

## Real Estate Law: Commercial lease amendment and termination considerations

One year ago, as the pandemic began to tighten its grip on the country, nobody truly knew what to expect, other than change. A year later, some of the impacts of those changes are surfacing in commercial leases.

A year of shutdowns, remote work and other pandemic-related restrictions has significantly impacted commercial leasing markets. Many office tenants, surprised at how well they adapted to a virtual workplace, have begun to re-think traditional assumptions on the amount of office space they truly need and the most efficient configurations and uses of such space. Retail and restaurant tenants have experienced significant revenue losses that, in many cases, have put their continued financial viability in jeopardy. As a result, commercial tenants have increasingly requested their landlords agree to lease concessions, modifications and/or outright terminations. Landlords and tenants should carefully draft such lease amendments and/or termination agreements and consider various issues.

First, the parties should determine if lender consent is required for any lease amendment or termination. If the landlord has an outstanding mortgage loan, amending or terminating a lease without lender consent may constitute a loan default. In addition, tenants will often execute subordination and non-disturbance agreements for the benefit of the landlord's lender, and landlords will often sign lien waiver forms for the benefit of the tenant's lender. Both types of agreements typically require lender notice and/or consent to lease amendments and terminations. The failure to obtain such consent could open a landlord or tenant up to liability to such lender for breach and, in addition, may cause any such amendment or termination to be unenforceable against a foreclosing lender.

Next, the parties should consider how the amendment and/or termination should



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impact the obligation of the tenant to pay additional rent. Commercial leases typically require tenants to pay monthly estimates for property taxes, insurance, and common area expenses with a reconciliation at the end of each year. If a lease is amended or terminated mid-year, the parties should document whether subsequent reconciliations may take place or whether the parties are "walking away" from any shortage/excess in the estimated payments made by the tenant. Failure to address this issue could result in the tenant receiving an unwelcomed invoice months after they thought the lease had come to an end. Lease amendments where a tenant is giving up space and or terminating the lease completely should contain carefully drafted release and waiver language. The parties usually won't want to terminate all liabilities and obligations, since it may make sense for some obligations to continue (e.g., liability for personal injury, environmental liability, etc.). However, since the lease that is being amended or terminated may contain standard lease clauses that survive any termination, a release and waiver clause should be drafted broadly enough so that no obligation survives that was intended to be terminated. In addition, the parties should consult their insurance advisors to ensure that they

will continue to have applicable insurance coverage in the event a third-party lawsuit is commenced after amendment/termination for activities that took place prior thereto.

Commercial landlords often obtain corporate or personal guarantees from the principals and/or parent entities of the tenant to secure the tenant's obligations under the lease. For lease amendments, landlords will want to obtain the guarantor's confirmation that the guaranty remains in effect for the modified lease. The failure to obtain such confirmation may limit a landlord's ability to enforce the guaranty in the future. Additionally, for leases that are being terminated, the tenants will want to ensure the guaranty is terminated as well.

Parties to commercial leases will often record a memorandum of lease in the real estate records to memorialize the tenancy. If a lease is being amended and/or terminated, inquiry should be made as to whether a memo was recorded and, if so, an appropriate document should be prepared and filed to evidence such amendment and/or termination. The failure to do so may cause title headaches for the landlord many years later when it is looking to sell and/or refinance the property and the former tenant is long-gone.

Pandemic-related changes are certainly not over. As the commercial real estate markets continue to react to the events of the past year, landlords and tenants will continue to negotiate modifications to their leases to adjust to the new environment. Agreements to evidence such amendments and terminations should be carefully drafted and thoughtfully considered to make sure that parties receive the benefits for which they bargained.

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