

Office Lease Negotiations for Tenants

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A Practice Note explaining the key provisions typically found in an office lease for a multi-tenant building with tenant-favorable negotiating tips and guidance. This Note provides tenants with advice on negotiating rent, rights and options, ongoing lease obligations, defaults and remedies, and calculation of expenses.

TENANT'S NEGOTIATED RIGHTS AND OPTIONS

The tenant's ability to negotiate certain rights and options can provide the tenant with considerable flexibility throughout the lease term. A tenant must always consider its business needs when negotiating its rights and options in the lease. A tenant with enough negotiating leverage can begin to negotiate rights and options during the letter of intent stage.

Tenant's rights may include any of the following:

- Build-out and alterations (see Build-Outs and Alterations).
- Permitted uses (see Permitted Uses).
- Landlord services (see Landlord's Services).
- Assignment and subletting (see Assignment and Subletting).

Tenant's options may include any of the following:

- Extension of the lease term (see Extension Option).
- Additional space in the building (see Additional Space Option).

- Purchase of the building (see Purchase Option).
- Termination of the lease (see Termination Option).

A tenant should be aware of any rights or options that are modified (or rescinded) if the tenant:

- Assigns its lease.
- Subleases all (or a portion) of the premises.
- Defaults (one or more times) during the lease term.

The tenant should put together a lease summary chart that outlines the tenant's critical notice dates for exercising its options (and any other time sensitive matters). For guidance on summarizing an office lease and a lease abstract template, see Practice Note, Guide to Summarizing an Office Lease ([3-503-9307](#)) and Standard Document, Summary Chart for an Office Lease (Long Form) ([9-503-0733](#)).

If the tenant plans to use the premises for other than "general office" use or the business is expected to expand dramatically during the lease term, the tenant should negotiate for the rights and options it anticipates needing and include these in the letter of intent.

BUILD-OUTS AND ALTERATIONS

Typically, the landlord constructs and finishes the premises to suit the basic needs of the tenant. The landlord and tenant usually negotiate the specific work to be undertaken in a work letter. Alterations to be performed later during the lease term generally require the review and consent of the landlord. Sometimes alteration provisions require that the tenant pay an oversight fee to the landlord or use general contractors approved by the landlord. The tenant should try to either:

- Negotiate the landlord fees out.
- Include in the lease a specified cost or cap for these landlord fees.

For more information on negotiating the build-out obligations of either the landlord or the tenant, see Practice Note, Key Considerations in Negotiating Commercial Lease Work Letters ([W-021-0983](#)). For sample work letter agreements, see Standard Document, Work Letter for Tenant Improvements (Landlord Build) (Commercial Lease) ([W-021-8368](#)) or Standard Document, Work Letter for Tenant Improvements (Tenant Build) (Commercial Lease) ([W-021-0725](#)).

LANDLORD'S SERVICES

Leases generally list the services provided by the landlord. Any services the tenant requires should be specified in the lease. The landlord typically provides services such as elevators, security, and general cleaning and maintenance services inside the premises and in the common areas of the building. A schedule outlining the frequency and type of cleaning and waste removal services should be attached to the lease (see Standard Document, Schedule of Cleaning Specifications for an Office Lease).

Many times, the cost for particular services provided by the landlord are a part of the rent. However, there may be particular services the landlord charges for independent of the rent (or charges for on an overtime basis only, such as HVAC). To avoid confusion or misunderstanding, these services should be listed on a schedule attached to the lease.

A tenant should clearly understand each of the following when negotiating the landlord services provision of its lease:

- The services included in the rent.
- The services paid for in addition to the rent.
- Overtime service charges during non-business hours.

The tenant should review the services to confirm the:

- Services meet the tenant's needs and the hours of service during which the landlord agrees to provide its services at regular rates cover the tenant's business hours at a minimum. In particular, with HVAC specifications, the tenant should consult an engineer to review the technical components of the landlord's specifications.
- Local industry customs for services that a landlord would typically charge (or not charge) for during normal business hours.

Many times, leases contain breakdown clauses allowing the landlord to interrupt services for necessary repairs, inspections, or other causes outside the landlord's reasonable control. Usually, these clauses provide that the tenant cannot abate its rent if the services are interrupted. During negotiations, the tenant should attempt to insert the right to abate its rent if the interruption continues for several consecutive days, especially if the interruption causes a material interference in the tenant's business operations at the premises.

ASSIGNMENT AND SUBLETTING

The assignment and subleasing provision of the lease outlines the tenant's right to transfer its lease interest through an assignment of the lease or a sublease of all (or part of) the premises. The lease provision regarding assignment and subleasing is frequently the most heavily negotiated provision in a lease.

