows the tenant to go forward with the assignment without the landlord's consent to the proposed assignment/sublease. These factors typically include: i) creditworthiness of the prospective assignee/sublessee, although this may be less of a factor depending on the significance of the creditworthiness of the original tenant; ii) the proposed use of the premises by the prospective assignee/sublessee; and iii) the character/reputation of the prospective assignee/sublessee.

In addition, in some cases tenants may want the right to end the lease, if the landlord's recapture right allows the landlord to take-back the premises upon an assignment/sublet.

Things to consider:

- How likely is it that you might want to assign or sublet the property?
- Is the space too big and you might want to sublet part of the space and make some money of it?

Tenant "Defaults"

■ What is a tenant "Default"?

A tenant "Default" occurs is when the tenant breaches any of the specified terms or conditions in the lease or otherwise does not satisfy the obligations specified in the lease.

When the tenant has committed a Default, typically they will want a limited period of time to fix or "cure" the Default. For example, if the tenant fails to pay rent on the day that it is due, depending on how the lease is drafted, the tenant may have committed a Default. If the "cure" provision is reasonably drafted, the tenant may have a two (2) to five (5) day right to "cure" the Default by delivering the rent payment to the landlord within the "cure" period window. If the tenant "cures" the Default within the "cure" period window, the landlord will not have the right to take enforcement action against the tenant (which may include termination of the lease and evicting the tenant). If the tenant does NOT "cure" the Default within the "cure" period window, the landlord may initiate enforcement action against the tenant.

■ What to expect in a lease prepared by the landlord:

In a landlord-produced lease, the landlord will not typically provide tenant with a "cure" period to cure tenant Defaults. In other words, if the tenant fails to make a required payment by the due-date, the tenant will be in Default. Additionally, landlords typically do not require themselves to deliver notice of the Default to the tenant and then allow the tenant to cure such Default within a post-notice "cure" period.

■ What can the tenant negotiate?

The tenant will want to make sure that the following are included in the lease:

1. Grace periods - time periods during which tenant is permitted to (i) be in technical breach of the lease without being in Default (e.g., the Default will not commence until the day that is three (3) days after an indicated payment is due to be received by the landlord).
2. Cure period - time periods allowing the tenant to "cure" a Default before the landlord has the right to take enforcement action against the tenant. Typical cure periods are (a) three (3) to seven (7) days for payment Defaults, and (b) thirty (30) days (following notice from landlord) for all other non-monetary Defaults.

In addition, the tenant may want extra time to make payments if they are making efforts to pay the rent but are not able to make on-time payments. The tenant may request a provision that allows for any "non-monetary" "cure" periods to be extended for a reasonable additional time in situations where the Default cannot

be cured within the stated time period, and the tenant has commenced the cure within that time period and has continued to pursue the cure.

Landlords are not likely to object to such an extension, but may want to impose an outside date (sometimes called a "drop dead" date) by which the tenant's delays, no matter what the reason, can no longer be excused. The parties often settle on dates between sixty (60) and one hundred twenty (120) additional days for the drop-dead date.

The tenant should also request that simply vacating the premises, by itself, does not result in a Default which would trigger landlord's right to terminate the lease or pursue enforcement measures against the tenant.

The landlord should be agreeable to such a request, as long as the lease does not contemplate that the tenant is using the premises for retail purposes. The landlord may want a cross-default provision pursuant to which a default under the lease being negotiated results in a default in any other leases between the tenant and landlord and vice versa. Most tenants will try to avoid having these provisions in their lease, but may not care if they haven't entered into and don't anticipate entering into any other leases with this landlord.

Things to consider and do:

- This is a very important part of the lease to understand. Make sure you understand when you will be in "Default" and what happens when you are in "default" of the lease.

Lease Types

"Gross Lease" vs. "Net Lease"

A "Net Lease" is a lease in which the tenant is responsible for paying both a base rent and its share of building expenses such that the operating expense payments made by all of the tenants cover all operating, insurance, tax and other costs associated with running the building. In a Net Lease, each tenant makes payments based on such tenant's proportionate share of the square footage occupied within the building. You may see reference to a triple net lease or "NNN" lease, which means that tenant will pay its proportionate share of all real estate taxes, building insurances and operating/maintenance expenses (the three "nets") for the premises, in addition to its rent obligations under the lease.

A "Gross Lease" can be broadly defined as a lease in which the tenant pays one base rent amount and the landlord is responsible for paying all building related expenses. In a "modified" Gross Lease, a base year is referenced (usually the year in which the term commences, or the following year if the lease starts late in the year) and provides that after the first lease year under the lease, the tenant is

responsible for its proportionate share of any increases over the expenses incurred by landlord during the base year.

