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Re-evaluating Commercial Leases with Landlords

The COVID-19 pandemic and ensuing macroeconomic conditions have forced many nonprofits to re-evaluate their commercial leases. Some nonprofits lost their funding, ability to pay rent, and/or ability to provide services to clients during and following the pandemic. One way for a nonprofit to mitigate these factors is to approach its landlord to renegotiate its commercial lease, or to terminate its commercial lease entirely. The general principle behind commercial leases is that if you break a lease, you are obligated to pay the landlord an amount sufficient to put them in just as advantageous a position as they would have been if you had not broken it. This Legal Alert will give you several tips on renegotiating your lease.

Read the Terms of Your Agreement

Before you start the process of trying to renegotiate, it is important to clearly understand the terms of your lease agreement. Leases generally require a tenant to pay its rent for the entire term, regardless of any adverse developments. However, there are provisions in some leases that may provide relief to tenants:

- **Deprivation of access and/or services:** Some leases have a provision that requires the landlord to provide the building or certain services to the tenant. For instance, a lease may require a landlord to clean the buildings common areas or provide janitorial services. But what happens when the landlord does not provide those services and the tenant is unable to access the premises? Typically, for a tenant to make a claim of deprivation of access and/or services, the landlord must have willfully not provided the services outside of a government shutdown. *However, most leases still require the tenant to pay rent even if the landlord fails to provide the required services.*
- **Force majeure:** May excuse a tenant's contractual obligations (i.e., paying rent) when it is prevented from doing so by factors outside its control, such as hurricanes, storms, earthquakes, other acts of God, or strikes. This provision, however rarely allows tenants to cancel their lease, and in most leases, even when there is a force majeure event, the tenant is still obligated to pay rent.
- **Assignment and Subleasing:** May allow a tenant to sublease all or a portion of the space or assign the lease to another organization. This provision, however rarely allows tenants to assign or sublease the space without the landlord's consent.
- **Sole-funding termination right:** This provision is an acknowledgment from the landlord that tenant's financing and funding comes from certain sources. If those sources are taken away, reduced, or removed, the tenant will be unable to pay rent, in which case the tenant would be able to terminate the lease. This provision only applies if it is included in the lease and funding is actually cut. To be enforceable, the provision must specifically describe 1) the specific funding source(s) and 2) if that funding is cut, how much notice you are required to give your landlord to terminate the lease due to the funding cut.

Contact Your Landlord

Don't hesitate to contact your landlord to set up a meeting. One of the first things you should do in this process is to contact your landlord early, either in written form or via a phone call, to discuss renegotiation. Tell them what is happening with the organization in as much detail as you can and explain how you are planning to boost revenues as you plan the future of your organization. Sooner is always better than later, so it is best to meet *prior* to your default on rent payments or any other tenant obligations.¹

You should be strategic about these discussions and keep in mind what the landlord is considering, including 1) the extent of tenant's financial distress; 2) whether the landlord wants to keep the lease in place; and 3) landlord's obligations to its lenders and investors and the availability of insurance.

Alter the Lease Terms

There are multiple ways you can alter lease terms in order to find a more suitable financial agreement that could allow you to stay in your space. Below are a few commonly renegotiated terms:

- **Rent reduction or abatement:** You can ask for a specific amount reduced each month either temporarily, or for the remainder of your lease. Similarly, you could ask for a rent abatement, where you could ask to delay paying rent for a certain period. After the period is up — for example, six months — you will pay back the rent owed, sometimes with interest.
- **Subleasing:** You can ask to sublet all or part of your space to another organization. For example, if you have an office space that is not being fully used, there may be another organization that could use that portion of the space. However, subletting a property will not relieve you of your lease obligations. You would still be responsible for paying rent and managing repairs or damage to the property, if your sublessee does not pay.
- **Lease Extension:** You can offer to extend your lease for a longer period in exchange for more favorable terms. This could be a win-win, with your organization having less monthly rent and the landlord not needing to find another tenant if you were to leave.

Alternatively, if you need to terminate rather than renegotiate the lease, consider offering a lump-sum payment to your landlord in exchange for a termination of your lease. This payment is often substantially less than the remainder due on the lease, as the landlord may feel that it would be able to re-let the space fairly quickly.

Commercial Landlords Potential Duty to Mitigate Damages

In July 2021, the New York State Assembly passed a bill² requiring commercial landlords to mitigate their damages when a tenant vacates a premises prior to the end of their lease term. This bill has not yet been signed into law. Currently, if a commercial tenant vacates its rental premises before the end of the lease term, its landlord could sue for the balance of rent owed under the lease, while leaving the premises vacant, unless the lease includes a duty to mitigate.

If signed into law, landlords would be required to take reasonable actions to find a new tenant before they can make a claim for the unpaid, future rent of the vacated commercial tenant. This is good news for a commercial tenant who may want to break its lease and vacate the premises. Landlords will now be required to look for a new tenant to pay rent for the space, rather than solely relying on suing the vacated tenant for the balance of the rent.

¹ It may be better to have a business meeting between you, as the tenant and your landlord before lawyers get involved. Once a deal has been struck, you and your landlord should contact your attorneys to put the agreement in writing.

² Assembly Bill A6906

This Legal Alert serves as guidance for nonprofit tenants considering their options with respect to renegotiating lease terms. If you would like assistance with questions about renegotiating a lease with your landlord or documenting any negotiations made with a landlord, please contact Lawyers Alliance for assistance.

This alert is meant to provide general information only, not legal advice. Please contact Lori Moses at Lawyers Alliance for New York at lmoses@lawyersalliance.org or visit our website, www.lawyersalliance.org, for further information. To become a client, visit www.lawyersalliance.org/becoming-a-client.

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