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# Doron F. Eghbali Commercial Leasing Law

## [What Are Some Salient Provisions of Commercial Leases?](#)

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Commercial leases, understandably, are rather different from residential leases. In fact, while drafting commercial leases, counsel should consider points not necessarily deemed salient for drafting residential leases. Some of these points include but are not limited to option terms, definition and applicability of net leases, timing and effect of tenant's bankruptcy on lease termination and viability of tenant's date of possession clauses. Let us explore such points and educate ourselves further.

### ***1. LEASE TERMS/OPTION TERMS IN COMMERCIAL PROPERTY LEASES***

Commercial leases have fixed terms which automatically create tenancy for years. Tenancy for years only means the lease term is for a DEFINITE period which could be for even less than year, ironically, despite what the name implies. At the end of the tenancy, the lease, often, automatically expires without any requirement on either parties to give notice.

Extreme caution should be given to option terms as they may be found to be unenforceable, as they might not specify necessary terms required for an enforceable lease. Usually, in drafting option terms, the problem arises when the rental price is not specified or even the mechanism to calculate is left for future discussions. The latter problem, often, creates an illusory contract with no enforceability and rife with litigation.

### ***A. NET LEASES DEFINITION AND APPLICABILITY IN COMMERCIAL PROPERTY LEASES***

Net lease, not a legal jargon and used only in non-residential parlance, is referred to the rent landlord presumably receives without deduction of anything, no property taxes, insurance, repairs or any other conceivable charges other than landlord's own income tax on the rent received. Hence, a lease is not net if the lease calls for anything less than what just enunciated. The commercial lease, could be PARTIALLY NET, if it obligates the tenant to undertake some



BUT NOT all of the obligations. NET LEASES could be lucrative investment tool for passive investors with relatively substantial return, if possible.

## **B. COMPARED TO GROSS LEASE**

Commercial lease could be GROSS LEASE. *Gross Lease* is an exact opposite of *NET LEASE*. In fact, in Gross Lease, landlord is obligated to pay for all of the items laid out such as taxes, insurance, improvements of any kind, etc out of the rent received. Gross Leases are rare.

## **C. APPLICABILITY OF NET LEASES AND BEYOND**

Net Leases are usually used in freestanding buildings where there is one retailer, for instance. Most multi-tenant buildings are an amalgamation of both NET and GROSS leases, something in the middle of the two extremes. In such circumstances, tenant agrees to pay any increase in the landlord's operating expenses. The way it often works is tenant agrees to pay anything above a dollar amount designated or base year determined for such increase.

## **2. BANKRUPTCY OF TENANT IN COMMERCIAL LEASES**

Generally, THERE IS NO TERMINATION OF COMMERCIAL LEASES BY OPERATION OF LAW, *only because commercial tenant is bankrupt or insolvent.*

*More importantly*, there is a conflict of law concerning Bankruptcy of Tenant provisions in commercial leases. In fact, while federal bankruptcy laws, generally, do not allow landlords to terminate a lease because of bankruptcy, CA law allows it. Hence, it behooves landlords to ascertain such clauses, generally, are unenforceable under federal bankruptcy laws, even though they exist in CA commercial leases. CA case law, interestingly, has upheld such provisions entitling landlords to terminate commercial leases when tenant becomes bankrupt or insolvent.

## **3. DATE OF POSSESSION PROVISION IN COMMERCIAL LEASES**

Date of Possession clauses in commercial leases are replete with peril since there is no guaranty the dispossessed commercial tenant will in fact move out. This is noteworthy most commercial leases contain relatively heavy punitive damages for hold over tenants. Nonetheless, the existence of such clauses could be detrimental to one being dispossessed and one moving in since the hold over dispossessed tenant and the new tenant could both be liable for heavy punitive damages under their respective clauses.



The bottom line is to prudently and intelligently weigh the costs of holding over awaiting the dispossessed tenant to move out.

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