In lease negotiations, it is critical that the tenant identify the type of lease the landlord is using. If the proposed lease is a Gross Lease, the tenant should try to obtain from the landlord a breakdown of the rent that shows the portion of the rent that is allocated to operating expenses. The tenant should also request information on the expenses that were used to calculate the base year figures. If the lease is a Net Lease, the tenant should request from the landlord an estimate of the building's aggregate operating expenses and the portion that the tenant will be paying per its proportionate share.

Percentage Rent

"Percentage rent" is typically reserved for retail tenants and is used by landlords to share in the success of their retail tenants. Percentage rent requires the tenant to pay the landlord, in addition to minimum rent, a percentage of its sales above a certain breakpoint.

In leases that include percentage rent, the tenant will pay both minimum rent and, once its sales pass the breakpoint, percentage rent. The breakpoint can be determined based on either monthly or annual gross sales figures.

The definition of gross sales is also key to any percentage rent lease because it defines what items will be included for purposes of calculating percentage rent. The tenant's goals in negotiating the gross rent language are to keep the calculation of gross sales as low as possible and limit the definition so that the tenant does not pay percentage rent on sales that are not attributable to the leased premises or items for which the tenant did not receive compensation.

The advantage for the tenant is that a percentage rent lease will generally have a lower minimum rent than a standard lease. The disadvantage for the tenant is that it must carefully negotiate the percentage rent provision to ensure that it pays only a fair amount in percentage rent.

Operating Expenses

What are Operating Expenses?

Operating Expenses are costs associated with maintaining and operating the commercial property or building. As discussed above, operating expenses may be a component of the gross rent in a Gross Lease or be in addition to the base rent in a net lease. Operating Expense provisions are called "pass through provisions" because the amount the landlord has to pay is passed through directly to the tenants.

What Do Operating Expenses Include?

Property Taxes: The government authority is going to charge the property owner/landlord property real estate taxes which are, in-turn, passed along to the tenants. The term "real estate taxes" should be defined to exclude income taxes, franchise taxes, and personal property taxes due and payable by the landlord. In other words, those things should NOT be passed-on to tenant. Most leases will provide for these exclusions, or, if not, most landlords will agree to revise the lease accordingly

Insurance: All landlords need insurance on the building as required by their respective lenders. These costs are also passed along to the tenants.

Common Area Maintenance Charges (CAM): Common Area Maintenance Charges include items such as maintenance and repair, administrative fees, utilities, elevators, lobbies, landscaping, parking lot maintenance, management salaries, etc. What is included varies by property type and building owner.

What is Not Included in Operating Expenses?

Operating Expense Exclusions are highly negotiated in leases. The short answer is that excluded items typically include capital expenses, administrative expenses (overhead), debt service, advertising and marketing costs, leasing commissions, salaries and benefits of personnel above the grade of property manager (unless equitable allocated), costs arising from gross negligence or willful misconduct of landlord or its agents, costs to comply with laws to remedy a condition existing prior to the commencement date (including removal of hazardous materials), construction costs for improvements of other tenant spaces, costs of disputes between the landlord and other tenants, tenant improvement allowances or capital reserves for future repairs, cost of services provided by landlord to other tenants, but which are not provided to the tenant under the lease, and legal fees incurred in connection with the negotiation of new leases or enforcing terms of an existing lease, as well as in-house legal and accounting fees.

Audit Rights

It is very important for a tenant to consider whether it should negotiate for the right to audit the landlord's books and records with respect to the operating expenses that are being passed-through to the tenant. The right to audit the landlord may be critical for the tenant to actually enforce the operating expense exclusions. Without an audit right, how can the tenant understand what the landlord is passing through to the tenant and that the landlord is not including excluded item. In most audit provisions, the tenant will have a deadline after receiving an expense statement from landlord to notify landlord that tenant would like to employ an auditor (typically a certified public accountant) to audit the landlord's books, and if so elected, tenant and tenant's auditor will have a deadline to complete such audit. Also, if it is determined that that tenant was overcharged by a certain percentage

(i.e., 3-5%) over actual charges, the landlord will pay tenant's audit fees as well. Because landlords don't give away their financial information lightly, audit provisions are also often heavily negotiated.

