

Lease Exit Strategies

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One way for a tenant to diminish its involvement in a lease is through assignment and subleasing. Assigning or subleasing does not completely release a tenant from liability or responsibility. It merely disperses some or part of the tenant's liability to the subtenant or assignee. Sometimes the lease may explicitly prohibit or limit the tenant's ability to sublease or assign the lease. However, if the lease is silent on the issue, this is generally treated as permission to sublease or assign. The tenant may then may sublease or assign whenever it wants without the landlord's approval. At will tenants may also sublease or assign absent a specific provision to the contrary.

It is possible to have restrictions in the lease in order to limit subleasing or assignment. The lease can have a provision that absolutely denies either one. If a tenant proceeds to sublet or assign in spite of such a restriction, the landlord can void the transfer and continue to act as if the original lease is in full effect, or the landlord may seek rent from the assignee or subtenant.

The lease may also have a provision requiring the landlord's consent. In either case, the landlord can refuse to sublet or assign with or without reason. However, a landlord waives the restriction when the landlord consents to subletting or assigning or accepts rent after the premises has been sublet or assigned.

Often times a tenant will want to add a clause that gives the landlord the power to approve subleases and assignments as long as "consent is not unreasonably withheld." Most landlords will object to the provision, especially those in charge of a shopping area where the tenant mix is critical. However, if there is such a provision a landlord may also want exclude itself from liability for consenting or not.

Additionally, the landlord will want to avoid additional subleases or assignments to the sublease or assignment. Any sublease or assignment longer than one year is required to be memorialized in a writing under the Statute of Frauds.

A corporate tenant cannot terminate a lease agreement by dissolving itself. In that case, the obligations under the lease would pass to the shareholders. Furthermore, if there is a restriction against subletting or assigning, it remains in effect after dissolution of the corporation and it is not avoidable if the tenant reincorporates. Mergers of corporations are usually treated differently. Even with a restriction against subletting and assignment in the lease, the merger of a corporation tenant is usually not treated as a breach of the restriction. A corporate tenant will also want to ensure that if there is such a restriction that it does not prohibit assignment or subletting to subsidiaries, affiliates, or parent companies. Most landlords will not have a problem with this exception, since it is vital to many tenant companies and not a significant burden to the landlord.

Bankruptcy will also affect the tenant's ability to sublease or assign. The trustee of the bankrupted estate can either reject the lease or assume it. Trustees will usually assume the lease with hope of assigning it soon after. Under bankruptcy laws, the estate can assign the premises in limited circumstances even if there is a restriction against assignment in the lease.

A. Subleases

The difference between a sublease and assignment is in the transfer of the property interest. An assignment is a full transfer, whereas a sublease is a partial transfer. A sublease may be for all or part of the premises and must last less than the remaining

term left on the lease. If a tenant attempts to sublease all or part of the premises for all of the time remaining, the transfer will be considered an assignment and not a sublease.

Why sublease as opposed to assign? A sublease is an agreement only between the tenant and the subtenant, and not between the subtenant and the landlord. Subleases do not affect privity between the landlord and the tenant and it does not create privity between the landlord and the subtenant.

Privity describes a mutual interest in property between two parties. There are two types of privity that concern leases; privity of estate and privity of contract. Privity of estate is created between a landlord and a tenant, while privity of contract is created between two contracting parties. Privity creates legal responsibilities and obligations between the parties.

Privity of estate creates liability for certain covenants in the lease. Specifically, it does so for those covenants that run with the land or those covenants that touch and concern the land. Privity of estate does not create liability for personal covenants or collateral covenants.

Privity of contract also remains in a sublease. Therefore, the tenant is still liable for the lease contract signed with the landlord. In sum, a sublease does not change the privity between the landlord and tenant, and it does not create privity between the landlord and subtenant. Privity, of course, will be created between the tenant and subtenant.

When a subtenant is considering a sublease it should look at the original or prime lease between the landlord and the tenant. The tenant cannot sublease more space than was leased to it. Additionally, any other limitations set out in the prime lease cannot be

avoided in the sublease. The subtenant cannot cause a default under the prime lease. The subtenant will also want to make sure the premises are suitable for its business.