The tenant should understand each of the following:

- **The scope of the definition of assignment.** The lease may define the term "assignment" to include a change of control in the tenant, and sometimes, even a change in control of the tenant's parent. Therefore, if a change of control in the tenant occurs, there may be a need to obtain the landlord's consent before the change in control. Many times leases provide that a transfer of the tenant's lease interest without the landlord's consent triggers a default under the lease. To prevent an unintentional default, the tenant must understand what constitutes an assignment (see Real Estate Leasing: State Q&A Tool: Questions 14 and 15).

- **How local laws interpret assignment provisions.** State and local case law and the interpretation of vague or ambiguous assignment language in a lease must be considered when trying to determine whether or not certain actions would be deemed an assignment requiring the landlord's consent. Most state laws do not limit a tenant's right to transfer its lease interest without an express prohibition against the transfer in the lease (see Real Estate Leasing: State Q&A Tool: Question 13).

The assignment and subleasing provision can take several forms, including:

- The most onerous but least common provision providing for an outright prohibition of any assignments or subleases.
- A slightly less onerous but still uncommon provision providing for assignments and subleases permitted with the landlord's consent, which can be withheld at the landlord's sole discretion.
- A more reasonable and most common provision providing for assignments and subleases permitted with the landlord's consent, which cannot be unreasonably withheld, conditioned, or delayed (provided certain conditions are met first).

The size and length of the tenant's lease and its relative bargaining power greatly affects its ability to negotiate for favorable assignment and subletting rights. For a smaller tenant, a landlord's agreement not to unreasonably withhold its consent to an assignment or sublease most likely represents the most favorable and realistic option.

Landlords and tenants have conflicting interests relating to the assignment and subleasing provision. For example:

- **For the tenant.** The provision represents a possible (and important) exit strategy if the premises (in whole or in part) are no longer needed or cost-effective.
- **For the landlord.** The provision represents a possible departure from the business goal of maintaining control over the tenant mix in the building and maximizing revenues. The landlord tries to set limitations on the tenant's ability to market the premises for many reasons, including that the landlord does not want the tenant to compete with the landlord's own leasing activities in the building.

Typical conflicts arise when the tenant tries to negotiate the scope of the:

- Conditions to be met before the landlord grants its consent.
- Tenant's permitted assignments and subleases that do not require the landlord's consent.
- Landlord's right to share in the tenant's profits resulting from an assignment or sublease.
- Landlord's rights to recapture the premises.

The final resolution for these conflicts usually depends on the size of the space and the tenant's relative bargaining power.

EXTENSION OPTION

A tenant's right to extend its term beyond the initial term should be expressly stated in the lease, because usually the landlord is not under an implied covenant to provide the tenant with an extension option. Because relocating an office can be costly and disruptive to a business, it often makes sense for a tenant to negotiate for an extension option with predetermined terms stated in the lease.

The extension option must be carefully drafted. Usually the extension option is conditioned on the tenant not being in default at the time the extension notice is delivered to the landlord and as of the effective date of the extension. The provision should clearly state that the extension term follows the same terms and conditions of the original lease (unless a specific right, such as an additional extension option, is not to be projected into the extension term) and should include each of the following:

- Clear notice periods and procedures for exercising the extension option.
- The term for the extension.
- The base rent (or the mechanism to be used to determine the base rent) for the extension.
- Any express limitations (monetary ceilings or floors) on any increases to the extension period's base rent.
- Continuations of the tenant's special rights and options (such as the tenant's right to remove fixtures or tenant's purchase option) stated in the original lease.

There are several items that can be beneficial to the tenant and may be included in the renewal provision depending on the tenant's negotiating leverage and the market, including:

- Updated base year for the operating expenses and real estate taxes (see Operating Expenses and Taxes).
- Several extension options with shorter terms, rather than one extension option with a long term.
- Budgeted tenant improvements or upgrades to the premises once the extension option is exercised.

The tenant should be aware that if it assigns its lease with the renewal option, the assignee's exercise of the renewal option is likely to cause the original tenant's liability under the lease to continue throughout the renewal term. An assignment should specifically exclude any renewal options. Alternatively, a tenant can negotiate with the assignee and the landlord so that the original tenant's liability stops as of the expiration date of the original term regardless of the exercise of any extension options by the assignee. This limitation on the tenant's liability is usually reflected in the landlord's consent to assignment.

Most extension options require the tenant to send an extension notice to the landlord within a specified number of days (or months) before the expiration of the lease term. Usually the tenant's notice period is subject to a time is of the essence clause. Sometimes, leases contain extension terms that occur automatically unless the tenant sends a notice that the automatic extensions are no longer effective. In some jurisdictions (such as New York), when a lease contains an automatic renewal provision, by statute the landlord must notify the tenant (before the extension term) that its lease term is scheduled to automatically extend.

ADDITIONAL SPACE OPTION

Landlords sometimes provide their tenants with options for additional space in the building. Where a particular business may grow over the term of a lease, it can be beneficial to seek the right to expand into adjoining premises as they become available. The terms and conditions, just as in an extension option, should be set out in detail to ensure this process goes smoothly.

