# Seven Lease Terms Every CEO Should Know for Negotiating the Office Lease

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**Introduction**

Real estate is often a business's largest expense, frequently second only to payroll. Many estimates put total occupancy costs between 10% and 15% of a company's annual operating budget. Preserving the ability to reduce occupancy costs through favorable lease terms can provide an immediate and often dramatic difference in profitability. This is particularly so in today's difficult economy.

As commercial real estate rents have declined, many tenants have found they are overpaying for their occupancy costs. When businesses make cutbacks, many will end up occupying too much space for their reduced needs, leaving them with square feet they can't productively use but for which they must continue to pay rent. Even small reductions in overhead can have an immediate impact on a business's prospects in a tough market. Reducing occupancy costs can often represent the difference between a company's successful year and an annual report written in red ink.

Many companies fail to proactively anticipate their corporate real estate risks when entering into lease negotiations, or thereafter to appropriately monitor and scrutinize their occupancy costs. They often underestimate the business risk involved in not doing so or lack the expertise or time to address the issue. This may result in businesses inadvertently paying too much for their real estate and suffering from operational inefficiencies. Failing to fully appreciate the safeguards which are available in the negotiation of lease terms can have an enormous negative impact on the success of a business.

There are a number of leasing techniques available to reduce a company's occupancy costs and potentially control occupancy expenses over the term of an office lease, which savvy commercial office tenants are using in the current tough market to reduce their rental obligations and to align their leases more closely with current market values. These materials will help to highlight selected areas where business tenants can build in advantages in their office leases, in order to maximize the potential for reducing occupancy costs over the life of a lease.

## I. Assemble Your Team

We begin by assembling the tenant's leasing team. Commercial office leases have developed into highly sophisticated documents that can run to scores or even hundreds of pages with a dozen or more related exhibits. Inasmuch as they frequently involve complex legal, financial, design, and construction arrangements, office leases require input from and the expertise of a number of different professionals. Negotiating a commercial office lease is a team sport and the most successful lease negotiations start with assembling the right team. This team may consist of the following players:

*Corporate Officers*
Ordinarily, a corporate tenant will act through a particular officer, to act as the formal representative of the tenant entity.

*Brokers*
Commercial real estate brokers are usually at the front end of the negotiating process, developing the terms and conditions upon which the landlord and tenant will initially agree, in order to establish the business deal governing the lease.

*Lawyers*
Lawyers usually will be responsible for the review, legal analysis and drafting of the lease, and typically will be the point person with the lawyer who is representing the landlord. Frequently, the lawyer is given the responsibility of managing the lease negotiation process, which requires a high level of coordination among all the team's players.

*Engineers/Architects/Space Planners*
This group of design professionals will be hired by the landlord or the tenant, depending upon which party is responsible for completing the tenant improvements. The design professionals' input should come early in the process, in order to gain control over costing issues and any particular feasibility and/or aesthetic concerns that may arise.

*Contractors/Subcontractors*
This group frequently will join the team in response to a bid process, with selection typically (although by no means always) being based upon the lowest cost. Once selected, the contractor and the subcontractors it hires will be charged with working with the design professionals, the landlord and the tenant to put into effect the plans which have been drawn up for the tenant's space.

*Casualty/Liability Insurers*
Invariably a commercial lease agreement will allocate risks between landlord and tenant, many of which risks can be covered off by insurance.

The party that bears the risk usually has the responsibility for procuring the insurance to address any potential losses from such risks.

*Lenders*
Both the landlord and the tenant may have lenders with a financial stake in the lease negotiations. The landlord's lender will want to ensure that it has appropriate access to the income stream associated with the lease as collateral for the landlord's loan. The tenant's lender may want certain assurances that to the extent any of its collateral is located within the leased premises the lender will have access to remove it in the event of a default.

*Accountants /Financial Analysts*
The number crunchers will have a role prior to lease execution in analyzing the cash flow represented by the rental income stream. After the lease is executed the accountants and/or financial analysts will track the performance of the lease relationship.

In order to ensure a successful lease negotiation process, it is critical that there be clear communication among all of the members of the tenant's team. Each team member should approach every lease negotiation with a solid understanding of its role and of the tenant's real estate priorities and requirements, with a well-considered strategy for containing occupancy cost risks.

