



# Commercial Leasing

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## Avoid Oversights in Lease Amendments

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The following scenario frequently occurs: A multi-tenant office building landlord requests its counsel to take a quick look at a proposed two-paragraph lease amendment that the landlord drafted itself. The landlord explains that the tenant has agreed to extend the lease term and establish a new base rental rate for the extended term. Very simple and straightforward, correct? In reality, if the landlord and tenant had signed the two-paragraph lease amendment, they would have made some potentially costly errors, overlooked several issues and bypassed an opportunity to capture more comprehensive provisions that, at a minimum, should have been considered for inclusion. This article will help attorneys avoid some common oversights when working on lease amendments and identify some opportunities that should be assessed during the amendment-drafting phase.

What was missing from the landlord's initial draft? From the time that the tenant first moved into the building several years ago, the standard of measurement for office buildings utilized in the local market had changed, and the square footage of the premises and building were different under the new standards. Accordingly, the tenant's proportionate share of building operating expenses, taxes and insurance should be updated along with the square footage. Similarly, some buildings use a base year methodology for

calculating and passing through building operating expenses, real estate taxes and insurance. If the base year has changed, the lease amendment should reflect the new base year.

In some instances, building ownership may have changed hands (or the owner or manager may have relocated) and/or a new mortgage lender may have an interest in the building since the lease was executed initially (or last amended). Commonly, upon changes in ownership or mortgage lenders, the tenant will have been notified of the changes and estoppel certificates and/or subordination agreements will have been secured. However, it is not a bad idea to use the lease amendment to update the notice provision and confirm where rent payments should be made on a going-forward basis.

If the lease is secured by a personal guaranty, the guarantor should confirm that the guaranty is extended along with the newly extended lease term. Similarly, the security deposit may need to be adjusted to reflect new circumstances (*eg*, increased rent, changed financial condition of tenant). The lease amendment should also reflect whether any real estate brokers were involved.

Are there any new requirements concerning improvements to the premises? If not, then an "as is" statement as well as a statement that any prior obligations set forth in the lease and any prior amendments concerning improvements to the premises (and construction allowances, if any) do not apply to the transaction reflected by the latest lease amendment.

In addition to including introductory recitals that accurately reflect the parties, all of the predecessor lease documents and the parties' intention

to amend the predecessor lease documents' various boilerplate provisions should not be ignored. For example, verifying that the lease, as amended, is in full force and effect is a sound practice. Additionally, it would be prudent to include a provision that confirms that if there are conflicts between the lease amendment and predecessor lease documents, the lease amendment controls. Similarly, if the lease amendment uses terms defined in predecessor lease documents (and does not define them in the lease amendment), add language confirming that such undefined terms shall have the meanings specified in the predecessor lease documents. Also, it would be a good idea to add an "entire agreement clause," as well as a clause providing that the lease amendment is binding upon, and inures to the benefit of, the parties and their respective permitted successors. If the lease amendment is to be executed by a corporation, limited liability company or the like, you might want to include a statement that the individual signing on behalf of the same has all requisite authority to so act. Further, if counterpart and/or fax signatures are desired, the lease amendment should so state.

Although tempting, do not fall prey to the alluring trap of simply accepting the two-paragraph lease amendment without considering the foregoing issues. Next time you face a lease amendment, remember how to avoid some potentially costly errors and do not miss the opportunities.

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