The important terms of a provision providing the tenant with an additional space option include:

- **Base rent.** The base rent for the additional space may be:
 - the same base rent as the existing premises plus any escalations the tenant is paying for the existing premises;
 - a predetermined increase of base rent plus escalations; or
 - a fair market rent determined at the time the additional space option is exercised, with any disagreements being handled by a specifically referenced dispute mechanism.
- **Condition of the additional space.** The lease should specify if:
 - the tenant is to accept the premises in its "as-is" condition;
 - the landlord is obligated to perform an initial build-out for the additional space; or
 - the landlord provides the tenant with a tenant improvement allowance or any free rent periods.
- **Description of the additional space.** Most of the time the additional space is contiguous to the tenant's existing premises. The lease should include floor plans (attached as exhibits to the lease) and any other details to clearly identify the additional space. Any necessary alterations (including any internal staircases) connecting the existing premises with the additional space should be pre-approved by the landlord.
- **Delivery dates.** The lease should clearly reference the date by which the tenant should exercise its option for the additional space. The lease should also specify the landlord's outside delivery date for the additional space or there should be a specified period of time between the tenant's exercise of its option and its actual possession of the additional space.

The option itself may take one of the following forms:

- **Right of first refusal.** The tenant has the right to match the terms of a third-party lease transaction.
- **Right of first offer.** The landlord must offer the additional space to the tenant first before marketing it to any third parties.
- **Predetermined start date.** A specific date based on the expected vacancy date of the tenant occupying the additional space at the time of lease signing.

The lease should expressly provide that the additional space remains subject to the same terms and conditions as the existing lease unless the parties clearly state otherwise. The tenant should review the lease to confirm whether there are any provisions that are no longer applicable to the additional space. The lease should also require that the parties enter into a lease amendment to memorialize the tenant's additional space.

For more information about additional space, see:

- Practice Note, Options for Additional Space in Commercial Leases.
- Standard Clauses, Additional Space Option in an Office Lease (Pro-Landlord) (NY).
- Tenant Options for Additional Space: ROFO and ROFR Comparison Chart.

PURCHASE OPTION

Purchase options grant the tenant the option to purchase the building. However, leases for only a portion of a building typically do not contain purchase options. When a tenant leases all or a

substantial portion of a given building, the landlord may provide the tenant with an option to purchase the building. The option may take different forms such as:

- Right of first refusal.
- Right of first offer.
- Predetermined terms on the landlord's election to sell.
- Predetermined terms on the tenant's notice to purchase.

For more information about purchase options, see Practice Notes, Purchase Options: Overview ([W-000-9968](#)) and Purchase Options in Commercial Leases ([O-522-0582](#)).

TERMINATION OPTION

Sometimes leases grant a termination right to the landlord or the tenant, or both. The termination right allows a party to terminate the lease before the expiration date (see Standard Document, Surrender and Acceptance Agreement (Commercial Lease) ([3-506-0983](#))).

Landlord's Right to Terminate

Landlords are traditionally granted the right to terminate the lease in the event of a significant casualty or condemnation. Less common termination rights for the landlord may include the:

- Voluntary demolition of the building (or extensive construction) for a new development project.
- Sale of the building.
- Landlord's personal need for the premises.

Any of the less common termination rights should include a termination payment to the tenant as a condition to cancelling the lease. If the landlord is unwilling to make a termination payment before the tenant vacates the premises, the payment should be placed in an escrow account pending the tenant's vacating the premises.

Tenant's Right to Terminate

In general, and depending greatly on the negotiations of the parties, the only events that allow a tenant to terminate a lease are a substantial casualty or a condemnation rendering the premises unusable. The definition of "substantial" or "unusable" may be the subject of some negotiation because the tenant wants to ensure that it is not left with a portion of the premises that is not economically viable for continued occupancy.

The condition under which a tenant (or landlord) may terminate based on a casualty or condemnation is often set in percentage thresholds of the overall premises and/or timeframes to restore the space. For example, if 50% of the premises are destroyed and the landlord anticipates it will take in excess of 90 days to restore the premises, the tenant has the option to terminate the lease or its rent will abate on the unusable portion until restoration is complete. If the lease provides this type of threshold provision, the tenant should negotiate for an outside date when it has the absolute right to terminate the lease if the restoration is not completed by the end of the specified period of time.

Aside from casualty and condemnation, a tenant typically does not have any right to terminate a lease. Sometimes a tenant can negotiate for a tenant termination right:

- If the landlord does not deliver the premises to the tenant by a specified date (for example, if landlord fails to substantially complete its initial build-out by an outside date). This termination right typically provides that the landlord reimburses the tenant for certain of its costs incurred in reliance of the landlord's delivery of the premises.
- Effective after the tenant is in occupancy of the premises. This termination right usually requires that the tenant makes a termination payment to the landlord. A formula should be specified in the lease that includes a determination of the then unamortized portion of the landlord's initial concession package (such as free rent periods, tenant improvement allowances, brokerage commission fees, and legal fees).

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