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LAW ALERT

REAL ESTATE

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# Is it a Lease or a License? Why it Matters.

**By Eric C. Rubenstein, Esq. and Mark Bailey***

Owners renting space may have the option of doing so by a “lease” or a “license agreement”. What is the difference to an owner (or the lessee/licensee)? Though sometimes the variances are murky, there are definite repercussions for following one route versus the other.

Leases generally grant an exclusive interest in real property. Tenants under leases can rely on hundreds of years of common law, as well as New York State statutes to protect their investment in the premises. The oft-quoted maxim, “the law abhors a forfeiture” applies to leases, not licenses. Conversely, licensing agreements are akin to a “personal privilege”, and generally just give the licensee permission to use the premises, or a portion thereof, sometimes on a non-exclusive basis. Licensors usually maintain direct supervisory power over the use of the licensed premises, unlike leased property.

Sometimes, courts have difficulty distinguishing leases and licenses. In ***Union Square Park Community Coalition, Inc. v. New York City Department of Parks and Recreation,*** the Court of Appeals of New York recently held that an agreement between the City and a seasonal restaurant located in Union Square Park, which retained many characteristics of a

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lease, was in fact, a license. In ***Lordi v. County of Nassau***, the parties actually labelled the document a lease, but the Court, nevertheless, found it to be a license.

Irrespective of whether the parties call an agreement a "license" or a "lease", dispositive indicia include the extent to which each party provides essential services (maintenance, repairs, utilities, cleaning, security, etc.), and the right of the owner to alter the premises. The less the owner provides services, the easier it is to argue that the relationship is one of landlord/tenant, not licensor/licensee. On the other hand, the fewer obligations an occupant has regarding the premises, and the more power the owner has, the less it looks like a lease. Owners looking to avoid granting a more substantive "tenancy" interest, should include a revocation at will provision, and consider supplying more of the licensee's essential needs in consideration for a license "fee", as opposed to "rent".

Usually leases are entered into for longer periods than licenses, and are not terminable at the owner's will. Self-help, a remedy exercisable often at the owner's volition under a licensing agreement, is consistently frowned upon by courts in a leasing relationship, which sympathize with a tenant's dominion and control over its space. Tenants under leases have holdover rights; licenses may be revoked at will at the expiration of the license term.

A lease by any other name is still a lease, unless it is a license. Consult counsel to understand the difference and to create a document that will best preserve your rights and remedies.

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