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Clean up (your lab) in a down economy - by David Blumberg

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With rising interest rates, inflation and escalating concerns about raising and borrowing funds, these are challenging times for life science tenants and their landlords. However, even in this environment, the decommissioning of lab space and securing a “Clean Certificate” at yield-up or upon subleasing or assignment must not be overlooked.

What is required to decommission a lab?

Decommissioning generally includes cleaning/sanitization by specialized vendors, an evaluation and testing by a certified industrial hygienist (CIH) and disposal of any hazardous materials pursuant to

law. The CIH should confirm in writing that the premises is free of contamination and ready for unrestricted occupancy by others.

Do all leases require the tenant to decommission its lab?

Ideally, a lab lease requires the tenant to perform a thorough close-out before surrender. Unfortunately, lease negotiations sometimes dodge end-of-tenancy issues, so a decommissioning may be inadequately (or not) addressed. In addition, few leases address the issue of decommissioning upon an assignment or sublet.

What is the value of a decommissioning?

Three key drivers are marketability, control of liability and costs, and lender obligations. Securing an “all clear” from a CIH has grown in importance as landlords, lenders and prospective tenants want to know the premises is free of contamination. For the landlord, it is cost-effective to identify -- and have the tenant address -- the issues prior to departure, when the landlord holds the security deposit, and avoid landlord liability to its lender on its environmental indemnity. The tenant also gets confirmation it has returned the premises in hazard-free condition.

What if the tenant is not obligated to decommission the lab?

Without a timely evaluation, dormant issues may be discovered after the tenant has departed or folded. The landlord will find it difficult to prove the source of contamination after reletting. Such factors weigh in favor of decommissioning, regardless of whether the lease requires the tenant to perform one or the landlord performs its own.

If the tenant defaults and the lease terminates, why bother?

Quick action may be critical if the tenant goes into bankruptcy or receivership. A proactive landlord could prompt the trustee or receiver to launch a decommissioning. At a minimum, the landlord can try to include its costs to close-out the lab space in its claim.

What about a sublease or assignment?

Decommissioning should occur prior to a sublease or assignment, for the benefit of all parties. The tenant/sublessor establishes a baseline reflecting that the space was clean when the keys passed to the subtenant. The subtenant, like a prospective tenant, wants to know the space is ready for its occupancy. The landlord also benefits, especially because a tenant/sublessor may be facing financial difficulty, leaving it unable to perform the work or reimburse the landlord at surrender. Decommissioning after multiple parties have used the premises can make it difficult to determine the source of problems. Moreover, timing undermines the quality of the CIH's evaluation. If the tenant cannot be found at a later date, the CIH may be unable to fully evaluate the premises because it cannot interview staff about the tenant's operations.

In the entire process, wise and experienced counsel is critical at each stage, from negotiating a lease through subletting, assignment, surrender, and yield-up to ensure the proper allocation of responsibilities and an environmentally safe use of space.

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