

Leasing for Start-Ups (and Other Small Businesses): What is a Lease, Really?

By: Andrew Baraff, Partner at Reitler

What is a Lease?

In theory, a lease is pretty simple. All it says is that the landlord will let the tenant use a certain space, for a certain period of time, in exchange for paying a certain amount of rent. What's so hard about that?

Nothing, really. And, indeed, that portion of a lease usually takes up less than a page. It's only after that when things start to get complicated.

Failure to Pay Rent or to Leave

For example, what happens if the tenant doesn't pay the rent or refuses to leave the space at the end of the term? So a remedies and damages section is added to cover non-payment and a "holdover" section is added to induce the tenant to leave.

Maintenance and Repairs

As they start to think about other issues that could arise, the landlord will want the tenant to keep the leased space in good condition. Conversely, the tenant will want the landlord to maintain and repair the parts of the building that the tenant isn't leasing, such as the roof and the lobby and sidewalks, and the structural elements.

Services from Landlord

The tenant will soon recognize that it needs the landlord to provide heat and air-conditioning, as well as hot and cold water, elevators, electricity and cleaning, and that the parties will have to determine how much the landlord will supply, and at what times and whose cost.

Compliance with Laws

The parties will quickly realize that they have to determine who will comply with certain laws, including future laws that haven't been enacted yet but could be during the term of the lease. So now they have to discuss and resolve which laws will apply whom and who will perform – and pay for – any work necessary to comply with them.

Alterations and Assignments and Subleasing

As the parties think about it further, it will occur to them that the tenant might want to make alterations to its space, or to assign the lease or sublet the premises.

Casualty and Condemnation.

Thinking a little more, what happens if there is a fire? The fire could be in the tenant's space, just affect the tenant's floor but not the tenant's space itself, or affect the entire building. What if the building is condemned? (It doesn't happen often anymore, but it happens. Consider the redevelopment of Times Square or what could have happened in Long Island City if Amazon HQ2 had gone through.)

Initial Work, Tenant Improvement Allowance, Security Deposit, Guaranty, Bankruptcy

Then things start to snowball: perhaps the landlord or the tenant has to do some work in the space before the tenant can move in. What happens if the landlord doesn't finish on time? Is the landlord going to pay for some of the tenant's work? Is the tenant going to give the landlord a security deposit? Will a third-party guaranty the lease? What if the tenant goes bankrupt?

But Wait, There's Even More!!!

Because almost every lease also provides for:

Free Rent; Operating Expenses; Real Estate Taxes; Financial Statements; Hazardous Materials; Landlord's Right to Change the Space; Insurance; Renewals of the Term; Expansion of the Space; Right of First Offer for Additional Space; Supplemental Air Conditioning; Communications Equipment; Security and Safety; Arbitration of Disputes; Limitation of Landlord's Liability; Mortgages on the Building,

and much, much more . . .

The Problem?

As the tenant consider these issues, it will come to understand that each of these matters has multiple permutations and subtle nuances which will take pages, not paragraphs, to address and that if not handled correctly could cost the tenant (sometimes surreptitiously) tens (if not hundreds for large leases) of thousands of dollars.

Suddenly, our simple, one page lease is 60, 80 or even 100 pages long – or longer!

The Solution - Understanding Your Business

This is why when a tenant asks if I can spend an hour reviewing the draft of the lease it just received from its prospective landlord and let them know what they should be concerned about, I have to tell them, “no - a careful review of all these issues will take much more than an hour. But what I can do is sit down with you and discuss your business, how you intend to use

the space, how long you expect to be in the space and a number of other questions so I can understand what is important to you.

Then I can review your lease efficiently and effectively, tailored to your needs.”

So even if it takes more than an hour, together you and I have taken the first steps towards crafting a lease that will address your needs while protecting you from unnecessary, unfair (and often hidden) risks, as efficiently – and inexpensively - as possible.

We will explore these topics, and others, in more detail in a number of articles that will follow.

About Andrew Baraff



Partner in Reitler’s transactional real estate and real estate finance practice. He specializes in sophisticated real estate and business transactions, including “special situations” – uncommon problems that demand creative thought and innovative solutions. Andrew is also a trusted advisor to his clients, providing counsel on real estate and non-real estate issues, alike. Andrew has a results-oriented, business approach to the practice of law – he offers creative strategic thinking to find practical solutions to complex problems.