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Unloading extra office space? Thoughts for corporate office tenants to consider when subleasing

August 19, 2010 - Connecticut

Despite an improved economic outlook from 12 months ago, companies continue to lay off employees and consolidate their reduced workforces into smaller office spaces. As companies downsize, either permanently or temporarily, an increasing number of corporate tenants wade into the potentially unfamiliar territory of offering all or a portion of their leased office space for sublease, thereby finding themselves stepping into the role of a "sublandlord".

If you are a corporate office tenant, here are eight key issues to consider when subleasing excess office space:

1. Initially, as a fundamental concept, it is important to scrutinize the sublet clause in the direct lease with your landlord. Tenants should carefully comply with all prohibitions and obligations in the direct lease regarding subletting, including any required notice and approval requirements. Most lease provisions requiring landlord consent to a transfer require the tenant to give the landlord anywhere from 30 to 90 days to review and approve the proposed transaction. Practically speaking, while most landlords will likely approve or disapprove of a proposed sublease in less than their allocated time, a tenant's failure to give the landlord proper and timely notice could stall the proposed sublease transaction until all sublease preconditions are met. Another item to consider is whether the landlord has any rights to recapture or take back your company's space if your company proposes subleasing all or a portion of it.
2. Remember that you (and any potential subtenant) are bound by the terms of the direct lease between you and your landlord. Except for the business deal (e.g., economic terms), the tenant must work within the confines of the direct lease and cannot grant rights to a subtenant in a sublease greater than those rights given to it as the tenant under the direct lease. While limiting in one regard, that limitation also simplifies the sublease negotiation with any subtenant.
3. Limit your obligations under a sublease. While the tenant in a sublease context is a "landlord", tenants should not be responsible for taking on any obligations that properly fall on a landlord of a multi-tenant office building, such as the provision of building services or the making of structural repairs.
4. Do not agree to be bound in a sublease by any representations or warranties made by the landlord in the direct lease. In fact, it may be prudent for you to specifically disclaim any such representations and warranties. The reason for caution is that most representations and warranties in a lease are factually related to the property and, because the tenant is not the owner of the building or the property, the tenant is unlikely to be in a position to know whether any such representations or warranties are accurate or complete. For instance, most landlords do significant environmental due diligence when they purchase a property, whereas a tenant leasing office space rarely does the same level of (or any) environmental due diligence. If an environmental

representation or warranty made by the landlord proves inaccurate and the tenant is bound by such representation or warranty in the sublease, the subtenant will try to seek damages and other relief from your company if it suffered any harm as a result of the breach.

5. Require your subtenant to expressly agree not to violate any of the terms of the direct lease. This is especially critical where your company has subleased only a portion of its office space. A subtenant violation could cause a default under and perhaps the termination of your company's direct lease. In that situation, your company could potentially be responsible to the landlord for damages and could, additionally, be ousted from its remaining space. To protect yourself in such a scenario, make sure to have adequate remedies and protections against the subtenant in the sublease, including the right to cure subtenant defaults.

6. Require rental payments under the sublease to be paid five to ten days before the date that rental payments are due under the direct lease. This helps to avoid unnecessary cash flow problems.

7. As further protection, require the subtenant to name your company as an additional insured on any commercial general liability policy required to be maintained by the subtenant that is related to the subleased space.

8. Finally, be sure not to allow the landlord to modify the direct lease in any consent or other document required by the landlord approving the sublease. For example, we have seen such consent documents specifically prohibit any further subleasing or other transfers under the direct lease, often despite the tenant having a specific right to do so under the direct lease. Be vigilant not to inadvertently lose the rights you bargained for in the direct lease.

This article was first published in the April 2010 issue of CBIA News, the journal of the Connecticut Business & Industry Association.

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