

Standard lease forms aren't always best

Be aware that in some cases, commercial tenants require a special kind of occupancy agreement



LEGAL EASE

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Vacancy rates for commercial space, already high, continue to increase. Traditional long-term tenants are in short supply. Out of necessity, landlords are

inventing new occupancy arrangements. These creative solutions, however, often require special kinds of occupancy agreements. Here are some common examples:

Pop-up stores

Many retailers are willing only to make a very short-term commitment to occupy store space. There are all kinds of these pop-up stores.

Holidays bring out the temporary sellers of decorations, flowers, gifts, costumes, fireworks, etc. New product rollouts by retailers often require short-term space. Sellers of seasonal products want space only during when their products are in demand.

Many landlords consider short-term rent and occupancy better than vacancy, and are willing to consider these pop-up arrangements.

A standard store lease form does not work well for these temporary tenants. For example, most lease forms are for net or hybrid rent structures. Short-term occupants want gross rents.

Standard lease forms contain repair and replacement obligations that do not work for pop-up stores; their obligation is typically limited to ordinary maintenance of the finish work. Insurance, damage, destruction and condemnation clauses in long-term lease forms make little or no sense for short-term tenants.

Depending on how short the term, legal possession of the premises may not be appropriate; a license to use the space may be better. Many landlords assume one size of lease fits all occupants, a penny-wise-but-pound-foolish mistake.

Shared offices

Like residential dwelling units, the sharing of commercial office space dramatically increases during recessions as occupants look for ways to reduce occupancy costs. Millions of feet of space are being marketed for sublease for this reason.

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sublease. That is another penny-wise-but-pound-foolish mistake.

Any time there are layered interests in real estate, the legal and business issues that must be thoughtfully resolved increase almost exponentially. For example, the sublessor can be caught between a rock (the master landlord) and a hard place (the sublessee) if the sublease fails to protect the sublessor with respect to defaults by either the sublessee or master lessor.

Sublessees, on the other hand, can be caught without any recourse if the sublessor defaults on the master lease without proper nondisturbance provisions. These are only two of many reasons why subleasing actually requires more careful and complex occupancy documents than the standard form lease.

Even more complicated is the office sharing license agreement in which the parties are actually using and sharing the same office space rather than using sublease space separated by a demising wall from retained offices. Many times a sublease is used incorrectly in these circumstances where a shared-use license is needed to maintain clear legal possession of the retained office space. Seasoned commercial leasing legal counsel will avoid these mistakes.

Government agencies

In times like these, landlords suddenly find untraditional tenants more attractive. Governmental and nonprofit-type tenants who would have been passed over may be the only options.

For example, the relocation of federal government employees while Portland's Green-Wyatt federal office building is renovated will likely absorb newly constructed office space.

These governmental leases are particularly scary for landlords, because the government's lease form is very one-sided. It is practically an understatement to say that the government condemnation

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power means the government can lease whatever space it wants on whatever terms it wants as long as it pays fair market rent as just compensation. That means landlords can forget their standard lease form, because the government will dictate the lease terms.

However, the landlord can count on the most important thing, which is guaranteed rent collection. That is no small comfort in times like these. Many empty speculative office developments in Portland have gotten lifts by leasing to government agencies.

Donated space

Even donated space, perhaps to serve a political campaign organization or a nonprofit agency, deserves the right form of occupancy agreement.

Typically a license is a better fit than legal possession under a lease. When space is being donated, the risk management provisions of the occupancy agreement are critical for the landlord.

Care must be taken to minimize the landlord liability associated with the recipient of the donated space. For example, adequate evidence of insurance is more important than ever, especially if liquor will be served at special events or other unusual use of the premises will occur. Indemnity provisions will be unusual depending on the circumstances. Property tax exemptions require special treatment in the lease, and the list goes on.

Standard lease forms often are a trap for unwary occupants and landlords. There is no substitute for an occupancy agreement that is prepared carefully and specifically to fit the factual circumstances. Resist the temptation to simply fill in the blanks using a standard lease form.

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