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## Thinking sublease? Be sure to think it through

The concept behind subleasing is simple, but the execution can lead to legal troubles.

As high vacancy rates pound the Kansas City region, many commercial lease deals now are structured as (cheaper) subleases. A sublease can seem deceptively simple, but in fact can be one of the most difficult contracts to get right because at least three documents typically are involved and interact: The Prime Lease between landlord and tenant (in which the tenant becomes the sublandlord); the Sublease between sublandlord and subtenant (always junior to the prime lease); and the Landlord Consent to Sublease.

Here are 10 non-economic “Gotchas” that a prospective Subtenant should watch for:

1. **Description of Sublease Premises.** Describe the area and attach a drawing. Include the square footage, particularly if the sublease rent is based on size. Do the sublease premises include all of the space leased under the prime lease, or only a portion? If only a portion, how is the subtenant protected if the sublandlord defaults under the prime lease as to the remaining space? Don’t forget parking, access rights and critical common areas, such as hallways and loading docks.

2. **Term of Sublease.** The sublease term must expire no later than one day before the Prime Lease ends. What if the subtenant wants to exercise renewal (or expansion) options but the sublandlord does not? Can the subtenant get a separate agreement with the prime landlord?

3. **Prime Lease.** Always review this, because it trumps the sublease. Attach a complete copy of the prime lease as an exhibit. The prime lease should be incorporated into the sublease, and typically the sublandlord and subtenant agree to be so bound as if they were landlord and tenant as to the sublease premises. But be careful, as certain lease provisions (for example, rent and insurance requirements) often should not apply.

4. **Condition and Operation of Sublease Premises.** Are floor strength, operating systems, and environmental condition acceptable? The sublandlord must deliver the space with all repairs current and in compliance with applicable laws. If the subtenant intends to make initial improvements to the space, get approvals from the prime landlord and city code departments. How will critical service contracts be handled?

5. **Use.** Confirm that the subtenant’s proposed use, operating days and hours comply with the prime lease. What signs or directory space is available? Does the subtenant need to lease personal property from the sublandlord, such as furniture or IT systems?

6. **Building Services.** The subtenant should receive the same building services as the sublandlord. If they go out, the subtenant

either should have a direct right to enforce against the prime landlord, or the sublandlord must be required to enforce prime landlord’s duty to provide/restore. The subtenant should have same rent abatement rights as the sublandlord.

7. **Notices.** If the sublandlord receives or gives the prime landlord notices, the subtenant should get a copy.

8. **No Change to Prime Lease.** The sublease should prohibit any amendments to or termination of the prime lease without the subtenant’s consent. The prime landlord also should so agree.

9. **Landlord Non-Disturbance (Recognition) Agreement.** What if the subtenant fully complies with sublease, but the sublandlord defaults under the prime lease? Should the prime landlord

give the subtenant notice of that default and additional time to cure? The subtenant should obtain a direct agreement with prime landlord that, so long as the subtenant is not in default, he can remain in its space.

10. **Conditions to Effectiveness and Prime Landlord Reqs.** Before sublease is effective, the prime landlord (and any mortgage lender and ground lessor) must

consent. In fact, a properly drafted landlord consent also should include certain representations, such as those stating that a complete copy of the lease is attached and that no defaults exist under the prime lease. If a sublandlord and subtenant sign the sublease first, then the sublease should include a date by which all consents must be obtained. If that date is not met, then the sublease is void.

Other legal issues may be lurking. It’s tempting for a subtenant to think “it’s just a simple sublease,” but there is more here than meets the eye. **1**

Before you sign off on that sublease, here are 10 potential “Gotchas” you should be aware of, either as a sublandlord or as a subtenant.