## II. Identify the Premises

Identifying the space to be leased should seem like a straightforward enough task and in some circumstances it is. For example, in a lease of an entire building, reference can be made to the legal description for the property being leased. Even here, however, care must be taken to delineate whether the building, parking lots and surrounding grounds are being leased or just the building only, as this might significantly impact the tenant's repair and maintenance obligations.

In multi-tenant office buildings, the task becomes more complex. Frequently, office leases simply make reference to suite numbers (i.e., Suite 2515). Since most office leases calculate the rent by reference to units of square feet, more is needed than just a reference to a suite number.

There are several different standards used in measuring office space. Some are used regionally. For example, the *REBNY Standard* published by the Real Estate Board of New York is frequently used in leasing space in office buildings located in the New York metropolitan area. In the Washington D.C. metropolitan area, the Greater Washington Commercial Association of Realtors' *GWCAR Standard* is used by many landlords.

In addition to these regional standards, there are several national standards, perhaps the most prominent being that issued by the Building Owners & Managers Association (BOMA). BOMA has issued a measurement standard as far back as 1915, which has subsequently evolved through a number of versions. The 1981 version was revised in 1989 and 1996, and more recently in 2010 to include new definitions and illustrations. The standard carries the designation ANSI/BOMA Z65.1-2010 and can be located at www.BOMA.org as an electronic download for a small fee. It applies only to office buildings. BOMA also publishes measurement standards for industrial and warehouse buildings.

Typically, in a lease of office space in a building, the square feet are referenced in terms of “rentable" square feet, as distinguished from “usable” square feet, the former being a larger number than the latter. This reflects the concept that not all of the area being rented by a tenant can actually be occupied by the tenant. Landlords will sometimes qualify their citation of the square feet being rented by the adjective “approximately.” Tenants should avoid this since the overall amount of rent is typically being calculated based on the number of square feet to be leased.

An important component which is related to the space measurement in a multi-tenanted building is the calculation of the tenant's proportionate share. Customarily, landlords will pass through a certain portion of the building’s operating expenses to the tenants based on their respective proportionate shares of occupancy. This proportionate share calculation for any particular tenant is a ratio consisting of the square feet leased by the tenant as the numerator, divided by the entire square feet of the building as the denominator. Accordingly, it is important that the two sides of the fraction consistently reference the term “rentable.” Otherwise, if the numerator is characterized as rentable and the denominator is characterized as usable, the resulting proportionate share percentage will inaccurately favor the landlord.

There are other important safeguards for the tenant related to measurement. A tenant should have a right to confirm the accuracy of the measurement, and/or re-measure the premises after the tenant build out has been completed. A tenant should insist that all areas in the building for all tenants should be measured using a consistent standard. This may be resisted by a landlord based on the argument that even the BOMA standard is periodically revised. Some landlords, in referring to a specific amount of rentable square feet, will indicate that this amount is “deemed to be” as stated. This formulation takes away a tenant’s right to challenge the accuracy of the square footage.

The foregoing discussion highlights the critical need for a tenant to have on its team seasoned space planners and/or architects, along with experienced brokers, who can navigate and explain the sometimes esoteric details of property measurement standards and customs. This is especially true when comparing

different buildings in order to make sure that the comparison is apples to apples, and not apples to lemons.

## III. Establishing the Use of Premises

A use clause defines what type of activity or business a tenant is authorized to conduct within the leased premises. In the context of retail leasing (shopping centers, malls, etc.), use clauses can be quite complex and are frequently coupled with radius restrictions and operating covenants to ensure that the landlord has the ability to present a wide mix of retailers, products, and services to the consuming public. In a multitenant office building, these clauses may receive far less attention, but they should nonetheless be an important consideration for tenants.

Generally, a tenant may use its premises for any purpose for which the premises are adapted and which is not either prohibited by the lease or illegal. (*American Law of Property*, Section 3.3 (A. Casner ed. 1952)). In addition, a tenant's leasehold interest will be subordinate to any recorded restrictive use covenants recorded in the land records which affect the building in which the premises are located, and any applicable zoning restrictions. A tenant's conduct will also be regulated by rules and regulations issued by the landlord and by a customary clause in the insurance and environmental sections of the lease prohibiting the tenant from any conduct which would impair or negatively affect insurance coverage carried by the landlord or adversely impact the environmental condition of the premises. Beyond these restrictions, however, the terms of the use clause will control the uses to which the leased premises may be put by a tenant.