The tenant will want to carefully consider any prospective subtenant. The tenant may be liable for the subtenant's actions and the tenant should ensure the subtenant complies with the prime lease. Additionally, the tenant will want an indemnification against the tenant's default caused by the subtenant along with a security deposit. The tenant will also want a right of re-entry in order to get rid of a subtenant who neglects rent and find a replacement quickly.

The landlord will also want to ensure it is being involved in the subleasing process. The landlord should seek an agreement with the subtenant whereby the subtenant will pay rent in the event the tenant fails to do so, along with the landlord's right to enforce the tenant's rights against the subtenant should the subtenant default under the prime lease.

B. Assignment of Lease

Assigning the lease is similar to subleasing. An assignment is a transfer for all or part of the leased premises for all of the remaining term. When a tenant decides to assign, it should be clear to the assignee and the landlord that the transfer is an assignment. It is not enough to accept rent and inhabit the premises. The assignee and the tenant should have a written agreement outlining the assignment to ensure the assignee properly assumes liability for the premises.

It is important to know who has liability because assignment affects privity differently than a sublease. Privity of estate ends between a landlord and a tenant when the tenant assigns its lease. The assignee in a sense replaces the tenant. Privity of estate is

created between the assignee and the landlord. The assignee is responsible to the landlord for rent, repairs and surrender of the premises when the term expires.

The assignee will want to check on the landlord's title and look at the original lease. If the landlord's title is no good, the assignee will be able to recover against the tenant.

Three sample assignment and sublease provisions:

(1) Tenant shall not assign this Lease or sublet all or any part of the Premises without the prior written consent of Landlord, which shall not be unreasonable withheld. Landlord has legitimate concerns regarding the compatibility of new or different occupants of the Premises, including concerns based upon the use to which such occupants may make of the Premises, and may therefore withhold its consent to any such transfer based upon any concern Landlord may have regarding the use to which the proposed transferee may put the Premises or based upon concerns related to possible lack of harmony between such proposed use of transferee and other uses or occupants in the Building or concerns related to the financial strength, character or reputation of the transferee. No transfer of any nature shall relieve Tenant of primary liability to Landlord hereunder unless Landlord agrees in writing. If Tenant is a corporation (other than a publicly traded corporation) or partnership, any change in the control of Tenant shall be deemed to be a transfer under this Lease. In the event of any transfer approved by Landlord which results in the generation of rent in excess of the amounts charged by Landlord hereunder, Landlord shall be entitled to any such surplus.

(2) Tenant may sublet the Premises without the prior written consent of Landlord. Tenant shall immediately notify Landlord upon any sublease and shall provide a copy of any sublease agreement.

(3) Tenant may not sublet the Premises or assign the Lease without the prior written consent of Landlord.

C. Termination Rights

Termination of the lease is another way of exiting the lease.

The tenant will want to ensure certain termination rights in the lease that are triggered by certain circumstances. Most often a tenant will want the right to terminate the lease if the premises are made untenable for a length of time, usually 90 days to one year. The tenant will also want the right to terminate the lease if a substantial part of the premises is made unavailable or if necessary facilities are made unavailable. Tenant default does not normally automatically provide for termination of the lease.

Upon termination of a lease, a landlord is typically allowed to recover unpaid rent up to the termination point, but not rent due beyond that point, unless there is a specific provision in the lease allowing collection of future rent. The future rent collected is usually diminished by rent received from reletting.

A landlord's termination rights do not limit the availability to other remedies in the event of a breach. The termination process does being immediately. First, the breaching party is given notice, followed by a grace period. Notice is necessary for other remedies as well sought from a breach.

A sample notice clause:

**Any notice required or permitted to be given to either party shall be deemed given one day following the date the same is mailed, correctly addressed, by United States certified mail, postage prepaid, return receipt requested, or on the date of personal delivery. Until changed, notices and communications to Landlord and Tenant shall be addressed as follows:
(contact information here)**

Each party shall have the right to specify as its proper address any other addresses in the United States of America by giving to the other party at least fifteen (15) days written notice of a new address.