

# Don't get burned on the boilerplate

How preconceptions can leave tenants vulnerable **Interviewed by Leslie Stevens-Huffman**

**C**ompanies seeking to lease a corporate facility justifiably spend a great deal of time and focus with a qualified broker hammering out location, rent, term and other primary business points. Many executives mistakenly feel that once the key deal points are covered in a letter of intent or otherwise, the rest of the lease document is mere "legalese" or "boilerplate."

That kind of thinking will get you burned.

The lease agreement has been carefully drafted and refined by the landlord's attorneys. Consequently, the overwhelming majority of the terms contained in the lease are heavily weighted in the landlord's favor. These terms often include critical provisions such as the method for calculating triple-net pass-through charges. At the very least, having the lease agreement closely reviewed by qualified legal counsel will help level the playing field between the tenant and the landlord.

"The tenant and the landlord often have totally different views about the intent of the initial draft lease document," says Tom Turner, managing partner with Procopio, Cory, Hargreaves & Savitch LLP and a long-time commercial leasing expert. "The landlord typically expects the tenant to use the document as a starting point for negotiations. The tenant often assumes that boilerplate leases are all about the same so the detailed terms aren't worth negotiating. This assumption can leave the tenant extremely vulnerable."

*Smart Business* spoke with Turner about the negotiable elements generally contained in "standard" lease agreements.

## What are some negotiable financial terms contained in boilerplate leases?

Provisions regarding the pass-through of triple-net operating expenses should be reviewed carefully, because the language often shifts the majority if not all of the operational expense responsibility to the tenant. The lease should expressly exclude numerous inappropriate expenses from the pass-through calculation. In addition, the tenant should have the unfettered right to conduct an audit of the costs after the fact. It is important that the audit not be



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restricted as to when it is performed, what time period it covers or who the tenant chooses to conduct it. Many other financial components, such as late charges and holdover rent, security deposits and other credit enhancements, are often presented by the landlord as 'standard,' but are in reality very much negotiable.

## Are lease expansion and termination provisions negotiable?

The right to extend or terminate the lease or to shrink or expand the space are negotiable areas that are often overlooked.

It is not unusual for a lease agreement to have a heading titled 'Option to Extend,' but in reality provide the tenant with little more than an option to negotiate. This really isn't a tenant benefit at all. The tenant needs to work carefully through the lease language to make certain that these are truly enforceable rights that are also workable from a practical perspective.

As an example, if you think your business may be growing, you may want the right of first refusal on any adjacent space that becomes available, on pre-established terms. Moves under any circumstances are costly, so by anticipating growth, you can eliminate much of the cost of expansion by sim-

ply adding on rather than relocating. But if you are not careful about the detailed language of the lease, you may end up with a worthless right to sit down and talk with the landlord.

## Why are boilerplate relocation provisions problematic?

In the event of disasters, such as floods, fires or earthquakes, the lease typically allows the landlord to evict tenants or move them to an alternate location of the landlord's choosing. You can bet these provisions are overwhelmingly favorable to the landlord, so it's important to spend the effort to assure they are fair and reasonable.

Also, it isn't uncommon to find a hidden provision near the end of a standard form lease that gives the landlord the right to actually relocate the tenant to other premises, almost on an unrestricted basis. Usually, if you push back, this provision will simply be deleted; at a bare minimum, should relocation be required, the tenant should have the right to acceptable comparable space and be completely reimbursed for all related expenses.

## What eviction provisions should tenants watch out for?

I have seen landlords actually searching out a basis to put a tenant into a technical default, in order to give them the boot in favor of a more attractive deal. As an example, the landlord requests that you deliver an estoppel certificate and subsequently evicts you, without recourse, if you deliver the certificate a day late. As the tenant, you want to retain the right to be notified of any default and a specific time frame to cure it before you can be evicted.

By closely reviewing the entire lease document before signing it, the tenant can gain important leverage by negotiating all of the terms and conditions up front, when the landlord and the brokers are eager to get the deal done.

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