

Five Key Issues for the Parties to a Sublease

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A sublease is a transfer of less than a tenant's full interest in its lease because either it is a transfer of less than all of the tenant's premises or a transfer of the entire premises for less than the entire term of the tenant's lease. Generally, there is no relationship or enforceable rights between the prime landlord and the subtenant because the sublease is basically a lease between the prime tenant and the subtenant whose terms are defined by the provisions of the sublease. As a result of the legal principles governing (i) the existing lease between prime landlord and prime tenant and (ii) the sublease arrangement between the prime tenant and its subtenant, each party must focus on certain key issues for its protection.

Issues for the Subtenant

1. The subtenant must determine the scope of the prime tenant's rights and the services provided to the tenant under the existing lease and whether the prime landlord must consent to the sublease.
2. The subtenant must assure that it receives the services provided to the prime tenant under the prime lease, either from the prime landlord or the prime tenant.
3. The subtenant must obtain confirmation from the prime tenant, but preferably from the prime landlord, that the prime lease is in full force and effect, that no default exists thereunder and that the prime lease has not been amended.
4. The subtenant needs to obtain a recognition and non-disturbance agreement from the prime landlord if the prime lease terminates by reason of the prime tenant's default because the sublease will come to an end if the prime lease terminates for any reason.
5. The subtenant must negotiate a sublease that is both consistent with the prime lease yet provides the subtenant with all of the significant rights the prime tenant has under the prime lease.

Issues for the Prime Tenant (As Sublandlord)

1. The prime tenant must obtain the prime landlord's consent to the sublease if such consent is required.
2. When the prime tenant agrees in the sublease to provide various services to the subtenant such as heating, elevator service, lighting and snow removal that in actuality are being provided to the prime tenant by the prime landlord, the prime tenant must attempt to limit its liability under the sublease for failure to provide those services because of the prime landlord's default. Typically, the prime tenant's only responsibility to the subtenant is to agree to enforce the prime tenant's rights against the prime landlord rather than agreeing to actually provide those services to the subtenant.
3. The prime tenant needs to be indemnified by the subtenant for any liability the prime tenant may incur to the prime landlord under the prime lease by reason of the subtenant's actions or defaults under the sublease.
4. The prime tenant must restrict the subtenant from assigning or otherwise transferring its sublease or further subletting the subleased premises.
5. To be sure that grace or time periods under the prime lease mesh with those granted to the subtenant under the sublease, the prime tenant must (i) add time in the sublease to any time period of the prime lease in which the prime landlord can notify the prime tenant of any decision taken under the prime lease and (ii) subtract time in the sublease from any time period in the prime lease in which prime tenant must either cure defaults or notify the prime landlord of any decisions taken by the prime tenant. For example, if the prime lease grants the prime tenant a grace period of 15 days to cure a default, then the sublease should only grant the subtenant 10 days to cure a default under the sublease.

The sublease is a very complex legal instrument and a great deal of attention must be paid to its negotiation and drafting to meet the varied and often conflicting rights and responsibilities of the prime landlord, the prime tenant and the subtenant. It can be a minefield for the uninitiated or any inexperienced party.

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