

**COMMERCIAL LEASES**  
**1 CREDIT HOUR**

**Commercial Lease Form (5 MINUTES)**

- The most widely used commercial lease form is the REBNY lease form (Store/Office/Professional Space)
- The printed form lease itself contains the major non-negotiable points utilized by most Landlords then a rider is added to personalize the Lease to the particular transaction
- There are substantially more obligations placed upon a commercial Tenant and substantially less protections.
- Unlike a residential lease where a Tenant generally cannot waive certain rights (warranty of habitability, specific service of process, compliance with the Certificate of Occupancy and many City and State rules and regulations) in a Commercial setting the parties can contract away the rights and obligations of each party
- Commercial vs. Residential
  - LOI: Letter of Intent
    - Buildout, free rent, commencement, Term, Escalations, Square Footage, Additional rent, LOC vs Security Deposit, Guarantor/ Good Guy Guaranty, Option(s)
  - If Leased to a Corporation the Tenant MUST have an Attorney or the Lease will not be binding
  - Proof of finances
  - Insurance Requirements, ADA Compliant, Fire Safety, Estoppels, Subordination
- Charges/Additional Rent
  - The Commercial Tenant will generally be obligated to make all repairs, maintain their space, make all replacements, supply and pay for all utilities including but not limited to: Heat, Electric, Gas, Water/Sewer, Air-Conditioning, Trash Removal, Cleaning, Sprinkler, Phone service, as well as be responsible for their share of the Real Estate Taxes
  - Where the property is a tax payer/free standing single story, the Tenant will generally pay all of the Taxes for the property
  - In an office Building, the Tenant will generally pay their proportionate share over the base tax year as well as CAM (Common Area Maintenance)
    - Today, most office buildings add a surcharge to the electric bill which is the equivalent of a service charge since many buildings now supply and maintain the electric and sub-meter each space
  - A prospective tenant should have the landlord enumerate all such items, as well as quantify initial amounts and previous schedules of increases; confirm that the tenant's percentage share regarding such items will not be excessive; budget for the bottom-line rent expense, i.e., the total base plus additional rent; and provide the method of calculation of any such increases. The tenant should negotiate for limits—annual and/or over-the-lease term—regarding such expenses.
- **LATE MONEY CAN BE APPLIED TO ADDITIONAL RENT FIRST**
  - Most commercial leases will have an “Application” clause, which allows a landlord to apply partial payments from the tenant to different debts at will. This means that a partial payment may be applied to monthly rent arrears, water/sewer, or real estate taxes.

### **Tenant Improvements (“TI”) (5 MINUTES)**

- It is not uncommon for the Commercial Tenant to build their own space, and generally, compensation for this usually given in the form of free time/rent concessions
  - The landlord may set an allowance that the Tenant gets for the TI
  - These points are almost always dictated by supply and demand/market conditions
- Not all Landlords are going to be comfortable not having any money from a new commercial tenant for a period of time. But there are creative ways around that. For instance, if the rent concession was going to be equivalent to six months’ rent, the landlord can try to negotiate receiving 50% of the monthly rent for 12 months, as opposed to nothing for six months. Concessions are also given because moving is such a great expense, a tenant may need time to catch up, especially if the tenant only began making a profit after the improvements were completed. Conversely, where the owner builds the space pursuant to the Tenant’s specifications it is common for the landlord to want a personal guarantee from the tenant, for at least a certain period of the lease to protect the Owner in case the Tenant breaks the lease/is evicted, etc.

### **Use of Premises/No Residential Use (5 MINUTES)**

- Landlords will often narrowly define the permissible uses of the premises by allowing only the current business of a tenant. For example, if you contracted to sell shoes but started selling sports cars, that can be seen as a violation of your lease, and your landlord could start what is called a holdover action to evict you.
- Landlords may choose to exercise these clauses to avoid unnecessary competition between their commercial tenants.
- If you are negotiating a lease for a prospective tenant, you are going to want to negotiate this broadly, in order to cover a wide range of uses and any related or ancillary uses which may later become desirable. If you are negotiating for a landlord you want the “Use” to be very specific.
- An example of this would be instead of limiting the use of an office suite to "law office uses," an experienced attorney could negotiate instead for: "use for general office purposes, including, but not limited to law office uses" (with no limitations as to the type of "office use").
- This expanded-use provision affords a commercial client with use of a portion of its space and to sublet or assign the lease to a broader spectrum of potential subtenants or assignees (although this is usually subject to landlord approval).