Tenants should keep in mind the distinction between "permissive" and "restrictive" use clauses. The former might be characterized as "*the premises may be used for…*" This formulation does not preclude other uses and is considered permissive. By contrast, a restrictive use clause indicates that "*the premises may only be used for…and for no other use.*" This construction locks a tenant into the particular uses described in the language.

These distinctions may seem arcane. However, restrictions on a tenant's ability to use its premises can significantly affect the tenant's freedom to assign or sublet the lease. The more restrictions that are imposed on a tenant's use, the narrower the field of subtenants or assignees that may be available to take over the tenant's leasehold interest in the premises by sublease or assignment. This is a "sleeper" issue in lease negotiations, but one which should not be ignored by tenant seeking to preserve maximum flexibility under its lease.

## IV. Gain an Advantage with Lease Terminations

In negotiating a commercial lease from the tenant's perspective, the most favorable lease will be that which provides a tenant with the most flexibility. If a tenant anticipates growing, it will want the flexibility to expand and therefore will try to negotiate expansion options which if exercised will allow the tenant to add more space to its existing premises. For tenants who want to avoid the cost and expense of relocating at the end of a term, extension options will be desirable. If exercised, these will allow for the tenant to stay in place and the term of the lease to continue for an additional term.

These two kinds of options are common and frequently used in commercial leases. Less common but potentially of critical importance to a tenant in a difficult economy are termination options. The ability to reduce space or avoid entirely any continued lease obligations are hard won and rarely given. The reason is that landlords, and more particularly their lenders, will value the lease with the view that a termination clause will be exercised, and accordingly the economic benefit conferred will only be for the shortened term.

The termination right typically gives a tenant a right to terminate its lease at a certain point during the lease term, usually for a fee which is either predetermined or is set by formula. This is distinct from other lease clauses which give the parties cancellation rights, for instance in the event of the destruction of the building or breakdown in services (such as an extended utility interruption). A termination right is also distinct from a negotiated buyout of a lease term that occurs during the lease as a result of negotiations that take place after the lease has been signed. Clearly, a termination arising in this manner will be more costly to the tenant than one negotiated at the outset of the lease relationship when the tenant most often has the highest leverage and presumably the best ability to drive a good bargain.

The essential components of a termination right include the conditions under which the tenant may exercise the right. Invariably, the tenant will be required to provide written notice to the landlord of the exercise of the right. This notice may only be provided if the tenant is not in default of its leasehold obligations, and frequently must be provided no later than a specified date, usually scheduled somewhere near the middle of the lease term. If no date is specified, then there typically will be a lengthy notice period in order to give the landlord sufficient time to try to market and re-let the premises.

There are other restrictions commonly seen in termination clauses. Landlords frequently require that the tenants' notice be "irrevocable," meaning that once the tenant exercises the termination right it may not change its mind. This termination right usually is not available to any subtenant under a sublease or assignee under a lease assignment.

In order to exercise the termination right, a tenant ordinarily will have to pay a fee. The termination fee is designed to reimburse landlord for unamortized leased costs as of the termination date these may include the broker's fee, any tenant improvement allowances made by the landlord, and the landlord's attorneys' fees. The termination fee may also include unamortized rental concessions (such "free rent"), and may also include several months of rent to cover the time it will take the Landlord to re-let the space.

Frequently a termination clause will be drafted to require that the termination fee be paid with the termination notice delivered by the tenant. An alternative formulation will require that the fee be paid on the last day of the lease term as accelerated by the termination notice. The termination option will often give the landlord the right to cancel the termination if the tenant is in default on the day it exercises the termination option, or if the tenant fails to pay the termination fee.

Although this termination fee can add up to a significant number, it may be a cheaper alternative to continued rental and other lease obligations for a tenant who can no longer afford these burdens. The added flexibility that a termination option provides can be a lifeline for a tenant who no longer needs the leased space. In addition, even if it is not exercised, a termination option can give a tenant a leg up in negotiations with the landlord for other concessions short of termination.

