

## Lease Tune-ups

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During this age of pandemic, lease modifications are going to be abundant. The silver lining to that necessity is that like renewals or assignments, they offer an opportunity to review the lease provisions and correct any mistakes made in the original, or to capture any changes which might have occurred since the original lease was signed. This includes some of the most basic terms, which in my 40 years of dealing with leases and landlord / tenant litigation, are often the soil upon which misunderstandings or errors fester, leading to unhappy results in court.

The following are lease provisions which bear a quick review when the opportunity arises.

**The Parties.** Are the parties correctly named and identified (e.g., separating the tenants from the guarantors)? Check the corporate entities on Sunbiz.org. Are the companies still active and in good standing, or have they been dissolved? Are the parties identified in the introduction of the lease the same parties reflected on the signature blocks? If the signers are different than in the original lease, ask why. If the answer leaves you uncomfortable, check Sunbiz.org, and if the signer is not listed, ask for a corporate resolution authorizing the signer to execute the lease on its behalf. (The resolution should be signed by someone reflected on the State corporate records as an officer or director—not the same as the signer authorized by the corporation.)

**Liability.** The new / modified lease offers the opportunity for the parties to acknowledge that as of the date of the new lease / modification / assignment, the parties are not then in default of the lease terms. Guarantors should be required to acknowledge their continuing liability under the guaranty. An acknowledgment by the parties of the expiration date of the term of the lease should be included (albeit it is promulgated in the original lease). Tenant assignors should acknowledge their continuing liability.

**Up-to-date.** This is the chance for the landlord to demand the copy of the certificates of insurance required and often not procured. The status of prepaid rental and the security deposit should be stated (i.e., has any part of the prepaid rental or security deposit been applied?). Tenants should

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request any delayed CAM reconciliations.

**Force Majeure.** Do you as landlord want to modify this provision in light of the pandemic? An exception should be included for the COVID-19 virus, and all future epidemics / pandemics, expressly stating that the tenant waives the right to raise the defenses of frustration of purpose or impossibility of performance arising from or connected with the situation. Payment of rent should be carved out of any right to assert force majeure. Tenants will want the antithesis to be the case.

**Exclusives.** Are the tenants with rights of exclusivity still around? If not, remove them from the list. It opens the door for new tenants, or might help existing tenants expand into new or similar uses, helping them to remain afloat.

**Notices.** The parties should make sure that the addresses for notice are still correct.

**Defaults.** Landlords should tighten up the default provisions. Eliminate grace periods if possible, and fall back on Florida law for the common 3-day notice of default for non-payment of rent. (While legal, I do not recommend a complete waiver of the default notice, as judges are used to seeing them, and once in a while a check might actually get lost in the mail.) Work on franchisor extended cure times. Use authorized process servers to deliver the default notices. They are recognized by the courts, and their use largely eliminates the “he said—she said” denials by tenants that the notice was received. Tenants should demand delivery of any demand letters be by overnight delivery service with tracking ability. Tenants will also want to insert grace periods—that is, time that elapses before a default actually occurs for non-payment of rent. For non-monetary defaults, landlords will want the cure period to be 10 days (for reasonable commencement of the cure); tenants will want to seek 30.

While some of these suggestions might seem a bit far-fetched in terms of what a party to a lease can expect to achieve in negotiations, these are not normal times, and there is no harm in asking. In addition, cleaning up earlier mistakes will pay dividends if litigation ever arises over the enforceability of a lease or its provisions.