Base Year Concept

Many leases provide that the tenant will pay its proportionate share of increases in taxes and operating expenses over a designated "base year" attributable to the property and building where the premises are located. In other words, rather than paying 100% of the taxes and operating expenses for any year during the term of the lease, in a "base year" concept, the tenant pays the "difference" in the amount of taxes and expenses paid in the "base year" and those incurred in each year thereafter. In other words, if there is a 2018 "base year", then the landlord adds-up the total amount of the taxes paid and operating expenses incurred and the tenant will pay the difference in each year thereafter OVER the amount incurred in the base year.

What to expect in a lease prepared by the landlord:

The landlord-oriented form of lease will exclude few, if any, expense items from that general description of "operating expenses" stated above.

The landlord may not have the flexibility to provide the tenant with its requested exclusions, and generally, will only be able to grant those exclusions that are consistent with (i) its existing accounting for the building operating expenses and (ii) the other leases in the building. The exclusions from operating expenses can be one of the most time-consuming and hotly contested areas of lease negotiations, but, if satisfactorily resolved, can result in the greatest savings to the tenant and, by avoiding potential disputes, to the landlord as well.

Things to consider and do:

- Make sure your budget to pay for the property includes the taxes and other operating expenses that the lease requires the tenant to pay.

Landlord's Services

What are "landlord's services"?

This is the part of the lease that identifies responsibilities and services that the landlord is going to provide to the tenant.

What to expect in a lease prepared by the landlord:

Most leases will or should address the services that the landlord is required to deliver/make available to the tenant's premises. These services typically include heating, ventilating, and air-conditioning, elevator (passenger and freight),

electricity, cleaning, running water, and sewerage. Sometimes janitorial service is also included as a "landlord service". The extent and nature of the services vary widely depending on the type of property being leased and the tenant's needs.

What can the tenant negotiate?

The tenant will want the lease to specify the days and times when these services will be provided at no additional cost to the tenant, as well as the rates and times for "overtime" services.

The tenant will also want the lease to specify the quantities in which the landlord's services will be provided to the premises. For example, the tenant will want the lease to specify at which outdoor temperatures the landlord will make air-conditioning and heating available to the premises. The landlord will want to avoid specificity here, preferring, instead, language requiring that it deliver services at levels that are reasonably necessary for tenant to operate its business. This is not an unreasonable compromise since it avoids potential disputes over services which are delivered in a manner that permits the tenant to operate its business, even though those services are not delivered according to the specifications set forth in the lease.

The tenant may also request the right to cure landlord's breach of its obligations to provide these services and to set-off against rent, the costs incurred by the tenant. The tenant may also request some amount of interest in connection with the payment of any money by tenant which payments are not necessitated by tenant's cure of landlord's breach, to the extent that the landlord has not reimbursed tenant for those costs.

The tenant may also request an abatement of rent (e.g., that the payment of rent would cease) if an interruption persists for a period of days (e.g., 3 - 5 consecutive business days) and is failed to be cured/restored.

Lastly, a tenant may want a termination right (right to terminate/end the lease) if the interruption of any services cause the premises to be untenable for a period in excess of a designated period of time. However, the tenant will probably face very stiff opposition from the landlord to a requested right to cure, set-off, and/or terminate.

Things to consider and do:

- Be specific about what you want and expect from the landlord and include those expectations in the lease (see below).
- Consider the heating, air conditioning and ventilation needs of your business. For example, if you have a restaurant business, check building code requirements and be very clear about the kitchen ventilation requirements you need and that all ventilation is in compliance with local building codes.

- Understand if the tenant is going to be required to sign-up with each utility provider directly and pay utilities directly, or if landlord will continue to do so and bill the tenant every month for such utilities as part of the Building's "operating expenses".
- Know that the lease should provide the ability to reduce or not pay rent if the landlord does not provide the services it is supposed to. Understand what the lease says about your right to withhold rent.

Quiet Enjoyment

What is "quiet enjoyment"?

Quiet enjoyment is the part of the of the lease that says the tenant can use the premises without interference from the landlord or others for the use described in the lease.

For a tenant, the covenant of quiet enjoyment is essential. The quiet enjoyment provision protects a tenant's right to occupy and use the premises during the term free from interference by the landlord or any third party claiming through the landlord. Landlord will want to ensure that the quiet enjoyment provision is subject to the tenant complying with all of the terms and conditions of the lease. Additionally, if a landlord insists that the covenant of quiet enjoyment be subject to a mortgagee's rights, the tenant should demand a subordination, attornment and non-disturbance agreement. See section above on "Subordination".