## V. Watch Out for Operating Costs

In addition to what is typically described as "base rent," tenants in office leases typically pay their proportionate share of the cost of operating the building. As was described earlier, a tenant's proportionate share is calculated by using a fraction, the numerator typically being the square feet of the tenant's premises, with the denominator being the amount of square feet in the entire building. Building costs are then aggregated and split up among the tenants, with each tenant paying its proportionate share. The proportionate share of any un-leased vacant space is borne by the landlord.

Typically, tenants will only pay their proportionate share of the expenses of operating a building to the extent of any increases over a "base year." A tenant's base year is typically its first full year of its occupancy. The tenant's proportionate share of the building's operating expenses for that year establishes the threshold. If operating expenses increase over the operating expenses of that threshold "base year," the tenant pays its proportionate share of the increases. Base years may be set in the aggregate for all operating expenses or may be established for separate components of the operating expenses, such as for taxes, insurance and utilities.

Alternatively, some leases use the concept of an "expense stop" which is a dollar amount under which the landlord absorbs the expenses and over which the tenant is expected to contribute. Ordinarily, the expense stop is calculated on a per square foot basis. For example, an expense stop might be $4.50 per square foot. To the extent that operating expenses exceed $4.50 per square foot in this example, a tenant would be obligated to pay operating expenses above that amount.

In the negotiation of the lease provisions regarding operating expenses, a tenant wants to contain its occupancy costs and a landlord wants to limit its operating expenses; thus the landlord's and tenant's interests are diametrically opposed. The landlord will attempt to define the set of operating expenses broadly, such that all manner of expenses are included. So, this section of a lease will contain a definition of "Operating Costs," which will be expansive in its scope to include virtually every conceivable expense necessary to run the building in which the lease premises is located. By contrast, the tenant will want to exclude those expenses which are inappropriate or which may be paid by others, and to protect against the landlord's ability to engage in "creative" accounting practices. The tenant will try to include a list of exclusions in the definition of operating costs. These exclusions can run to many pages. Below is a short example of items a tenant might reasonably expect to negotiate out:

> "Operating Costs" shall not include the following: (a) depreciation of the Building; (b) tenant improvement work; (c) lease commissions; (d) principal or interest payments on mortgages and other non-operating debts of Landlord; (e) expenses which are reimbursed by insurance; (f) the amount of any refundable deposits; (g) Federal, State or local income, revenue or excise taxes imposed on Landlord or any inheritance, estate, succession, transfer, gift, capital stock, franchise, or excess profit taxes (unless imposed in lieu of Taxes); (h) the cost of any work or service performed for any tenant at such tenant's cost and expense; (i) the cost of capital improvements in excess of amounts amortized over the useful life thereof; (j) advertising, promotional and marketing expenses, or the cost of maintaining a leasing or marketing office for the Building; (k) Landlord's overhead not related to management of the Building; (l) expenses incurred by Landlord in connection with furnishing any service or providing any other benefit which is not made available to Tenant; (m) interest or principal payments on any financing for the Building; (n) costs, including permit, license and inspection fees incurred in renovating, improving, decorating, painting or re-

> decorating vacant tenant space in the Building (as distinguished from Common Areas); or (o) any costs for which Landlord is reimbursed by tenant(s) of the Building (other than as part of an operating expense reimbursement mechanism).

There are two components to a building's operating costs. The first component is the fixed costs, such as liability insurance, security, landscape maintenance, and other such costs that do not vary by a building's occupancy. The other component is variable costs. These are costs that increase or decrease depending upon the occupancy of the building, and include repairs and maintenance, utilities, janitorial services and utility costs. If a tenant is leasing space in a building that is only partially occupied, then it runs a risk that the base year or expense stop thresholds will be set artificially low, reflecting the lower variable costs associated with a building that is not fully occupied.

