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Board Talking Points: Assigning or Subletting Your Organization's Space

Your organization may be eliminating a program or may be trying to cut costs - and you have excess space. To control costs, consider assigning or subletting all or a portion of the excess space. The first step is to read your lease, including any lease riders. It most likely will contain a clause regarding assignment and subletting. Contact Lawyers Alliance for a full understanding of your lease and your rights to assign or sublet your leasehold interest.

Do not assume that you have the right to assign or sublet any of your leased space. Typically, unless a tenant has been able to successfully negotiate for the right to assign or sublet the lease, the landlord's prior written consent to an assignment or sublet will be required. Keep in mind that the landlord will also normally require thirty (30) or even sixty (60) days' notice to review an assignment or sublet request. In that case, you will still have the obligation to continue making the full rent payment for a minimum of two or three more months.

Here are some questions you might have about subleasing or assigning your space.

1. What is an assignment of lease?
2. What is a sublet?
3. If your lease does not have an assignment or sublet clause, what does that mean?
4. Must the tenant ask for approval to assign or sublet from anyone besides the landlord?
5. Unrelated to assignment and subletting issues, what other sections of the lease should the tenant review in order to keep check on leasehold related expenses?

Answers

1. What is an assignment of lease?

An *assignment* is a transfer by the tenant of its entire remaining interest in the lease. The tenant who is assigning its interest remains liable under the lease unless the landlord releases the tenant from liability. If your organization is intending to permanently vacate all of its space at one location - shut down operations or close a program, an assignment is the appropriate tool since you do not intend to re-enter or return to the space and continue

business. This is a mechanism for getting out of your lease payments when there is time remaining on the lease.

Example: Child Care Org., as tenant, entered into a lease with Commercial Landlord, as landlord, for 5,000 square feet of office space in a building for a 10-year term. At the end of the seventh lease year, Child Care Org. needs to get out of the lease because the rent is too high and Child Care Org. is going to cease operations. An assignment is the best option for Child Care Org. If Child Care Org. cannot assign the lease – whether because its lease prohibits it or it cannot find a tenant to take over, Child Care Org. will remain liable for the rent and other charges under the lease through the end of the 10-year term.

Note: A commercial landlord has no duty to try to lessen its damages for the loss of rental payments under a lease. The landlord has no obligation to re-lease the space in order to lessen the damages to the tenant that vacated the space.

2. What is a sublet?

A *sublet* is a transfer by a tenant to a third party allowing them the right to use the leased property or a portion of such property. It is a mechanism for, among other things, temporarily solving an expense issue. You may not need all of the space your organization is currently using but may want to hold on to it for use at a later date. A sublet allows you to lease a portion of your space for part of your lease term (or all of the term) and to take back occupancy at the end of the sublet term. The sublet agreement should be in writing and is subject to the terms of your lease. You are still obligated to pay the full rent to your landlord (the "Overlandlord") and act as a buffer between the Overlandlord and the sublessee although you can have the sublessee pay their rent directly to the Overlandlord. Repairs, maintenance, alterations and other provisions will be governed by the lease and the subtenant will not be able to make any repairs without your approval and the Overlandlord's approval.

Example, Social Services Org. lost a grant to provide home visits to its elderly clients. It now has three offices in its current space that were used full-time by program staff that will be unused. Social Services Org. hopes that the program will be funded again before the end of its lease term. For the time being it will keep 1200 square feet for its offices and look for a subtenant to lease the remaining 800 square feet – if its lease permits – until the program is back on track. Social Services Org. should enter into a written sublease agreement with its subtenant. The sublease agreement does not need to be as detailed as the lease between Social Services Org. and its landlord (the "Overlease") because the sublease agreement will contain a provision stating that the lease is subject to all of the terms and conditions of the Overlease.

3. If your lease does not have an assignment or sublet clause, what does that mean?

If the lease is silent, the legal policy is in favor of allowing tenants the freedom to transfer by assigning, or subleasing if the lease does not restrict their right. Consult with Lawyers Alliance before taking further steps.

4. Must the tenant ask for approval to assign or sublet from anyone besides the landlord?

A tenant should keep in mind that if it is a not-for-profit corporation and it leases all or substantially all of its assets, in addition to the approval of its board of directors, a not-for-profit corporation will need approval from the attorney general and from the Supreme Court of the State of New York for such a transfer. The approval process can be time consuming and can take anywhere from one month to several months depending on the complexity of the transaction and the number of applications being processed at the attorney general's office and at court. Lawyers Alliance is expert in preparing and filing petitions for such approval. Call if you need legal representation in connection with preparing and filing such petition.

5. Unrelated to assignment and subletting issues, what other sections of the lease should the tenant review in order to keep check on leasehold related expenses?

The tenant should review any sections of the lease that set forth the financial terms, such as the rent and calculation of rent increases, real estate tax and operating expense pass-throughs to determine how any payments due under the lease are calculated. The tenant should review these sections to make sure that it is not being overcharged for rent or pass-throughs. If permitted under the lease or even if the lease is silent, the tenant should request copies of bills, such as real estate tax bills, and analyze whether the landlord has billed the tenant correctly. Most leases will provide a mechanism for the tenant to receive back-up on the charges for pass-throughs. If you have questions about what the landlord should be providing to you or if you are unsure whether you are being properly charged, contact Lawyers Alliance for assistance.

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A decision to sublet or assign part of your leasehold space is an important business decision but with potentially long-term financial and legal ramifications. Make sure you have the appropriate information and understanding of the step you are about to take and that you have expert legal advice in making such a decision.

This alert is meant to provide general information only, not legal advice. Please contact Hedwig O'Hara at (212) 219-1800 ext. 226 or Gail Bayarin at ext. 279 if you have any questions about this alert.