

WANG & KASHOU LLP

LEGAL ISSUES TO CONSIDER WHEN ENTERING A COMMERCIAL LEASE

When it comes to negotiating a commercial lease, most business tenants focus on the rent amount and the term, but fail to consider other issues that can be equally important. During the course of their leases, many business tenants encounter certain common problems and have similar complaints. By the time they are encountering problems, however, the tenants often have difficulty resolving their problems due to the actual provisions of the lease.

Ideally, the lease should be drafted in such a way that the tenant is not helpless in the face of such problems. We encourage our clients to consider certain issues when negotiating their leases with a potential landlord. Such an approach could save you considerable headache and expense down the road. Below are a few issues that should be negotiated at the outset in order to avoid problems down the road.

Failure by Landlord to Provide Basic Services Under the Lease

When renting a commercial space, you often have a reasonable idea of what you should be getting for what you are paying. For example, if you are renting an office space, you expect the elevators to work and be kept in reasonable condition and the heating and air-conditioning system to keep you comfortable throughout the year. As a tenant, you need to know whether you can abate rent, engage in some kind of self-help or expect some other kind of reimbursement if the landlord fails to provide a basic service promised under the lease. At a minimum, the lease should provide standards with respect to these types of building services that the landlord must meet.

Notice Regarding Entry and Repairs

When repairs need to be made on the premises, they can frequently be noisy and disruptive to the normal flow of an office environment. It is therefore a good idea to require a landlord to provide you with at least several days' advance notice of any such repair or maintenance, particularly if such repair will take place within the actual office space of the tenant. Such advance notice permits you to reschedule client meetings or other important events in order to minimize the effects of such noise and disruption on your business.

Subletting or Assigning the Lease

Often a situation arises that makes it necessary or desirable to sublet one's office space or assign the lease to a third party. For instance, if you sell your business to a third party, it is often necessary to assign your lease to the buying party. Or, alternatively, if your need for office space increases, you may desire to lease larger office space in a different location and sublet your existing office space to another party. Landlords, however, typically try to prevent such subletting or assignment by including a "no subletting or assignment" provision in the lease. Thus, it is important to negotiate a provision that requires the landlord to permit reasonable subletting or assigning of the lease. In other words, if the landlord elects to disallow subletting or assigning of the lease, the landlord must have a reasonable and substantive basis for such decision, *e.g.*, the sublessee or assignee is heavily in debt and likely cannot afford the rental payments.

Early Termination of the Lease

Our clients often encounter situations where they no longer desire to continue their lease due to the landlord's continual failure to fulfill certain obligations under the lease, or because of changes to their business plan or an unexpected opportunity arises. In anticipation of this possible problem, your lease should contain provisions permitting you to earlier terminate your lease; in the event that your landlord defaults under the lease, *e.g.*, fails to provide a functioning HVAC system or to make the necessary repairs promised under the lease, the early termination should be without penalty.

Guarantees

Landlords frequently desire that an individual (such as the owner of a small business) or parent company associated with a business tenant extend a personal or other guarantee concerning the payments required under the lease. Such guarantees expose the guarantor's personal assets in the event of a default by the tenant and should be restricted to the extent possible. Restrictions may include a definitive expiration of such guarantee (*e.g.*, the guarantee expires two years after the beginning of the lease term) and the ability to assign its obligations to a third party. The ability to assign such guarantees is critical in the event that the guarantor seeks to sever its relationship with the business tenant, such as when a partner elects to leave the business after having given personal guarantees at the outset of a lease.

Attorneys' Fees

In the event that you need to hire an attorney to enforce any aspect of the lease, it is desirable to have a provision that allows you to recover the costs associated with hiring such attorney from the landlord. The legal fees can be significant, depending on the matter involved, and better to have the landlord bear the burden of such costs than you.