In order to protect itself against an unfair increase in operating expenses a tenant should insist upon lease language which requires the landlord to "gross up" variable operating costs to reflect a certain agreed-upon level of occupancy. This language will obligate the landlord to adjust the building's expenses that vary with occupancy up to an amount that the landlord reasonably believes would be appropriate if the rentable area of the building were occupied to a full level (customarily 95%). If this adjustment is consistently made for every year in which the operating expenses are calculated, then the year-to-year calculations necessary to compute increases in operating costs should be consistent and fair. This will protect the tenant against bearing the risk of paying too much in operating costs as a result of an artificially low base year or expense stop.

## VI. Monitor Expenses with Lease Audit Rights

Having successfully negotiated a base year or expense stop and then worked to build in adequate lease protections regarding operating expenses, a tenant needs to make sure that it can enforce these rights. There is some limited case law which protects a tenant against the excesses of a landlord in passing through unwarranted expenses. For example, a Maryland court held that a landlord has a limited fiduciary relationship with its tenant and must provide the tenant with an itemization of the landlord's expenses in order for that tenant to determine their accuracy. (*P. V. Properties v. Rock Creek Village Association Limited Partnership*, 77 Md. App. 77, 549 A2d 403 (Md. App. 1988).

The case law notwithstanding, a tenant's safer course is to negotiate for specific audit rights, which would allow a tenant access to the landlord's books and records in order to confirm the accuracy of the landlord's accounting. While landlords may not resist the concept of an audit, they will typically try to contain the breadth of the examination. For example, a landlord may require that a

tenant’s notice of the exercise of its audit right must be given within a certain short period of time after receiving the landlord's annual reconciliation, such as fifteen days. An untimely request would be void. A landlord may limit how far back the auditor may look, such as only for the preceding year and no further. This establishes a private statute of limitations for any claims beyond the specified reach-back period.

Other limitations may require that the landlord consent to the selection of the auditor, that the auditor be a certified public accountant, or that the auditor not be compensated on a contingency fee basis. At least one court found that an auditor’s agreement by which it was to audit a tenant's lease for a percentage of the savings was contrary to public policy (*See*, *Accrued Financial Services, Inc. v. Prime Retail, Inc.*, 298 F3d 291 (4th Cir. 2002)). A landlord may insist that the auditor's findings be held confidential, in order to prevent that auditor from soliciting other tenants in the building if an overcharge is found. Of course, a landlord will insist that a tenant may not exercise its audit rights if the tenant is then in default of any of the lease terms.

In addition to resisting these limitations, a tenant may seek to have the landlord bear the costs and expense of the audit if the audit reveals overcharges of more than some threshold percentage (e.g. 3%). A tenant should require that the landlord maintain its books and records for the audit period in question, and that they be accessible to the tenant and its auditor in some reasonably convenient location.

If a tenant does not have the leverage to negotiate broad audit rights, the mere presence of even limited audit rights in a lease often will work to keep a landlord honest. In truth, instances of landlords intentionally defrauding tenants through misapplication of pass-through expenses are rare. Far more common are disagreements over the interpretation of lease clauses regarding these pass-throughs, as they can be complicated and subject to varying readings. For these reasons, audit rights remain a useful tool for tenants trying to contain occupancy expenses.

## VII. Negotiate Broad Assignment and Subletting Rights

When businesses make cutbacks, this often means reductions in staff and personnel and may include shuttering entire offices. After these reductions, many office tenants will end up occupying too much space for their diminished needs, leaving them with square feet they can’t productively use but for which they must continue to pay rent. If there is no lease termination option, and if buying out the lease is not feasible, then a tenant should look to its assignment and subletting rights.

First, a tenant should understand the distinction between assignment and subletting. Under an assignment, a tenant assigns its entire leasehold interest in its lease to an assignee who takes over the lease for the entire balance of the term. By contrast, a sublease amounts to a "lease within a lease" by establishing a lease relationship between a tenant and a subtenant. The critical distinction is that a subtenant may be taking over only a portion of the leasehold premises or a portion of the leasehold term (or both). Thus, if a tenant has 5,000 square feet under its lease and wants to downsize to 2,000 square feet, it can attempt to sublease the 3,000 square feet balance. Alternatively, a tenant may want to take its seven year term and sublease it out for only a portion of those years. In either case, these transactions will occur by means of a sublease, rather than an assignment.

