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Real Property Lease Checklist

The real property lease checklist addresses some of the most common issues that occur when a real property lease is being negotiated. After reviewing it, you should be in good position to understand what to look for in any real property lease. Of course, before signing a real property lease, make sure that you have your attorney review it.

- Nature and duration of the lease.** Determine the term of the lease, and when the lessee is entitled to possession. Is the lease to be a net lease? What are the duties of the lessor?

- Rent.** In the contract, make sure that the amount of rent and when and how it is payable is stated. If the lessee holds over, what is the rent for this period?

- Escalation clause.** Since most commercial leases contain a rent escalation clause, determine whether the escalation is keyed to actual increases in operating costs or if it is keyed to some index.

- Competition.** In the case of a lease of retail space, such as a store in a shopping mall, there may be restrictions placed on the landlord's right to lease nearby space to businesses similar to the lessee's business. Are the restrictions reasonable? What rights does the lessee have in the event the lessor violates any restrictive covenant, thereby reducing the value of the lease to the lessee?

- Renewal.** Is there an option to renew, and what is the term of each option? What is the rent for each renewal period? How must the option to renew be exercised?

- Subletting.** Is the lessee entitled to sublease the property or to assign the lease? What is required before the lessee may sublease?

- Space.** What the landlord considers rentable square feet and what the tenant gets in usable square feet space can vastly differ. Designers and space planners can often save costs by laying out the facility to fit the space efficiently. The location of a building's columns, windows and mullions can affect a tenant's total space requirements.

Determine whether the lease provides an option for additional space. Is the lessee given a right of first refusal when additional space becomes available? Can other tenants be moved when additional space becomes available so that the lessee's areas are contiguous?

- **Taxes and expenses.** Determine who is responsible for the real property taxes. If the lessee is agreeing to pay only for increases, is there a stated maximum? Who pays for general maintenance and services? If it's the lessee, is the lessee free to contract with whomever they want for these services, or must they be obtained from or through the lessor? Who is responsible for extraordinary or structural repairs or alterations?

- **Construction.** Does the lessor warrant that the building conforms to all local laws and codes, and will the lessor reimburse the lessee for correcting any code violations? Does lessee have right to inspect before execution of lease and before taking possession? Are there adequate parking facilities and other transportation facilities?

- **Workletter.** Space is rarely taken by major tenants in "as is" condition, whether the building is new or old. The fitting out of the premises to mutually agreed specifications is accomplished by a workletter. The latter is a contract between the landlord and tenant describing what is to be constructed, who pays for it and how, what the schedule for completion is, who is responsible for delays and cost overrun and more.

- **Zoning.** What zoning applies to the building, and is lessee's intended use permitted? Are there covenants or restrictions on the property? Easements? How about easements the lessee must have on adjacent property in order to fully utilize the leased property?

- **Liability and insurance.** Who is responsible for liability insurance, and what are the limits? Who carries theft, fire and other casualty insurance? To what extent does the lessor or lessee excuse the other party for liability for injury to persons or property? Lessees should scrutinize any hold-harmless provisions within the lease with great care. While a lessee may be willing to reimburse the landlord for losses caused by the lessee, most lessees would not want to hold a landlord harmless for damage caused by actions of the landlord. The provisions should indemnify the landlord only for harm caused by the lessee within the leased space.

- **Tenant "going dark" rights.** A fear of many small tenants in a shopping center is that a major tenant will go out of business or not renew its lease ("going dark"). In an economic climate in which major department stores are filing for bankruptcy and closing