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Legal Alert: Managing Lease Costs

The New York City real estate market poses distinct challenges for nonprofits. This legal alert outlines key lease provisions that, if not negotiated carefully, can expose nonprofits to unexpected costs, delays, or long-term liabilities. Remember that lease negotiations involve parties with differing interests and leverage, and not all provisions will apply to every lease or organization's needs. This alert is not a substitute for legal advice. If possible, work with an attorney to review and negotiate the lease.

When starting lease negotiations, ***don't rush to sign*** — understand what you are agreeing to! While a broker or landlord may pressure you to sign a lease quickly, you should first review the lease carefully, hire a lawyer, and ***don't be afraid to negotiate any unfavorable terms***.

Significant Lease Provisions

- **Dates:** Pay attention to key dates and their definitions.
 - *Commencement Date:* The date a lease term and your right to **occupy** the space begins.
 - *Rent Commencement Date:* The date you begin paying rent, which may differ from the "Commencement Date" (e.g., if work is being done on the premises, landlord may grant a rent concession).
- **Triple Net vs. Full Service:** Triple Net (or NNN) means you pay rent AND cover other expenses, such as property taxes, insurance, and maintenance. A Full Service lease means you pay one all-in rent and the landlord covers these other expenses.
- **Landlord's Work:** The responsibilities of the landlord, such as repairs or alterations, that the landlord has agreed to perform, typically completed before the tenant takes possession. Any such agreed-upon work should be documented in the lease.
- **Tenant's Work:** Alterations, improvements, or repairs that a tenant may make to the leased property. This work is typically done to tailor the space to tenant's needs. Tenant's Work is usually subject to the landlord's approval and, if known ahead of time, can be negotiated at the outset of the lease.
- **Premises:** The specific space the tenant is renting and allowed to use under the lease, typically described with specificity (e.g., all of Floors 2, 3, and 4, including square footage or boundaries as set forth in the lease). It may also include:
 - *Common Facilities:* e.g., a lobby, cafeteria, conference rooms, etc. If you need access to common areas, make sure the lease provides for that access, including by designating the hours and calendar days the facilities are available to you.
 - *Storage Areas:* If you need access to storage areas, make sure the lease provides for that.

- **Use:** Tenants should negotiate for **broad use of the space** to be stated in the lease, while landlords often seek limits. This provision can also impact your ability to sublet (e.g., if the lease says space must be used to run a daycare, this could limit your ability to sublet to a food bank).

Sample Language for Use Without Landlord Restrictions — Use: Any use permitted under law shall be permitted under this lease.

- *Permitted Uses:* These are the specific activities or purposes for which the tenant is allowed to use the property. Even if Landlord limits Permitted Use to certain activities, **broader language is typically better**. Make sure that the use is allowed by law and confirm whether certain uses require any additional governmental regulations, permits, or licenses, etc.
- *Certificate of Occupancy:* Check the Certificate of Occupancy (“CofO”) to ensure the premises are suitable for your intended present and future uses. In New York City, the CofO can be found on the Department of Buildings [website](#).
- **Assignment/Subletting:** Assignment and subletting are **different**.
 - *Assignment:* Original tenant transfers all of its rights and responsibilities under the lease to a new tenant. New tenant “steps into the shoes” of the original tenant.
 - *Subletting:* The tenant rents all or part of its leased premises to another party (a subtenant, through a sublease). Typically, subleasing does not relieve the tenant of its responsibilities under its “master” lease (i.e., the lease between the landlord and the tenant).
 - *Consent Clauses for Assignment and Subletting:*
 - *Best Case Scenario – No Consent Required:* Aim to get the broadest sublease and assignment rights you can, which would be the ability to do either **without** needing the landlord’s approval or consent, though landlords often seek control here.
 - *Consent with Carve Outs for Affiliates or Known Transferees:* If you know it is likely you will sublet or assign the lease to a third party, e.g. an affiliate, you can negotiate to exclude this party from the consent provision.

Sample Language for Consent with Carve Outs — Tenant shall not assign or sublet the Premises, in whole or in part, without the prior written consent of Landlord, **except that Tenant may assign or sublet to [KNOWN ENTITY] and Tenant’s affiliates without Landlord’s consent.**

- *Reasonable Consent:* If the lease grants Landlord a consent right, it should require Landlord to act **reasonably** with clear deadlines for the landlord to respond and a pre-agreed consent form, without demanding extensive documents or information.