The test to determine whether a transfer is an assignment or a sublease is whether there is a transfer of all of the tenant's estate for the entire remainder of the lease term (in which event it is an assignment), or whether there is a transfer of less than all of the tenant's estate for all or less than all of the term (in which event it will be a sublease). Importantly, in either an assignment or a subletting, the original tenant will remain liable to the landlord unless landlord specifically releases the original tenant.

If a lease is silent as to a tenant's right to assign or sublet, then the tenant may do so without the landlord's consent. However, virtually every reasonably sophisticated office lease will have some controls over the tenant's ability to assign or sublet. From the landlord's perspective, a landlord will want to restrict assignment or subletting in order to regulate who is in possession of the leased premises to ensure that the use of the premises fits within the confines of the use clause that has been negotiated, to avoid possible exposure to environmental or other liability, and to otherwise prevent an undesirable occupant. From the tenant's perspective, a tenant will want to ensure that it has flexibility to reduce its occupancy costs by shedding unneeded space. While an assignment or subletting will not release a tenant from liability, it will certainly reduce a tenant's expenses.

The negotiation of the terms under which a landlord will consent to a tenant's subletting or assignment are important. Generally, courts will uphold a flat restriction on assignment and subletting. Most landlords, however, will permit assignments or subleases under certain circumstances. The two standards most frequently seen involve a formulation whereby the landlord can withhold its consent "in its sole discretion," or alternatively that the landlord will not "unreasonably withhold" its consent. Under the first formulation, the landlord does not need to have any reason to withhold its consent. If this is the landlord's position, then at the very least a tenant should seek to exclude assignments or subletting to affiliates and/or subsidiaries, as well as assignments that occur as a result of mergers and consolidations.

As to the “not unreasonably withheld” standard, the landlord must act in an objectively reasonable commercial manner (See, e.g., *Maxima Corp. v. Cystic Fibrosis Foundation*, 81Md. App. 602, 613, 568A. 2d 1170, 1176 (1990)). Factors regarding the reasonableness of the landlord will include the financial responsibility of the proposed assignee or subtenant, its identity or business character and proposed use, and an assessment of the assignee’s or subtenant’s ability to fulfill the terms of the lease. An example of bad faith or unreasonableness would be the landlord's leasing the premises to the same person it previously rejected, or withholding consent so that the landlord may charge a higher rent than that charged to the original tenant.

Even if a landlord agrees to a “not unreasonably withheld” standard, there may be other obstacles. For example, in a rising market, it is not unusual for a landlord to require that the tenant split with the landlord the net proceeds or “profits” above the rent that the tenant has to pay. Additionally, some sophisticated landlords will require that a tenant’s request to sublease or assign triggers a landlord's right to recapture the leased premises. This allows the landlord to control the premises under the theory that the tenant no longer needs it.

The rights of a tenant to sublet or assign its premises are a key element to its ability to reduce its occupancy expenses in a meaningful manner. Without these rights, a tenant can be stuck with surplus square feet that are a dead weight to its balance sheet. Since leases frequently constitute long-term obligations, these rights to sublet and assign provided a tenant with a way to mitigate the lease commitment and lesson occupancy risks.

## VIII. Consider a Guaranty

Unless a tenant is a highly rated publicly traded company or a government entity, a landlord may require as a condition to entering into a lease that the lease be guaranteed. Discussions of a guaranty are related to security deposit considerations, and more generally to the credit underwriting a landlord must go through to qualify a tenant’s ability to perform its leasehold obligations. In some cases, a large security deposit will be sufficient to satisfy a landlord. In other cases, however, a landlord will seek assurances through a guaranty.

A guaranty is not a part of a lease, but is a standalone document establishing an independent relationship between the landlord on the one hand and the guarantor on the other. A guarantor could be related entity (such as a parent company), or an individual with an interest in the tenant (such as a principal or major stockholder). The ability of a guarantor to act as such will be underwritten by the landlord separate and apart from a review of the creditworthiness of the tenant.

Lease guaranties can take many forms. Some lease guaranties will "burn off" over time, on the theory that the landlord's exposure reduces over the course of the lease term. If the lease calls for an expensive tenant build-out funded by the landlord, a guaranty may expire after a tenant has been in occupancy for a relatively short period of time, based on the rationale that the landlord's greatest risk occurs during the period of construction and reduces once the tenant moves in.

