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ASSIGNMENT 101: CONSIDERATIONS FOR LANDLORDS AND TENANTS IN NEGOTIATING ASSIGNMENT CLAUSES

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Assignment clauses are lease provisions that are often not given appropriate consideration by tenants in lease negotiations. Likewise, landlords' standard anti-assignment clauses may not cover some transfer scenarios that could result in a less creditworthy replacement tenant assuming the lease.

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A tenant's primary concern in negotiating a lease assignment clause is flexibility. The need for flexibility is heightened in long-term leases. If facing economic hardship, a tenant may want the ability to downsize or to obtain help in paying the rent either via subletting a portion of the space or a wholesale assignment of the lease. Likewise, if a tenant's business is growing, the tenant may need to assign the lease or sublet the premises in order to find a larger, more suitable premises for the tenant's needs.

In the case of an assignment of a lease or a subletting of a space, a landlord wants to be sure that an entity with sufficient net worth is liable under the lease for the payment of rent and the performance of the other lease obligations. Additionally, a landlord will want to prevent a tenant from competing with the landlord for the leasing of space within the building, shopping center or property (as applicable). Often a landlord will prohibit assignments and subleases with other current tenants of the property or with a prospective tenant with whom the landlord is negotiating for the lease of space at the property.

Assignment Provisions

There are a number of issues that should be considered when drafting and negotiating the assignment provision of a lease.

Prohibited Transfers

- Landlords should make sure that their anti-assignment provisions are sufficiently broad and capture various types of assignment, subletting and third-party occupancy arrangements, as well as changes of control and other entity-level transfers. Although anti-assignment clauses usually restrict the assignment of the lease and the sublease of the premises, a comprehensive anti-assignment clause should also restrict (1) the sublease or all *or any portion* of the premises, (2) a shared occupancy agreement or license to use the space by a third party, and (3) sub-subleases of the premises or any portion of the premises. "Transfer" should also be defined broadly to cover a transfer of the equity interests of (and/or the power to control) the tenant entity (or any parent entity if the tenant entity is a subsidiary). A tenant should negotiate for language providing that the landlord will not unreasonably withhold, condition or delay its consent to a proposed assignment or sublease.

- In light of broad anti-assignment provisions, as discussed above, a tenant should develop a list of transfers that constitute “permitted transfers” and that do not require any landlord consent. When negotiating these provisions on behalf of a tenant, it is crucial to understand the tenant’s business and its unique needs. For example, is it likely that, during the term of the lease, the tenant entity will be purchased by another company? If so, the tenant will want to exclude a sale of all or substantially all of its assets or stock from the definition of “transfer” and clarify that such an event will not require the landlord’s consent. Often, a landlord will require a net-worth test in this situation to ensure that the successor entity has a net worth following the transfer at least equal to that of the original tenant immediately prior to the transfer.

Profit Sharing

- Many landlords’ form leases include language that, in the event of an assignment or sublease, the landlord is entitled to 100 percent of any profits realized by the tenant from any sublease or assignment. As discussed above, a tenant will want to be sure that any profit-sharing requirement does not apply to a preapproved or otherwise permitted transfer. Additionally, the tenant should push for a 50/50 sharing of any sublease or assignment profits.

Liability

- A landlord will want to ensure that the original named tenant remains liable under the lease following any assignment, even if the assignment is approved by landlord. If a landlord is willing to consider releasing the original tenant from liability, the landlord will typically want to defer that determination until the tenant actually makes a transfer request. Once the landlord has the proposed assignee’s financial information, the landlord is in a better position to make a decision as to whether the original tenant should be released from liability under the lease. The release of liability language can be added to the form of consent executed by the parties in connection with the transfer.

Permitted Uses

- An overly restrictive permitted-use clause in a lease can thwart even the most tenant-friendly assignment clause. If the permitted use of the premises under the lease is limited to operating under a specific trade name, the tenant's ability to assign the lease or sublet the space is severely limited. Tenants should be sure that the use clause of their lease is broad enough to allow the lease to be assigned or sublet to a different named operator, or even for a different type of use.