Sample Language for Reasonable Consent — Assignment/Subletting. No assignment or subletting shall be permitted hereunder without the landlord’s prior written consent, **which consent shall not be unreasonably withheld, conditioned or delayed**. Tenant shall request such consent by submitting to Landlord a completed Assignment/Sublet Consent Request Form in the form attached hereto as [Exhibit ____], together with the following information only: (i) the name and contact information of the proposed assignee or subtenant; (ii) the proposed commencement and expiration dates; and (iii) the intended use of the Premises. Landlord shall approve or disapprove the request within [__ business days] after receipt of Tenant’s written request form. Failure to respond within such time shall be deemed consent.

- **Hell or High Water Clauses:** These clauses provide that rental payments continue irrespective of any difficulties a tenant may encounter accessing or utilizing its leased premises, whether

through the fault of the landlord (e.g., poor maintenance) or not (e.g., flood). Aim to eliminate these clauses.

Avoid this Hell or High Water Language — Tenant is not entitled to terminate this lease, or to claim actual or constructive eviction, partial or total, or to receive any abatement or diminution of rent, or to be relieved in any manner of its other obligations hereunder by virtue of any reason whatsoever.

- **Additional Rent:** Rent paid in addition to base rent. Additional Rent may include charges for real estate taxes, operating expenses, electric and other utilities, and/or other expenses e.g. parking or other special charges. Additional Rent payments are typically estimated and then, at the end of the year, recalculated after landlord determines the actual costs.
 - *Audit Rights:* Don't rely on landlord's statement about what a property's monthly operating expenses are; ask for evidence showing what those expenses are and how landlord is calculating Additional Rent. Tenants can bargain for the right to audit/review a landlord's operating statements after the landlord calculates Additional Rent. The audit right should include a right to object to any assessment you disagree with.

Sample Language for Additional Rent with Audit Rights — Additional Rent. At least [x]¹ days prior to the commencement of a [lease year], landlord shall provide tenant with an estimate of [additional rent / operating expenses] for such [lease year]. Tenant shall pay 1/12th of such estimated [operating expenses / additional rent] each month of such [lease year]. Within [x] days after the end of a [lease year], landlord shall provide tenant with actual [operating expenses / additional rent] incurred for such [lease year], in addition to backup and supporting documentation reasonably requested by tenant. Tenant shall be permitted to audit such [operating expenses / additional rent] and provide landlord with notice of objection to any charges within [x] days from receipt of actual [operating expenses / additional rent] from landlord. All disputes shall be handled by [arbitration]. If, after both parties agree with respect to actual [operating expenses / additional rent] for the prior [lease year], estimated expenses were higher than actual expenses, landlord shall credit subsequent additional rental payments in an amount equal to such excess paid by tenant. If, after both parties agree with respect to actual [operating expenses / additional rent] for the prior [lease year], estimated expenses were lower than actual expenses, tenant shall pay to landlord the amount of such difference within [x] days from receipt of notice to tenant that such monies are due.

- **Repairs:** Typically, tenants are responsible for non-structural repairs, while landlords handle structural repairs (e.g., building exterior, major systems). Consider negotiating a clause allowing you to deduct the cost of necessary repairs from rent if the landlord fails to perform required repairs after notice.
 - *Casualty/Condemnation:* Often, in an event of a casualty (like a fire) or a condemnation, the landlord is required to repair and restore the leased premises.
- **Utilities:** Utilities are typically a tenant cost. Understanding the billing mechanism for utilities arranged for by the landlord but passed through to the tenant is critical. The tenant needs the ability to audit such costs and pass-through expenses. While submetering is ideal, it can be costly to install and not all landlords will want to bear that expense.

¹ Note that bracketed terms are to alert you that in a written lease, these terms are usually defined and have a precise meaning. It is important to review definitions and negotiate them if they are unsatisfactory to you.