Other guaranties will obligate the guarantor only to certain specified sums. For example, a guarantor may agree to guaranty repayment of the unamortized amount of tenant improvement costs, brokers' fees and the landlord's attorneys' fees, the amortization schedule being based on the term of the lease at an agreed-upon interest rate. This form of guaranty does not obligate the guarantor to the payment and performance of all the tenant's obligations under the lease, but does provide some comfort to the landlord that it will at least get its out-of-pocket expenses back through the guarantor.

Another form of guaranty is the so-called "good guy" guaranty. This is usually seen in the context of a guaranty offered by an individual who is a principal or shareholder of the tenant entity. A good guy guaranty is limited to rental payments owed by the tenant while the tenant is in occupancy. As long as the tenant pays the rent, there is, of course, no liability of the guarantor. Once the tenant stops paying rent and remains in occupancy, however, the good guy guaranty kicks in. This form of guaranty is designed to provide an incentive for the tenant to move out promptly. It does not provide the landlord with a guaranty of future unpaid rent after the tenant moves out, but does give a strong inducement to the tenant to vacate voluntarily so that the landlord does not have to contend with the cost, expense and delays associated with eviction proceedings.

The ability of a tenant to offer up a guarantor can often provide a useful means to get a lease deal done, especially where a tenant is a startup, or otherwise has not been able to establish a satisfactory credit record. The use of a guaranty can also eliminate the need to tie up company cash in a large security deposit for the term of the lease, and can reduce a tenant's out-of-pocket leasing expenses.

**FAQs**

Question 1: *Does my company need a commercial real estate broker to represent its interests in a lease negotiation?*

Answer: A good commercial real estate broker can be invaluable to a tenant. The broker is in a unique position to understand the marketplace and the opportunities that may exist within it. This is critical for your company in order to properly evaluate its options. Usually (but not always) the broker representing the tenant is paid by the landlord and not the tenant, although ultimately all of the landlord's costs have a bearing on the tenant's rental rate.

Question 2: *As my company approaches the end of its current lease term, what strategies can I use to lower my occupancy costs?*

Answer: If your company is in the last couple of years of its lease term, it may be in an ideal position to start negotiating with the landlord for a lease extension. The concept of "blend and extend" may be appropriate in these circumstances, whereby a landlord agrees to exchange an immediate reduction in rent for an extension of the lease term. The existing landlord is in a unique position to offer this, and therefore has an advantage over its competitors. For the tenant, a lease extension eliminates expensive moving and build-out costs that would be associated with relocating to a new building.

Question 3: *What can my company do to lower its occupancy costs if it has already signed a lease and has several more years to go before the term expires?*

Answer: There are many steps a tenant can take to help control its occupancy costs even if it is in the middle of its lease term. These include engaging a lease auditor to examine the accuracy of a landlord's expense pass-throughs. Other areas that should be examined include subletting of surplus space, and/or assigning the entire lease, if feasible.

Question 4: *Should my company expect to pay a higher rent for leasing in a "green" building?*

Answer: For tenants looking at buildings which have been built to LEED or other similar green or sustainable standards, there should be little if any rental premium. As these standards are more frequently incorporated into new construction, they have become commonplace and the increased construction costs associated with them have gone down substantially. To the extent that there is any difference in rental rates, a tenant should be careful to examine all occupancy costs estimated to be incurred during the term of the proposed lease. Recent studies have shown that buildings built to "green" and sustainable standards cost less to operate, which translates to lower overall occupancy expenses over the entire lease term.

Question 5: *These days, should my company be concerned about the creditworthiness of its landlord and if so, how can it protect itself against a landlord's financial distress?*

Answer: In this economy, there can be no solid assurances of any landlord's creditworthiness. A tenant can protect itself by making sure that its lease contains adequate remedies in the event of a landlord default including, ultimately, being able to terminate the lease and move out. A tenant may also seek to negotiate terms with the landlord whereby the landlord is required to procure for the tenant's benefit a non-disturbance agreement from the landlord's lender. This non-disturbance agreement would ensure that, even if landlord's lender forecloses on the building, the lender will recognize the rights of the tenant under the tenant's lease and not disturb its continued occupancy.

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