What to expect in a lease prepared by the landlord:

Landlords will often allow the tenant to have "quiet enjoyment" of the premises so long as the tenant is meeting all its responsibilities stated in the lease. In other words, if the tenant defaults on its obligations under the lease, the landlord may "cut-off" the provision of services to the tenant which could materially impair the tenant's right to operate from the premises during any such period.

What can the Tenant negotiate?

The tenant should push-back against the landlord exercising any "self-help" rights or interfering with tenant's right of quiet enjoyment of the premises during the term of the lease, subject to landlord's enforcement rights against tenant pursuant to a tenant default AFTER any applicable notice and cure periods.

Things to consider and do:

- Make sure there is a quiet enjoyment provision that allows the tenant to occupy and use the premises during the term free from interference by the landlord or any third party claiming through the landlord.

Estoppel Certificate

■ What is an "Estoppel Certificate"?

An Estoppel Certificate is a document that the landlord periodically asks the tenant to complete and deliver which provides a snapshot to the landlord and other parties regarding the status of the lease and on which the landlord and such other parties can rely with respect to the status of the lease.

■ What to expect in a lease prepared by the landlord:

Landlords often include a requirement that the tenant deliver an Estoppel Certificate upon the landlord's request. Tenants will want to make sure that the Estoppel Certificate is limited to factual matters, and that the lease provides the tenant with adequate time to respond to the landlord's request for an Estoppel Certificate.

■ What can the tenant negotiate?

On larger leases, a tenant may consider requiring the landlord to provide an Estoppel Certificate to the tenant upon which the tenant can rely and/or use in connection with obtaining a loan from a lender. The form of the tenant's Estoppel Certificate should be attached to the lease as an exhibit, and the parties should consider what remedies will be available if a party fails to timely deliver an Estoppel Certificate.

■ Things to consider and do:

- Make sure that the tenant has at least ten (10) business days in order to review and respond to the Estoppel Certificate.
- Request that the landlord have a mirror-image requirement to provide some sort of Estoppel Certificate to the tenant if the tenant needs it in connection with the tenant's banking relationships or obtaining financing.

Financial Statements

■ What are "Financial Statements" in the context of the lease?

This is the part of the lease where the landlord requires the tenant to provide financial information about the tenant's business. The landlord wants to know how the tenant's business is doing financially so they know whether the business is doing well and likely to pay their rent on time.

■ What to expect in a lease prepared by the landlord:

Landlords often include a provision in the lease requiring the tenant to deliver its financial statements to the landlord from time to time during the term, and/or in connection with a landlord financing or potential sale of the property.

■ What can the tenant negotiate?

Tenants should limit the requirement to include only financial information that the tenant currently maintains and should require that the landlord keep all financial information confidential. If the tenant's financial statements are publicly available, it should not be required to deliver them to the landlord.

■ Things to consider and do:

- What are the specific financial reports that the landlord is asking for and when do you need to submit them?
- Do you have an accountant who can help you create the financial statements or reports that the landlord is requiring?

Brokers

■ What are "brokers" in the context of the lease?

Brokers are the people who represent the landlord or the tenant in the real estate market. Many landlords use commercial brokers. Brokers get paid to help find tenants and negotiate the leases for the landlord.

Every lease should include a standard brokerage provision that identifies all brokers that are involved in the transaction (or represents that no brokers were involved). The provision should also state how the brokers will be paid and provide for a mutual indemnity in the event that either the landlord or the tenant breaches its representation related to brokers.

■ Things to consider and do:

- Make sure you know who the broker, landlord and property manager are and how to contact them.
- Make sure you know when it is appropriate to contact the broker and when it is appropriate to contact the landlord or property manager directly.
- It is wise to create a good working relationship with broker, landlord and property manager.

Authority Representation

■ What is "authority representation"?

The authority representation confirms the identity of the entity or individual entering into the lease, and provides assurance that the party giving the representation has the authority to enter into the lease and that the individual signing on behalf of each party has the authority to bind such party to the lease.

Often the authority representation can be found at the end of a lease in the "Miscellaneous" or "Additional Provisions" section. If a lease does not include this representation, or if the representation is only made by the tenant, the provision should be added or expanded to be mutual

■ Things to consider and do:

- Who is the right person or entity to sign the lease?
- This question is about what your corporate structure is. Do you have a corporation (nonprofit, limited-liability corporation, or other type corporate structure? The person signing the lease should have the authority to sign the lease for the corporate entity. If you have not thought about what type of corporate structure or legal entity you should have, that question should be resolved before signing the lease. We suggest you talk to Wayfind or another attorney if you need to figure out what type of corporate entity your business should be.

