

REAL ESTATE JUKEBOX

Allen Matkins

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Suggestions for Seeking Landlord's Consent to a Sublease Transaction (Part One)

A Tenant leasing more space than it needs may consider subleasing as a way of keeping its costs under control. But even after the Tenant finds a Subtenant and reaches an agreement, the Tenant will probably need to obtain the consent of its Landlord to the sublease transaction.

The process of obtaining the Landlord's consent begins with the drafting of the Sublease. The Tenant should negotiate the Sublease with the Landlord's consent in mind so that, ultimately, the Tenant can present the Landlord with a Sublease that satisfies the obligations set forth in the Lease and addresses concerns that the Landlord might have.

WHAT PROVISIONS WILL THE LANDLORD REQUIRE IN THE SUBLEASE?

- The Sublease should be subject and subordinate to the terms of the Lease. It will be important to both the Landlord and the Tenant that the Subtenant abide by all of the terms of the Lease, including all rules and regulations.
- The Lease may specify certain provisions or language that must be included in the Sublease.
- The Lease may require that, upon receipt of notice from Landlord, the Subtenant pay Sublease rental directly to the Landlord during the pendency of a default by Tenant under the Lease.
- The Landlord may also reserve the option, upon termination of the Lease, either to terminate the Sublease or to require the Subtenant to remain in the subleased premises and attorn to the Landlord (*i.e.*, recognize the Landlord as the Subtenant's own landlord).

WHAT ELSE SHOULD THE SUBLEASE CONTAIN?

- A Sublease will typically incorporate all of the terms of the Lease by reference, clarifying that references to "Landlord", "Tenant" and "Leased Premises" will be deemed to refer to "Sublandlord", "Subtenant" and "Subleased Premises".
1st Drafting Tip: Be careful! Those terms of the Lease that do not apply with respect to the Sublease (*e.g.*, specific monetary terms; measurements; renewal, expansion and other rights) should be expressly excluded from (and not incorporated into) the Sublease.
2nd Drafting Tip: The Tenant may not be in a position to perform Lease obligations of the Landlord that are incorporated into the Sublease by reference. The Tenant's liability to the Subtenant for such obligations will need to be limited.
- The Tenant should require the Subtenant to carry the same insurance that is required of the Tenant under the Lease. The Subtenant's insurance should be required to name the Tenant and the Landlord as additional insureds.
- Pursuant to the terms of the Lease, the Tenant almost certainly will be required to indemnify the Landlord from claims resulting from the acts or omissions of the Subtenant. Accordingly, the Tenant will want to obtain indemnification from the Subtenant.

WHAT FORM SHOULD THE SUBLEASE TAKE?

- The Lease may require that the Landlord's approved form of Sublease documentation be used to memorialize the transaction.
- Even if the Landlord does not require a particular form of Sublease, the Landlord nevertheless may require that the Tenant and the Subtenant enter into a tri-party consent agreement on the Landlord's standard form.



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