

Subleasing unwanted space is not quite so simple

BY **BOB B. ROSENTHAL**

If your company is among the many struggling to contain costs, saving on occupancy expenses by subleasing unwanted space may seem like an obvious step. But aside from the challenge of confronting a market that has turned in the favor of subtenants, you may find that the subleasing process is far more complex and difficult than you would have imagined. Thoughtful planning and preparation will maximize your chances for success.

In most business transactions, you are free to negotiate the best deal you can with the other party. But with a sublease, you have to take on two opponents at the same time: your landlord and the intended subtenant. What's more, the landlord generally starts out with the upper hand because your company is already bound by its obligations under its existing lease.

First, you must confront the direct controls that your current lease places on your right to sublet your company's space. These typically take the form of a prohibition on subleasing without the landlord's approval.

Sometimes the lease allows the landlord complete discretion to grant or deny approval, while other leases require the landlord to act reasonably in responding to such a request. There are many variations and nuances that can be incorporated into the sublease approval provisions of a lease. It is critical that these provisions be reviewed carefully so that you can devise a strategy for securing your landlord's consent to the sublease transaction.

In addition, don't overlook indirect controls on subleasing, which may appear in lease clauses that restrict the permitted use of the space and that limit the tenant's rights to alter the space. Even if your lease contains a favorable subleasing section, you may still face difficult negotiations with your landlord if the intended subtenant's use is not permitted under the lease, or if the subtenant will require mod-



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ifications to the subleased space that require the landlord's consent.

Beyond the approvals needed, the landlord's involvement also presents challenges in negotiating the sublease. As a general rule, the landlord will be unwilling to assist the sublease transaction either by releasing the tenant from some of its obligations or by undertaking commitments directly to the subtenant, even if the landlord has already agreed to those commitments in its lease to the tenant.

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For instance, suppose your company has a lease that has two years remaining in its term with an option to extend for an additional five years. Many prospective tenants would not consider subleasing the space unless they are given the right to exercise the extension option.

Conversely, your company, which is seeking to reduce its liabilities, will balk at the prospect of incurring rent obligations for five years beyond its present commitment. The problem would be solved if the landlord would agree to release your company from its lease obligations during the extension period (in exchange for a direct undertaking from the subtenant), but most landlords will not make this concession, at least not without a significant

financial incentive.

For another example, consider the landlord's obligations to repairs. Your landlord may be responsible to your company under your existing lease for certain repairs such as roof or structural repairs but may refuse to extend its duties directly to a subtenant. The intended subtenant, however, will likely insist that your company assure that any such repairs be performed by your company or its landlord. You do not want your company to become a guarantor of your landlord's repair duties. You should attempt to persuade the prospective subtenant to agree that as long as your company uses reasonable efforts (without resorting to a lawsuit) to enforce the landlord's obligations, your company will not be liable if the landlord defaults.

If your company plans to sublease the full premises covered by a lease for the entire remaining term, the intended subtenant probably will prefer to structure the transaction as an assignment of your lease, rather than a sublease. An assignment will enable the new tenant to enforce the lease directly against the landlord.

Unfortunately, however, without an express release from the landlord, an assignment does not relieve your company from its lease liabilities. In fact, not only does your company remain responsible if the new tenant does not fully perform its lease obligations, but by eliminating the sublease, your company gives up its ability to regain control of the premises as a measure to contain its ultimate liability exposure.

Whether your company is subleasing a small office, a large manufacturing facility or any other excess space, the sublease process involves more challenges and complications than are apparent at first glance. Thorough preparation and thoughtful planning are keys to a successful sublease transaction.

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