



Webinars for Wise Nonprofits

Leasing Space: Negotiating Lease Agreements and Lease Modifications

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Disclaimer

- Please note, today's presentation is informational only and is not intended to constitute legal advice. Consult with appropriate counsel for guidance pertinent to your organization.



Overview

- The Lease Agreement
 - Key Provisions
- Amendments to the Lease
- Lease Termination



Leases and the Statute of Frauds

- A lease is a real estate conveyance and is subject to the Statute of Frauds.
 - All leases longer than one year must be in writing to be enforceable. [NY Gen Oblig L § 5-703](#)
- Terms of the lease must be included in the lease or an amendment to the lease signed by both the landlord and the tenant.



Question

Does your organization typically hire a lawyer before signing a lease?

- A. Yes
- B. No
- C. Not applicable or I don't know



The devil is in the details!

- After payroll, rent may be one of the highest expenses for a nonprofit
- Model printed lease forms are landlord-friendly
 - Blumberg; Real Estate Board of NY (REBNY)
 - Lease riders modify or include additional terms
- The lease may reflect the business deal but there are terms that could be negotiated to be more favorable to the Tenant
- Your lease is probably for a minimum of 5 years and may have a 5 year renewal option
 - It's worth the time to negotiate the terms.



Contact Lawyers Alliance for *pro bono* help

- Contact Lawyers Alliance when you're beginning to look for space or renewing your lease
- Certain terms will not be negotiable, for example:
 - paying a share of real estate taxes
 - paying rent on time every month
 - getting approval for major alterations
 - carrying liability and personal property insurance
- However, the language used can be negotiated to your advantage



The Lease Agreement



Key Lease Provisions

- Use of the Premises
- Access - Hours of access; elevator access
- Rent and security deposit
- Term: commencement date and rent commencement date
- Option to extend term
- Demised premises
- Option to expand; right of first refusal or right of first offer
- Additional rent may include charges for:
 - real estate taxes
 - operating expenses
 - electric and other utilities
 - other: parking or other special charges





Key Lease Provisions cont'd

- Right to sublet or assign
- Force Majeure
- Alteration right
- Obligation to repair
- Condemnation and casualty
- Insurance
- Default
- Authorization to sign
- Termination rights



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Confirming use is Tenant's burden

- Landlord will not make any representation regarding use.
 - Will not represent the space is suitable for tenant's use
 - Will not represent that tenant's use complies with the certificate of occupancy
 - Tenant could move in and begin carrying on any activities without landlord's knowledge
 - Consult an architect, engineer or attorney to confirm your use is allowed.



Use of the Premises

- Zoning and building code compliance
 - In some instances, you need to make sure your use complies with zoning
 - e.g. Renting an entire building for use as a homeless shelter or as a charter school
 - Make sure any work you plan to do will be acceptable to landlord and can be done under current zoning and building code



Plan for the future, as needed

- Make sure the premises is suitable for present and future uses.
 - Review the Certificate of Occupancy, which can be found by searching for the premises on the Dept. of Buildings website: <https://www1.nyc.gov/site/buildings/property-or-business-owner/certificate-of-occupancy.page>
 - Review the “use” clause in the lease; check for prohibited uses; landlord may restrict use for various reasons
 - Use restrictions will impact you and future sublessees/assignees.



Access: Don't assume anything!

- Will elevators and utilities be available 24/7? What services are included and provided?
- Is landlord providing full access?
- Confirm you and your clients have access to the space as needed.

Case example: NFP runs a CPR training program for adults at night from 7:00 P.M. to 9:00 P.M. and on the weekends. The initial draft lease provided:

“Tenant shall have access to the Demised Premises during the Term on Mondays through Fridays from 7:00 A.M. to 9:00 P.M.”

- Access for Repairs - Landlord typically requires immediate access for emergency repairs, such as a flood but should provide notice for non-emergency reasons.
- **Negotiating Tips** - Notice requirements and LL should have real reason to access the premises.



Lease Commencement v. Rent Commencement

- Lease start date and rent start date may differ.
 - Rent Commencement Date is when you must start paying rent
 - May be later than the Lease Commencement
 - Tenant sometimes has a rent concession where the landlord might allow tenant to occupy and do work before starting to pay rent
 - In the alternative, landlord might do work before the lease starts and notify tenant when the space is ready



Rent Payments

- Security deposit amount of two months' rent would not be unusual
 - Typically payable on signing
 - Amount will depend on the tenant's credit
 - Cash v. letter of credit
- First and last months' rent will also be due on signing
- Rent is payable - first of the month with 10 days' grace period
- Timetable and method of calculation for rent increases
 - A typical annual fixed base rent increase might be between 2-3%
- Rent is based on square footage



Don't sign a guaranty!

