STRATEGIES FOR NEGOTIATING A LEASE

If you are planning to lease a facility in which to operate your business, rent may become your largest monthly expense. Rent may involve a particularly major commitment if, as is generally the case, your lease lasts for several years. In addition, the success of your business (and your own mental health) may depend, at least in part, on the quality of the physical space in which your business is located. Consequently, you should be very careful before signing a lease. This article, written from the tenant's perspective, discusses some of the most important issues you should consider and perhaps negotiate with your prospective landlord before you sign the lease.

How Has the Landlord Determined the Size of Your Lease Facility? Rent is usually calculated by multiplying a dollar amount per square foot times the number of square feet of your leased space as stated in your lease. But, as you will see below, the square footage of leased spaces is somewhat open to interpretation.

Landlords often measure the size of leased spaces from the exterior walls, and they often include obstructions, such as pillars that lie within the space. Of course, you would want to measure the space from the interior walls, and you would want to exclude obstructions. In addition, if your space has an odd shape, rendering part of it unusable, you might try to adjust the measurement accordingly.

Occasionally, landlords may include a percentage of your building's common areas within the size of your facility. Common areas are those areas that two or more tenants share, such as hallways, lobbies, basements, elevator shafts, bathrooms, and stairwells. Clearly, including part of the common areas when determining the size of your leased space will probably increase your rent. Therefore, you should try to exclude the use of common areas.

What Costs May Be Included as Rent?
As stated above, your rent will probably be calculated by multiplying X dollars times Y square feet. In a lease, this is often called base rent. Landlords also may seek payment from their tenants for the operating expenses associated with the building. These additional expenses are often called pass-through expenses. Your lease may contain a long list of pass-through expenses, such as real estate taxes, maintenance, repairs, trash removal, salaries of the landlord's employees, and costs of building improvements. Typically, landlords divide pass-through expenses among the tenants pro rata, according to the percentage of the building each tenant leases. Pass-through expenses can significantly increase the amount of your

monthly rent. Worse, as pass-through expenses can rise with inflation, they represent a potentially limitless amount of additional, unanticipated expense.

If you cannot convince your landlord to exclude pass-through expenses from your lease entirely, your next best alternative may be to negotiate an expense cap. An expense cap places a floor and/or a ceiling on pass-through expenses. For example, the cap may specify that you are not obliged to pay any additional expenses unless your pro rata share of the pass-through expenses exceeds X dollars per month. In the alternative (or in addition) the cap may specify that you are not obliged to pay any pass-through expenses that exceed Y dollars per month.

Whether or not you negotiate an expense cap, you should also try to limit the items the landlord can include as pass-through expenses. For example, try to exclude the cost of capital improvements to the building, excessive salaries or payments to vendors (who may be the landlord's relatives or which may be side businesses owned by the landlord), overhead expenses incurred by the landlord for the landlord's other properties, penalties and other expenses incurred by the landlord for violations of building codes and other laws, rent abatements and other allowances given to other tenants (discussed below), and expenses reimbursed by insurance.

Miscellaneous Items
Congratulations. You have fixed the amount of your monthly expenses by determining the square footage of your leased facility, by obtaining expense caps, and by limiting the items your landlord can include as pass-through expenses. Now it's time to consider several miscellaneous items.

To help offset the cost of your move (and, perhaps, your startup expenses), you should attempt to obtain a rent abatement and a decorating allowance. A rent abatement refers to a period of time, usually at the start of a lease, during which you are not obliged to pay rent. A decorating allowance refers to an amount of money the landlord pays or deducts from your rent to refurbish your leased premises (such as painting, carpeting, and so on).

Further, to best position your business, you may want to avoid having a competitor located within your building. If so, you should try to obtain the landlord's agreement not to lease space to a competing business.

Naturally, you assume that your business will exist when the initial term of your lease expires. Therefore, you should try to obtain one or more options to renew the lease when it expires. You should also anticipate the growth of your business by obtaining an option to lease available space adjacent to your facility or within the building. If you renew the lease or expand the size of your space, you should attempt to obtain another decorating allowance and perhaps an abatement. Even if you want to move, you should try to minimize the time period during which the landlord can post "For Rent" signs or show your space to prospective new tenants.

Although we are all optimistic about our future success, you should anticipate and plan for the worst scenarios. Therefore, you should seek a rent abatement and the right to terminate your lease if all or a part of your leased premises or the building is damaged by a fire or other casualty. You should also try to obtain the right to make an assignment or sublease of your lease to someone else. With an assignment of your lease, you vacate the leased premises. Someone else moves in, and you are no longer responsible to pay the landlord. With a sublease, you vacate all or part of the leased premises. Someone else moves in and pays rent to you. You remain liable to the landlord under your lease.

As a general rule, the landlord is not liable to provide any services (such as repairs and janitorial services) unless they are specified in the lease. Therefore, you should make sure that all the landlord's obligations are clearly stated. You should also try to negotiate remedies if the landlord does not perform. For example, you might try to obtain the right to withhold rent or perform the landlord's obligations and deduct the cost from the rent. Because tenants may be required to construct expensive improvements mandated by the Americans With Disabilities Act, you may particularly want to make the landlord responsible for those items.

Generally, tenants have no means to monitor the financial stability of their landlords. Therefore, you should try to protect yourself in case your landlord's lender acquires ownership of the building due to your landlord's failure to pay the mortgage. This can be done through a subordination and a nondisturbance clause in your lease. A subordination clause states that the mortgage is subordinate to your lease. A nondisturbance clause states that your landlord's lender and future owners of the building cannot terminate your lease so long as you continue to fulfill all your obligations under your lease. These clauses may be especially useful if you have negotiated a "sweetheart" lease.

Conclusion

No matter how good you are at whatever you do in business, the amount of rent and the terms of your lease can have a crucial effect on your success. Therefore, if you are considering leasing space, you should consult with an attorney or real estate broker who has experience representing tenants. By so doing, instead of being a millstone around your neck, your lease can contribute to your profit.