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## **NEW YORK RESTAURANT LAWYERS BLOG** THE LAW OFFICES OF DAVID A. GABAY, PC

### **Restaurant Leasing: 6 Important Issues to Consider**

Whether you are a veteran operator or opening your first establishment, negotiating and documenting a restaurant lease is critical to the success of your concept. The terms of your lease can make or break your restaurant financially. Here are 7 important legal issues which must be addressed in your lease and some ideas for how to solve them:

- 1. Rent Escalations & Pass Through Charges:** Yearly rent increases should be tied to either pre-negotiated fixed yearly rent increases. If this is not possible, the next best option would be to link rent increases to the Consumer Price Index (CPI) with a ceiling but no floor. You should try as hard as humanly possible to avoid leases which base the rent on the percentage of your sales.

Also, restaurant owners need to pay very close attention to pass through costs, such as Common Area Maintenance (CAM) charges, tax increases, capital improvements, etc. These additional fees can very easily get out of control in the middle and later years of a lease, and every effort should be made to eliminate or at least cap them in the lease.

- 2. Exclusive and Prohibited Use:** Leases contain clauses specifying the exclusive use of the property. Restaurant owners and operators will typically try and negotiate for an exclusive use clause which excludes all competing concepts. Landlords will generally try to obtain a clause which is very specific, so that they have more flexibility to lease their other spaces. For prohibited use clauses, the roles are reversed: owners and operators will want a very narrow prohibited use clause which makes it easier to assign or sublease the space, or change the concept, and Landlords will want clauses which are very broad so that they can control the use of the space in the future,
- 3. HVAC/Kitchen Hood/Power Supply:** Because restaurants use more HVAC and power than many other commercial tenants, a restaurant lease must account for these additional costs. This includes issues such as: (a) who pays for improvements to the HVAC system

and electrical system before the lease period begins, (b) which contractors can do the work, and (c) which party pays for rate and cost increases in electrical power. In addition, there are a number of issues surrounding the condition or construction of a kitchen hood which must be negotiated, including: (a) the cost of construction or bringing the hood and its exhaust/venting system up to code, (b) responsibility for the roofing and walls and spaces through which the venting passes, and (c) payment of costs for code changes regarding the hood and ventilation systems.

4. **Permitted Uses & Permits:** Before beginning to negotiate a lease, you must investigate and determine whether the space can legally be used as a restaurant. The property's zoning, permitted uses, and required permits must all be documented. For restaurants, these specialized requirements include liquor license requirements, food handling and department of health permits, seating capacity, and septic flow capacity.
5. **Sublease/Assignment:** This is your exit strategy. If you need to exit the restaurant for any reason or take on an investor or partner the lease will determine how that gets done and what the costs and legal requirements will be. It is a critical mistake to not address these issues during the lease negotiation process. A well-negotiated lease will contain provisions which will allow you to exist the lease under certain circumstances without having to have the landlord's consent, because that consent is often sold at a very steep price.
6. **Compliance with Laws:** Every restaurant lease has a clause stating that the operator will comply with all applicable laws. This simple statement can often be a trap for the unwary. Real estate brokers and lawyers who are not experienced in restaurant leasing often will not recognize and deal with the specialized rules and law applicable to restaurants: (a) fire sprinkler codes for restaurant spaces, (b) venting, grease interceptor, and other specialized commercial kitchen devices, and (c) public accommodation (Americans With Disabilities Act) requirements for restaurants. These issues must be identified and budgeted for as part of the lease negotiations in at least 3 ways: (a) what is the current state of the property, and who pays how much and for what improvements needed to make the space compliant, (b) who actually performs the work, and (c) how are any future additional expenses paid and by whom in the event that codes are amended (as they often are).

For all of these issues, discussion and negotiation between you and your landlord early on in the lease process is vital to a successful lease negotiation. The time and effort you spend on preparing a clear, fair, workable lease will pay dividends over time by helping to create a stable business foundation upon which you can build a successful restaurant concept.

If you would like more information on restaurant leasing issues or for a consultation concerning your lease, please call or email me.

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