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CORPORATE TRANSACTIONS CLIENT ALERT

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Subleases: A Tenant's Perspective

In many instances, a tenant of property decides to enter into a sublease as an exit strategy for getting out of a space. Subleases can be deceptively simple, but they are, in fact, fairly complicated documents that require attention to issues unlike any other type of arrangement. Here are five important issues to consider when entering into a sublease:

Sublease vs. Assignment

Consider whether you actually want to sublease rather than assign your interest in the lease and premises. An assignment is the transfer of the tenant's entire interest in the premises; in a sublease, the interest being transferred to the subtenant is something less than the whole interest of the tenant in the premises. For example, it might be only part of the entire space, or it might be for a period of time less than the entire underlying term of the existing lease, even if only by a month or so. Each approach has its advantages and disadvantages, but one big difference is that with a sublease, your landlord and your subtenant do not have a direct relationship with each other—you are the go-between for the length of the sublease. Thus, if your landlord fails to provide promised services, you may have to make a claim against your landlord on behalf of your subtenant. Similarly, you are still obligated to your landlord under the lease such that even if your subtenant fails to pay you rent, you still must pay rent to your landlord. You might have successfully exited the leased premises, but you certainly haven't exited the relationship.

Applicability of Master Lease Provisions

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When you sublease, you are in essence stepping into the shoes of the landlord and your subtenant is stepping into the shoes of the tenant in the underlying master lease. You will likely want to except out certain provisions in the master lease and state in the sublease that they don't apply. For example, if the master lease grants you a tenant allowance that you will not be passing onto the subtenant, the sublease should make clear that the tenant improvement allowance provision does not apply.

Allow Time Following Sublease Term

If you are subleasing the entire premises but are setting the sublease term to be shorter than the underlying term, allow yourself enough time to re-enter the premises after the sublease ends but before you must deliver the premises to your landlord. You may need time to remedy problems left behind by your subtenant before you turn over the space; for example, your subtenant may have caused damage or otherwise not fulfilled its termination obligations.

Tenant Consent Rights

Some provisions in the sublease—such as permitted alterations, assignments or changes in use—should expressly require not only your consent as the sublandlord but also the consent of the underlying landlord to the extent required under the master lease.

Master Landlord Approval Requirements

Lastly, before you get too far down the road, make sure you've studied the requirements in the underlying lease as to your ability to sublease in the first place. What will the landlord require in terms of documentation? If financials of the potential subtenant are required, will they be willing to provide those? Does the landlord need to see the fully negotiated but unexecuted sublease or can you submit a signed sublease? If the latter, be sure to include a provision in the sublease stating that it is effective only if the landlord consents.

These are but a few of the issues to contemplate when considering, negotiating and formalizing a sublease arrangement. Due to the necessary interplay and needed coordination between the underlying master lease and the sublease document, the situation and documentation just isn't as simple as it seems.

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