- **Alterations:** A landlord is not likely to allow alterations to the premises without its approval. However, if you know there are specific alterations contemplated in the future, you should carve out an exception for such alterations on signing the lease. To avoid delay, negotiate for a provision stating plans are deemed approved after submission to Landlord after 10 business days or two weeks.
- **Force Majeure:** Force majeure clauses often excuse performance 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. This clause could cover events similar to the COVID-19 pandemic if it includes specific public health-related language, such as serious illness or plagues, flu, epidemic, disease, emergency or outbreak.
- **Insurance:** In general, Tenant should maintain general liability insurance and name the Landlord as an additional insured. The landlord typically maintains its own general liability insurance, as well as property insurance on the building.
- **Termination Rights:** Unless you have an explicit right to terminate the lease, early termination of the lease by the tenant may allow the landlord to recover ***all of the rent due from the date of termination to the end of the lease term***. A tenant can bargain for the lease to set out express termination rights that would permit the tenant to end a lease early without paying damages. Common termination rights include casualty/condemnation, un-inhabitability of the premises for other reasons, and landlord's breach of obligations under the lease.
 - **Funding-Contingent Termination Rights:** Consider whether your organization will require special termination rights. For example, if space is being leased for a particular government-funded program, ***bargain for a right to terminate the lease early if funding for that program is eliminated or materially reduced***.

Sample Language for Funding-Contingent Termination Right — Termination. In the event [INSERT FUNDING AGENCY'S NAME] or any other governmental agency or authority from which tenant is now or hereafter obtains funding, cancels or materially reduces tenant's funding, tenant may terminate this lease upon thirty (30) days' prior written notice to landlord, and this lease shall terminate with the same force and effect as if such date were the date herein finally fixed for the expiration of the term of this lease, and on such date, tenant shall deliver the demised premises in accordance with [Section ____, insert a reference to the section of the lease pertaining to delivery of the demised premises at the end of the term] of this lease.

- **End of Term:** Review clauses stating what condition you must leave the property in when you are getting ready to vacate. For example, if you add furniture, alterations, etc., the landlord may insist that the space be returned to its original condition. Consider negotiating that any alterations to the space may be left on site and become the landlord's property.
 - **Receipt and Release:** Require that landlord deliver a certificate to you stating that all lease obligations have been complied with and nothing further is required from you.
 - **Subtenants:** Subtenants must have their sublease terms end with, or earlier than, your lease term. If a subtenant does not leave when you do, you may be liable for holdover rent or other penalties.

Sample Language for Vacating the Space with an Option to Leave Alterations — End of Term. Upon the expiration or earlier termination of this lease, tenant may, at its discretion, remove any furniture,

alterations or other personalty belonging to tenant from the leased premises. If tenant chooses not to remove any furniture, alterations or personalty, the same shall become the property of landlord and tenant shall have no further obligations with respect to the same whatsoever.

- **Guaranty:** Guaranties are contracts made by another entity (typically an affiliate of the tenant or an individual) that obligate such entity to perform under the lease if the tenant defaults for any reason. A guarantor “steps into the shoes” of a tenant when a tenant defaults. ***It is best to avoid providing a guaranty***, particularly because they can create significant liabilities for the person who provides the guaranty. Also, a personal guaranty by board members or staff of a nonprofit can create conflict of interest issues in the future. You can aim to offer other concessions, e.g. a higher security deposit, rather than providing a guaranty.
- **Good Guy Guaranty:** A personal guaranty that limits the rental obligations between tenant and landlord, based on certain conditions being met. A “good guy” guarantor typically agrees to: (i) provide landlord with enough notice that tenant will be vacating the leased premises; (ii) pay all rent obligations to landlord up and until the surrender date of the premises; and (iii) deliver the premises in “broom-clean” condition. A good guy guaranty limits the guarantor’s personal risk compared to a full personal guaranty, but it still creates personal liability and therefore should be avoided.

Lawyers Alliance for New York provides legal representation in connection with leases for nonprofits that serve low-income communities in New York City. Information about how to become a client is available on our website at <https://lawyersalliance.org/becoming-a-client>.

This alert is meant to provide general information only, not legal advice. Please contact Bonnie Kalos Bye at Lawyers Alliance for New York at (212) 219-1800 x 276 or visit our website www.lawyersalliance.org for further information.

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