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Tenant Favored Lease Strategies for 2011

Although the national leasing market generally stabilized in 2010, leasing has been hit by the economy like virtually every other area of real estate. The beginning of the year – as landlords and tenants begin to reconcile their 2010 operating expenses - is a good time to examine leasing strategies for the new year.

Proactive thinking will remain the winning strategy in 2011. Listed below are basic descriptions of a handful of tenant-favorable lease provisions that might be useful, both for tenants to use and landlords to note, as part of negotiations this year for a new or amended lease.

- **Alternate Term Length:** A tenant concerned about a long-term commitment for a new business or in a new market may desire a shorter initial term with more renewal terms. The tenant that once agreed to a ten-year initial term and 2 five-year renewals now may want an initial three-year term and 5 three-year renewals. With a structure like this, the tenant can get out of the lease if the business does not support the space, but also has reserved rights if the business does well.
- **Termination, Contraction, and Expansion Rights:** If business is slow, reducing the space or exercising an early termination right (both often with a landlord fee) might be a cost-effective way to reduce the lease obligation. Alternately, if business is better than expected, a right to expand into adjacent vacant space may be useful for a tenant who initially leased a smaller space due to economic uncertainty.
- **Permitted Uses, Assignment, and Subleasing:** Having sublease or assignment provisions with minimal landlord conditions is ideal in case a tenant wants to quickly unload an underperforming site. The permitted use clause also should be as broad as possible because it will maximize the audience of prospective subtenants and assignees that may be able to take the space.
- **Delayed Delivery of Space:** It normally is critical for a tenant to have new premises delivered by a landlord on time so that the tenant can open for business as scheduled and begin to generate revenue as budgeted. To this end, consider providing in the lease that, in the event the premises are delivered late, then tenant receives one day of rent abatement for each day of delay, two days

of rent abatement for each day over thirty days of delay (this credit is in addition to pushing back the rent commencement date), and a right to terminate if the delay is beyond 90 days.

- Retail Co-Tenancy: For retail tenants, a co-tenancy provision allows a tenant to pay reduced rent when certain conditions are not met. Usually, the condition is that certain other stores, such as anchors, or a certain percentage of stores in the center, have to be open for business. The reasoning is that a tenant is spending a lot of money for a particular site and center, and if that center is not operating as it should due to the economy or other reasons, then tenant should receive a remedy.
- Preempting Landlord Problems - Self-Help and Rent Abatement: Tenant protections from landlord financial difficulties are useful in a weak economy. Self-help provides a tenant the right to fulfill landlord's lease obligations if the landlord does not do them and then deduct the cost from rent. A rent abatement provision provides for rent abatement if landlord fails to fulfill its lease obligations after a certain waiting period.

Lease provisions like these may provide flexibility and peace of mind to a tenant and will help keep the tenant's focus on its most important goal for 2011: the success of its business.

If we can assist your business in achieving its goals with respect to leasing, please contact one of the attorneys listed below:

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