Parking

■ What is "parking" in the context of the lease?

This is the part of the lease that describes the parking spaces that come with the property.

■ What can the tenant negotiate?

Ideally, the tenant will want to ensure that it has parking rights that include a sufficient number of spaces for its employees, clients and visitors. While landlords may accommodate the tenant's requested number of parking spaces, the tenant should also be sure that its parking spaces are leased, rather than licensed, since, generally, a license is a right that is revocable by the landlord.

If parking rights are important to the tenant's business and no alternative parking arrangements are available in proximity to the leased premises in the event the tenant loses its parking privileges, e.g., as a result of condemnation or casualty, the tenant may want to make the loss of parking rights an event that triggers tenant's termination rights. Most leases will provide that the tenant has termination

rights if some portion of the premises or the building is destroyed or condemned. The landlord can avoid having to grant such termination rights to the tenant by providing, if possible, alternative parking arrangements for the tenant within reasonable proximity to the premises.

■ Things to consider and do:

- Does the building have parking?
- Does my business need parking to be successful?
- What are the parking options around the building?
- Do my employees need parking?

Options

■ Expansion

The lease may provide that the tenant has various options to expand its space including:

1. Right of First Refusal.

(a) General Concept. After the landlord receives a bona fide offer to lease specified space within the building from a third-party, the tenant has the right, to be exercised within a fixed period of time, to lease such space upon the same terms set forth in the third-party offer.

(b) Benefits. The benefits to the tenant include: (i) the option provides the tenant with the preemptive right to specified expansion space; (ii) there is no need to take expansion space until last minute - when landlord is about to lease it to a third party; (iii) the option compels the landlord go to the market and solicit and negotiate alternatives.

(c) Issues.

(i) The tenant has no preemptive right to lease the expansion space until landlord is in some state of negotiations for the leasing of such space to a third-party.

(ii) The tenant needs to define what constitutes the "offer" from a third-party that triggers the right of first refusal.

(iii) Lastly, following the tenant's rejection of such third-party offer, if the third-party offer changes in any material respect, it should be determined whether tenant will again have a right of first refusal with respect to the revised third-party offer or whether it's a one-time right.

2. Right of First Offer.

(a) General Concept. When specified space becomes available in the building, landlord must first entertain an offer for such space with tenant and negotiate such offer in good faith before negotiating with third-parties.

(b) Benefits. The benefits to tenant include: the tenant has the exclusive right to negotiate for the space sooner than it would have under a right of first refusal.

(c) Issues.

(i) It should be determined how far negotiations will go before landlord is allowed to negotiate with third-parties for the space.

(ii) Whether, following unsuccessful negotiations, the tenant will be entitled to match third-party offers or whether it's a one-shot deal.

3. Extension and Renewal Option.

(a) Distinctions. An option to renew creates a new leasehold estate and effectively surrenders the original lease. An option to extend is a continuation of the existing leasehold estate.

(b) Benefits. Rather than locking the tenant into a long-term lease, an alternative is to negotiate a shorter term with a renewal or extension option.

(c) Issues.

(i) How many extension periods are being granted? What is the duration of each extension period? Landlords generally prefer to limit both.

(ii) When must tenant's notice to landlord to extend be given? Landlords prefer that notice not be sent too late in the term because landlords will need sufficient time to market the space to new tenants if the existing tenant elects not to exercise. Conversely, landlords usually will not permit notice to be given too early in the term because they will want to make sure their tenant has performed under the lease without default for the longest practical period and many options to extend will require that rent be set based on the "market rent" then existing and most landlords would prefer that the same be established as close to the extension period commencement date as possible.

(iii) What will the rent be and/or how will rent be determined? Common methods used by landlords and tenants to determine the rent during the extension term include (1) tying it to the consumer price index, (2) setting it by appraisal or arbitration, or (3) raising the last month's rent by a certain percentage increase agreed upon by the parties.

(iv) Should the tenant be provided a right to rescind its option after the rent is determined?

Notice of Construction from Landlord

To avoid any "unforeseen" or "unexpected" construction that may commence after the lease commencement date, it may be worth asking landlord to insert language into the lease stating that (a) they do not anticipate commencing material construction or renovations within ____ months of the lease commencement date, (b) if any such construction or renovations impair the tenant's access to or use of the premises for tenant's intended business purpose for more than ____ days, then the rent payable by tenant will abate and, if such interruption lasts more than ____ months, then the tenant has the right to terminate the lease, and (c) landlord will deliver written notice to tenant at least thirty (30) days prior to commencing any such construction or renovations.