- A lease guaranty means that person is personally liable for any rent or other payments the tenant does not make under the lease
 - Avoid signing a guaranty
 - No individual should be “on the hook” for these payments
 - An attorney must review any guaranty to try and limit liability or exposure
 - Ask landlord to accept another form of security
 - letter of credit
 - larger security deposit upfront
 - ask if it can be reduced later if you pay promptly



Don't inadvertently guaranty the lease!

- Use a proper signature block
- *This is wrong:*

Tenant:

Tom Blank



Proper signature block

- When you sign the lease, include the name of the corporation, your name and your title:

Community Social Services, a New York nonprofit corporation

By: _____

Tom Blank

Executive Director



Good Guy Guaranty

- A "Good Guy Guaranty" is a personal guarantee that limits the rental obligations between the tenant (usually a creditworthy principal of a corporation) and a landlord, based on certain conditions being met:
- **Basically, this is what the "good guy" does:**
- Provides landlord with enough notice that tenant will be vacating the leased premises
- Pays all rent obligations to landlord up and until the surrender date of the premises
- Delivers the premises in "broom-clean" condition
- Any guaranty is problematic for a nonprofit



Question:

- Our organization is a nonprofit.
- A nonprofit never has to pay real estate taxes when it leases space because we have an exemption.

A. True

B. False



Real estate tax exemptions

- False. It is the *owner's* exempt status that counts, not the tenant.
- Even if the landlord has an exemption now, the lease will contain a provision requiring tenant to pay in the event the exemption expires or no longer applies.
- In a commercial lease, landlord will pass through the cost of real estate tax increases to tenant.
- Let's look at real estate taxes:
 - Base year = the tax year in which the lease is signed
 - NYC real estate tax year runs from July 1 to June 30
 - Tenant pays its pro rata share of tax increases over base year



Real estate taxes and your budget

- You will have to pay your proportionate share of the increase in real estate taxes
 - e.g. If you rent 50% of the building, you will have to pay 50% of the increase in real estate taxes over the base year
 - The landlord will establish your proportionate share by dividing your rentable space square footage by the entire building square footage
 - Be careful about extra space getting added to the percentage
 - Make sure you budget for increases in taxes each year



Rent and Additional Rent

- Any other charges due to landlord will be Additional Rent
- If tenant pays operating expenses, tenant will pay its share of any increase in the landlord's operating expenses
 - Know what's included in operating expenses
 - Negotiate for the right to audit the expenses
- Tenant also has to pay their own utilities
 - electricity, water, gas, "HVAC"
 - HVAC means "heating, ventilation and air conditioning"



Negotiating tip: Pass-through Expenses

- Request or confirm that you have the right to audit real estate tax pass-throughs or any other pass-through expenses i.e. operating expenses and to adjust the pass-through as necessary.
- Landlord will be accountable and you will have the ability to confirm the expense is legitimate.



Landlord's approval of alterations

- Check the lease for:
 - Alteration rights - typically limited and subject to Landlord's prior written consent
 - Ownership of Installations
 - Requirement to restore premises at the end of the term
- Check Certificate of Occupancy
- Consult with an Architect
- Landlord to review and approve any plans for alterations



Negotiating tip: Alterations

- Do your best to negotiate a limitation on the amount of time landlord has to take action.
 - For example: review and approval of alteration plans.
- Negotiate for a provision stating plans are deemed approved after submission to Landlord after 10 days or two weeks.



Repair and Maintenance

- Landlord is (typically) responsible for structural repairs and tenant is (typically) responsible for non-structural repairs.
- Obligations may shift if, for example, damage is caused by tenant or tenant's agents, invitees or representatives.
- There is no right to offset or deduct from the rent for the landlord's failure to perform repairs.



When the Premises is Damaged

- Landlord typically has the right to terminate if entire building or a certain percentage of the building is destroyed and cannot be repaired within a certain time frame, or within 6 months of lease expiration
- Landlord or tenant may have the right to terminate if a certain percentage of the leased premises is destroyed and cannot be repaired within a specified time frame
- Landlord's mortgage documents will govern



Negotiating Tip: Damage to Premises

- Regarding landlord's right to terminate:
 - In this case, you may want to have a shorter notice period for landlord's right to terminate. You don't want to wait for the landlord to make a decision.
 - YOU may want the right to terminate. Make sure you have the right to terminate if a certain percentage of the premises is destroyed, or if it cannot be put back into use within a certain timeframe.



