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**Program Preservation, Evolution, and Financial Change: Real Estate
Coping with Excess Space - Subleases and Assignments**

Leasing office space in New York City is expensive for any business. For a nonprofit organization, being able to afford rent and related occupancy costs including real estate taxes, utilities, and insurance can be particularly challenging if the organization relies on government contracts and donations for funding. Rent is frequently the second largest expense for an organization after payroll. Therefore, when an organization has excess space it makes sense to eliminate the financial burden. While it might be tempting to quit the premises and walk away, if the lease does not contain a right to terminate, the landlord can recover the full amount of the unpaid rent remaining under the lease through the end of the term and seek a judgment against the tenant. Unlike a residential landlord, a commercial landlord is not obligated to mitigate or lessen its damages. A bill has been introduced in the State legislature to require New York landlords to mitigate damages when a commercial tenant vacates a premises in violation of its lease agreement. However, this is the fifth year in a row that the bill, S2134/A2729, has been introduced. It is not clear whether it will pass this year. The most logical option, if you do not have a legal right to terminate the lease, is to sublease all or a portion of the premises, or to assign the lease.

When confronted with extra space, the first step is to confirm whether your lease contains a termination provision. If not, look for a provision governing assignments or subleases. Be sure to review any riders and amendments to the lease. The most common lease form used by New York City landlords is a Real Estate Board of New York (REBNY) form. REBNY is a real estate trade association. Its members are real estate developers, property managers, agents, and brokers. REBNY has forms for leasing office, loft, and storefront retail space. The standard form is landlord-friendly. The REBNY lease provision on assignment and subleasing states that a tenant may not assign, transfer, or encumber any portion of the premises without the landlord's prior written consent. The provision also restricts a tenant's right to mortgage its interest or engage in any transfer of its leasehold interest.

It is important to review and understand all of the lease terms pertaining to assigning and subleasing. A savvy landlord will further modify or entirely replace the standard lease provision with a longer provision in a lease rider containing additional restrictions and qualifications favoring its own interests. Assignment and sublease provisions may be several paragraphs long, depending on the landlord's sophistication and the type of property. It may include details such as how much notice the landlord requires before a tenant can sublease or assign, how much time the landlord has to respond to your request, whether the landlord expects to receive a percentage of any profit you make, whether the landlord will further restrict the use of the premises, and any financial thresholds the proposed assignee or subtenant must meet. It is not unusual for a landlord to require a copy of the signed sublease to be submitted at the same time as your request for approval.

Landlords will normally require at least thirty (30) days' notice to review an assignment or sublease request but that time period may range anywhere from ten (10) days and up to sixty (60) days and longer. You will need to continue paying the full rent and any additional rent payments due under

the lease while you wait for the landlord to respond to your request for approval of the sublease or assignment.

Practical Considerations

While there are legal steps you need to take, there are also practical considerations. For example, if your space is in an office building with multiple tenants, you might take note of how many vacancies there are in the building, what the real estate market is like in your neighborhood, and consider whether your rent is above or below market. These factors will impact how your landlord will respond to your request. You should make sure to look for a credit-worthy tenant and be sure to request business or professional references, including references from prior landlords. You may also consider speaking to your landlord or leasing agent to start the conversation but you may want to consult a lawyer or agent who is representing your interests before starting a dialogue.

Here are some questions and answers about subleases and assignments of lease.

What is the difference between an assignment and a sublease?

An *assignment* is a transfer by the tenant of its entire remaining interest in the lease. If your organization is intending to shut down operations or close a program, an assignment is the appropriate option (if the landlord allows it) since you do not intend to return to the space. The tenant who is assigning its interest typically remains liable under the lease unless the landlord releases the tenant from liability.

Example: *Child Care Org., as tenant, entered into a lease for 5,000 square feet of office space for a 10-year term. At the end of the seventh lease year, Child Care Org. wants to terminate the lease because Child Care Org. is going to cease operations. An assignment is the best option for Child Care Org. If Child Care Org. cannot assign the lease, whether because its lease or landlord prohibits it or it cannot find a tenant to take over, Child Care Org. will remain liable for the rent and other charges under the lease through the end of the 10-year term, unless the landlord agrees to modify the terms of the lease.*

A *sublease* is a transfer by a tenant to a third party allowing them the right to use the leased property or a portion of such property. It is a mechanism for, among other things, temporarily solving an expense issue and/or to dispose of excess space for a period of time. You may not need all of the space your organization is currently using but may want to hold on to it for use at a later date. A sublease allows you to lease a portion of your space for part of your lease term (or all of the term less one day) and to take back occupancy at the end of the sublease term. The sublease agreement should be in writing and is subject to the terms of your lease. The overlease should be attached to the sublease agreement so that the subtenant is aware of all of its rights and obligations. Keep in mind that you are still obligated to pay the full rent to your landlord (the "Overlandlord") although you can direct the subtenant to pay their rent directly to the Overlandlord. Repairs, maintenance, alterations, and other provisions will be governed by the lease and the subtenant will not be able to make any repairs without your approval and the Overlandlord's approval.

Example: *Social Services Org. lost a grant to provide home visits to its elderly clients. It now has three vacant offices in its current space that were used by program staff. Social Services Org. hopes that the program will be funded again before the end of its lease term. For the time being it will keep 1,200 square feet for its offices and look for a subtenant to lease the remaining 800 square feet – if its lease permits – until the program is back on track. Social Services Org. should enter into a written sublease*

agreement with its subtenant. The sublease agreement to be prepared by its attorney will be subject to all of the terms and conditions of the Overlease.

What are my rights if the lease does not have a provision on a sublease or assignment?

If the lease is silent and does not mention sublease or assignment under New York State law, the legal policy is in favor of allowing tenants the freedom to transfer by assigning or subleasing its interest under the lease.

What other sections of the lease should a tenant review?

The “use” clause and any restrictions on tenant’s use of the premises are key provisions to review when considering entering into an assignment or sublease. A subtenant or assignee will be subject to the same restrictions as the primary tenant. For example, if the use clause states the premises will be used for nonprofit administrative offices and program space, you cannot sublease or assign to a business corporation or other type of business that is not operated by a nonprofit organization. A restriction on use will impact your ability to find a suitable subtenant or assignee.

If you have questions about the process or need help interpreting your lease or exercising your rights under the lease, you should seek legal representation. Lawyers Alliance for New York can provide pro bono help through our law firm and corporate volunteers.

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