### **Ground Floor Commercial Space vs Office Space (5 MINUTES)**

- Different commercial units in various parts of a commercial building will have different obligations about which a commercial tenant must be aware.
- Ground floor units need permission from a landlord to install a sign or awning, as well as an approval of the type of signage/awning
  - Uniform Store Front is very common. Any work plans whatsoever, in upper offices or in ground floor locations, should be reviewed by the landlord beforehand and given their approval.
  - Ground floor units such as restaurants are not automatically entitled to sidewalk seating. Permits for such seating has to be procured, but are certainly not guaranteed, and in recent years the city has cracked down on restaurants illegally using the sidewalk outside their units; requiring restaurant owners to show proof that zoning requirements allow a sidewalk café, or that their business has a zoning exemption. Generally, the

lease will not be subject to such approval and the Cost is borne solely by the Tenant (same with a liquor license).

- Another requirement for tenants in ground floor units is that the proprietors of the business must keep the sidewalk in front of their unit in good repair, including keeping the sidewalk clear of from snow and ice.

### **Rent Commencement Date and Basic Net Rent (5 MINUTES)**

- The lease term should be long enough to allow tenants to recoup their capital and intangible outlays for moving, alterations, furnishings, administrative matters, such as notices to clients and vendors, and lost billable hours.
- The term of lease section will note the rent for each year of the lease and will show the increases that will be accrue throughout the entire term of the lease.
- Tenants should also beware of "catch-up" CPI provisions designed to allow the landlord to catch up for years when the scheduled increases were less than the CPI increases. Tenants should identify, with precision, the actual CPI formula to be employed.
- A low base rent will attract a tenant's initial interest, however, additional items, such as real estate tax increases; common area maintenance, or CAM, charges; sprinkler charges and utilities may not be apparent at first. These additional items can significantly increase the total rent.
- In commercial leases, the monies that tenant agrees to pay, such as real estate taxes, water/sewer charges, sums, costs and other expenses are often treated as additional rent, and can be the basis of non-payment proceedings.
- A prospective tenant should have the landlord enumerate all such items, as well as quantify initial amounts and previous schedules of increases; confirm that the tenant's percentage share regarding such items will not be excessive; budget for the bottom-line rent expense, i.e., the total base plus additional rent; and provide the method of calculation of any such increases. The tenant should negotiate for limits—annual and/or over-the-lease term—regarding such expenses.
- Most leases now contain both apparent and not-so-apparent restrictions, procedures and fees, for assignment or subletting. The ability to assign or sublet is essential, and any provision which allows the landlord to withhold, delay or require additional compensation for this right could adversely affect a tenant.

### **Special Due Diligence Concerns (5 MINUTES)**

- As with any other legal matter, early and extensive research into the essential and underlying considerations is vital.
- A prospective tenant should conduct a title search of the premises to determine: that the chain of title confirms that the landlord is, in fact, the owner and not a mere net or ground lessee; the existence of any violations of record, such as municipal, building department or board of health, which could affect the tenancy; that the building is properly zoned for the tenant's use; that the certificate of occupancy is current and there are no outstanding violations; and that the landlord has a mortgage on the premises.
- Most commercial leases agreements provide that the tenant's leasehold is subordinate to the landlord's mortgage(s), net leases or ground leases. In the event the landlord defaults with respect to any of these underlying agreements, a tenant's leasehold estate will be adversely affected and, in some instances, terminated.
- For firms that have invested a significant amount of time and capital in the space, or when the appearance of stability is essential, consider negotiating for a **non-disturbance provision**,

subject to approval by any mortgagees, net or ground lessors, which ideally would provide that in the event of a breach by the landlord of any agreement to which a lease is subordinate, the firm's leasehold estate and the lease's terms and provisions, such as base rent, additional rent items, escalations, term and options, will remain unchanged.