Assignment and Subletting

- Under NYS law, if lease is silent tenant may assign
- Negotiate the sublet or assignment provision
 - In a sublet, the original tenant and new tenant have a sublease agreement in addition to original tenant's lease agreement with Landlord. Original tenant remains responsible for all obligations under the lease.
 - In an assignment, original tenant transfers all of its rights and responsibilities under the lease to the new tenant. New tenant "steps into the shoes" of original Tenant.
 - Review the "Use" clause in your lease
 - Include the right to sublet/assign to your affiliates without landlord's consent
 - Try to require the Landlord's consent to assignment/sublet "not to be unreasonably withheld" - a court will enforce a reasonableness standard



Negotiating tip: Assignment and Subletting

- Try to negotiate provision for right to terminate if you lose a certain % of your funding.
- If lease does not address, you may want to leave it alone.
 - Risk: Landlord is slow to respond. No defined procedure to follow. Delays create more difficulties.



Force Majeure

- Force majeure clauses often excuse or defer performance under New York law in the event of circumstances beyond the parties' control, such as fire, flood, war, or acts of God.
- Under New York law these clauses must be narrowly construed, meaning that only events specifically listed will excuse a party's performance. A force majeure clause could cover the COVID-19 pandemic if it includes specific public health-related language, such as serious illness or plagues, flu, epidemic, disease, emergency or outbreak.
- Remember that the landlord also has to agree to insert this language.



Insurance Requirements

- Tenant should maintain:
 - General liability Insurance; name landlord as additional insured
 - Insurance for personal property damage
 - Workers' Compensation / Unemployment insurance for its own organization
 - Loss of use (risks such as flood or fire)
 - Lease will provide that tenant must also pay any increase in landlord's insurance premium caused by tenant's activities
- Landlord should maintain:
 - General liability insurance
 - Property insurance on the building



Default

- Typical defaults include:
 - Late payment of rent or additional rent beyond a grace period
 - failure to provide evidence of insurance
 - failure to repair damage caused by you or your agents
 - failure to notify of a sublet
- Tenant should seek (a) notice and (b) an opportunity to cure for defaults
- Try to ask for on average 30 days to cure a situation
- If a cure cannot be completed within the time period allocated, Tenant should not be in default if Tenant has commenced to cure and continues cure to completion



Default cont'd:

- Such rights do not exist unless expressly stated but are standard requests
- Tenant should ask for the right to bond any liens placed against its premises for work done by Tenant



Negotiating tip: What to do when you're in Default

If you receive a default notice:

- If possible, keep the lines of communication open with your landlord.
- Contact a lawyer so that you don't prejudice your own rights.
- Landlord may be more forgiving if you have a good relationship.



Before you sign the lease...

- Lease must be approved as required by the organization's governing documents.
- Must be signed by an officer or an authorized person.
- Board consent authorizing officer to negotiate and sign the lease may be granted by:
 - Vote at a meeting; or
 - Unanimous written consent
 - N-PCL allows for electronic consent.
 - Check your bylaws.
 - Can be ratified after lease is signed



Amendments to the Lease



Remember the Statute of Frauds!

- Amendments must be in writing and signed by both parties
- Ideally, lease term should coincide with funding term
- Financial obligations in the lease amendment line up with the funding available under your contract
- Get approvals needed for entering into the amendment (Board consent, if necessary)



Lease Modifications

- Lease modification must state which provisions are being modified
- Must state that anything not explicitly amended in the modification shall remain the same
- Modifications may cover any amendment to the terms of the Lease including renewals or expansions



Lease Termination



Don't Abandon A Commercial Leased Premises

- This is a bad idea!
 - In a commercial lease, a tenant is obligated to pay the rent for the entire lease term
 - Landlord has no obligation to mitigate damages (*unlike residential property*), but pending NY legislation will change the law so that landlord's will have to mitigate damages.
 - Landlord can seek a judgment against the corporation for the full amount of the rent
 - If there is a guarantor, guarantor would be liable
- When you cannot pay rent, call a lawyer to confirm the best course of action and negotiate with landlord, if necessary
- Check lease for right to terminate if funding is lost and right to assign/sublet



How Lawyers Alliance can help

- Lawyers Alliance for New York is here to help your organization!
- Leasing administrative offices or program space
- Negotiating an amendment to the lease
- We can help:
 - Negotiate a new lease agreement
 - Answer questions during the lease term
 - Negotiate a lease amendment
 - Help with a lease termination



Do you have a question about running your nonprofit?

- Call our resource call hotline with any question about running your nonprofit organization:

Resource call:

ResourceCall@lawyersalliance.org

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