

# Insights for New and Emerging Businesses Leasing in the Pandemic

If you are a new or emerging business owner beginning the process of finding a suitable property to lease, it is important to be critical of the lease provided by the landlord. You should also attempt to negotiate each provision of the contract to ensure that the lease works practically and with the intended goal of your business. This blog post addresses a few of the key provisions that you as a business owner should pay close attention to and can help you determine how each provision aligns with your business goals. Especially while facing the impacts of the COVID-19 pandemic, it is imperative that business owners have an operative knowledge of their lease and know that it is likely negotiable.

## Key Commercial Lease Provisions

Key areas and provisions to focus on when reviewing your business lease include:

- 1. Lease Term:** One of the most important aspects of your new lease is the structure of the lease term. Landlords typically prefer a longer term commitment from tenants, while most growing businesses prefer shorter, more flexible terms. If a growing business is unsure of how long they could remain at a particular property, they can negotiate stronger renewal rights into their shorter lease term. This will ensure that the business will be able to remain in the space if they choose to renew the lease. The drawback to this approach is that landlords may give less reimbursement for tenement improvements to the space, as the tenant will be in the space for a shorter expected period of time.  
  
Another approach is to agree to a longer term but negotiate early termination periods. Early termination periods allow tenants to purchase their way out of a lease at given periods within the lease. Pursuing this strategy will often allow tenants to negotiate portions of their tenement improvement costs as part of their termination. Keep in mind that this route includes the excess cost of having to “buy out” of the lease.
- 2. Assignment Provision:** In almost every commercial lease, there is an assignment provision that requires the landlord’s consent in order to sublease or assign the property. It is important to know what your company’s plans are moving forward and attempt to narrow the scope of the assignment provision accordingly. An important item to check is whether the definition of assignment in the lease includes an instance when you sell your company. If this is the case, it is important to build time into the sale process to account for getting the landlord’s approval. It is also important that buyers of your company who are assigned the lease have the option to extend. Depending on the needs of your business, it could be important to negotiate items such as no landlord consent required to assign to an affiliate, no landlord consent required to assign to a surviving entity of equal or greater net worth, or no landlord consent required to assign to a tenant that agrees to the use for the space as permitted in the lease. These are all items that can be negotiated into an assignment provision. A final item to be aware of is a “recapture” provision. Ensure that your lease does not allow your landlord to “recapture” your space if you request an assignment. These provisions can allow landlords to terminate the lease.
- 3. Build Out Terms:** It is important to recognize who has the obligation to build out the space. If the obligation is on the tenant, is there an allowance from the landlord to compensate for improvements made to the space? If so, the business should take care to document the costs of construction. If the obligation is on the landlord, the lease commencement date should be defined as the day that the landlord hands over the possession of the property to the tenant with the repairs/space substantially completed.
- 4. Personal Guaranty:** Commercial leases might require the business owner to personally guaranty the rent payments owed from the business to the landlord. This could potentially be problematic for new business owners. However, these provisions can be negotiated out of leases. Another way to adjust these provisions is to cap personal liability, making liability only up to a certain dollar amount. One item to be aware of is the

effect on the personal guaranty should the lease be assigned. This should be negotiated before the assignment takes place, ensuring that the landlord will release the guarantor from personal guaranty upon assignment to a new tenant. If the landlord will not release the guarantor from personal liability, it is very important to screen potential sub-lessees or assignees.

- 5. Common Area Maintenance Fees:** Common area maintenance fees (CAM) are included in almost every commercial lease. Whether they are in addition to base rent, or calculated into the base rent fee, it is important to be aware of the CAM the tenant is responsible for under the lease (CAM is in excess of the standard base rent). CAM can include general maintenance fees for the common areas of the entire building in which the space is a portion of (such as cleaning, parking lot striping, utilities overhead, etc.). The CAM that is payable by tenant for the first year of a commercial lease is usually an estimate. Following the first year of the lease, CAM will often be recalculated based on the actual CAM costs for the previous year. It may be possible to negotiate a cap on the amount of CAM that the tenant is responsible for under the lease. At minimum, it will likely be in the tenant's best interest to negotiate a cap on the annual increase of CAM that is allowed under the lease.

#### **6. Force Majeure Clauses, Rent Obligations, and Security Deposits:**

**Force Majeure Clauses:** [Force Majeure clauses](#) typically extend the timeframe in which one of the parties must perform under the lease due to unforeseeable circumstances. In some instances, they can call for the termination of the lease. There is a wide range of issues that can be covered under a force majeure clause, and the party bearing the risk will likely try to broaden the range of these clauses to cover as much as they can. Items that can be affected by force majeure clauses include: Acts of God, delays, shortages, service delays, damages, construction work, pandemics, epidemics, governmental interference, access to the premises, etc. Because of this, it is important to review the lease's force majeure provisions to understand what events may permit nonperformance or termination under the lease. At the present time, negotiating a specific reference to COVID-19 in a force majeure provision is imperative due to the impacts it is currently having on the local and global economies.

**Rent Obligations:** During the COVID-19 pandemic, tenants must confirm their rent obligations under the lease. Most commercial leases provide that rent must be paid regardless of whether there has been a reduction of services or any closings of the property. However, rent abatements can be triggered in certain circumstances, such as when a force majeure event occurs. When evaluating the potential for a rent abatement, review your lease for any late fees that may accrue from non-payment, and any grace period for paying rent as a result of a force majeure event. If your business is interested in creative ways to address rent in the pandemic, check out our article: [How Commercial Landlords and Tenants Survive the Pandemic](#).

**Security Deposits:** Finally, when reviewing a lease, the business tenant should look at a landlord's rights in regard to the security deposit. Most provisions on security deposits allow the landlord to apply security deposits to unpaid rent charges. It is important to be familiar with these rights in this regard, and any notice that the landlord must give before they offset the security deposit against any unpaid rent.

The pandemic has presented a number of challenges (and opportunities) for businesses and their property owners. With our extensive experience advising real estate clients in a number of different roles, whether lessee, landlord, developer, investor, etc., we are in excellent position to address a wide variety of commercial real estate concerns.

*If your business has any questions regarding commercial lease terms or obligations, please contact McKeehanon Rue or a member of our [Real Estate](#) team.*