#### **“Good Guy” Guaranty (5 MINUTES)**

- Landlords often require a company’s principals to assume personal liability for a commercial lease in the form of a **Personal Guarantee**. A copy of this kind of personal guarantee can be found attached in your handouts as *Exhibit A*.
- Tenants trying to avoid this can consider having a corporate tenant execute as tenant and the principals execute as guarantor (in separate agreements); and executing a separate “good guy” guaranty.
- A “good guy” guaranty is one in which the guarantor is personally responsible for certain Lease terms (these are negotiable areas). Generally, the GGG will be personal liability until the Date that the Tenant surrenders possession with specific provisions, i.e. all rent and additional rent is current, Tenant provides proper notice (typically 90-180 days prior written Notice), all consequential costs and expenses are borne by the Tenant, and keys are delivered in compliance with the lease as if the lease had ended
- Tenants try to specifically limit the exposure of the principals to base rent and certain ascertainable monetary obligations, such as real property tax increases, CAM charges, sprinkler charge, electric usage or porters' wage, for the period starting from the date of the tenant's uncured breach (not from the beginning of the lease to date); and only then, if the tenant and guarantors have not vacated by the noticed date

#### **Americans with Disabilities Act (ADA) Compliance (5 MINUTES)**

- **All commercial properties must meet the accessibility guidelines as set forth by the Americans with Disabilities Act of 1990 (“ADA”). The responsibility of maintaining the premises in an ADA compliant matter will generally fall on the tenant of the premises.**
- If the Space is pre-built and not in compliance the parties “may” negotiate this obligation.
- These most recently revised accessibility guidelines can be found in their entirety at <http://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm>.

#### **HVAC (Heating, Ventilation, and Air Conditioning) Issues (5 MINUTES)**

- SPECIFIC COMMERCIAL LEASE LANGUAGE RELATED TO HVAC USE IN COMMERCIAL LEASES
- HVAC in place: generally Tenant’s responsibility to maintain (**GET A SERVICE CONTRACT**)
- HVAC not in place: Tenants are generally responsible for HVAC distribution within the space. However, Tenants can request that landlord operate HVAC in conformance with specific design criteria, such as certain architectural or engineering needs. For example, server rooms need to be kept at a certain temperature. Tenant can require landlord to deliver air conditioning to the server room as part of its design criteria (which is typically included as an exhibit to the lease).

#### **Limited Rights of Commercial Tenant (5 MINUTES)**

- A commercial lease in New York can end up seeming almost archaic as there are few rights left on the side of the tenant in the event of conflict.
- Unlike some types of contract law, which allow a party to a contract to withhold performance of its obligations after the other party has breached the contract, New York requires the parties to

a lease to continue to perform their obligations, even when the other party is in default or breach.

- While a certain amount of self-help may be allowed on the part of residential tenants (even if officially not a true defense to a non-payment action), those rights have not generally been extended to commercial tenants.
- If commercial tenants are not provided with these rights, what can they do if their landlord does not fulfill his obligations? The tenant can always claim that if the landlord is not performing his obligations under the lease, that he has constructively evicted the tenant. This allows the tenant to be relieved from the lease and move elsewhere. If the tenant stays in possession, however, he must pay rent. This does not, therefore, provide much assistance to those tenants for whom it would be impractical or expensive to move to an alternate building.
- In a nutshell, there is no right for a commercial tenant to spend his own money to solve a problem and then claim that he can withhold the same money from rent. If the tenant did have to expend his own funds, the only remedy he would have would be to pursue the landlord in civil or Supreme Court for the balance.
- **Assignment & Subletting**
  - Residential: you cannot block Tenant's right
  - Commercial: Landlord can deny for any reason or no reason at all

#### **Local Law 11 (5 MINUTES)**

- Codification of inspection requirements of the facades and exteriors of buildings
- Requires landlords to hire an architect or engineer to perform an inspection of the exterior walls of buildings greater than six-stories, every five (5) years. The inspection report documents any dangerous conditions along the walls and is submitted for review by the Dept. of Buildings. The ASPA Engineering LLC prepares and files this LL 11/98 report on behalf of the building managers or landlord.
- Under Local Law 11, all the building's façades have to be inspected. The only exception is for walls that are 12 inches or less from the wall of an adjacent building. The physical inspection has to consist of at least one drop from a scaffold or other observation platform.
- Most Commercial leases do **NOT** allow Tenants to withhold rent because scaffolding is in place. This has become predominantly true since the birth of LL11.

#### **Local Law 97 (5 minutes)**

Beginning on May 1, 2025, each owner of a covered building must deliver an annual Local Law 97 building emission compliance report for the preceding year to the Office of Building Energy and Emissions Performance.

This report must be prepared by an approved third-party consultant and show:

- 1) the occupancy group, property type and floor area of the building;
- 2) whether the building is compliant with the applicable GHG limit and;
- 3) the amount exceeding the limit if building is noncompliant.

False reports are punishable by fine of up to \$500,000 and 30 days imprisonment.