



REAL ESTATE  
COUNSELORS

## Restructuring a Lease

*Collaborative and creative Options.*



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- **Introduction** – During the tough economic climate that we now face, a tenant may be forced to downsize or may have difficulty keeping current with its rent payments. A way to address such issues is to negotiate a restructuring of the lease with the landlord. Before approaching a landlord, tenant could carefully evaluate several options discussed below.
- **Rent Payments** – It is not in landlord's interest to have tenant default and consequently the landlord may be amenable to restructuring the rent payments to help the tenant through a difficult period. The best option for a tenant would be to abate rent payments for one, two or three months and resume full rent after the abatement period. Most landlords are not inclined to abate rent entirely, however. A more acceptable compromise would be to defer (not abate) rent payments for one, two or three months and then amortize the amount of such deferred rent over the remaining term of the lease (or a shorter period of time). One way to sweeten a rent abatement offer, is for a tenant to commit now to renew the lease in the future at a higher rental rate.

In negotiating a restructure of rent payments, the tenant should consider whether it will have the capacity to pay rent under the new terms. If tenant agrees to a higher rental rate at a future date, will the new rate be financially viable for the tenant?

Prior to documenting the restructuring, a landlord should check whether its lender requires approval for any such restructuring. Likewise, if the tenant has a subordination, non-disturbance and attornment agreement (SNDA) with the landlord's lender, it will likely need to get that lender's consent to any amendment or restructuring of the lease.



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- **Contract Space or Buy Out** – The tenant may try to re-structure its lease obligations by contracting its space or possibly buy-out its obligations (a negotiated lease termination). If at all possible, tenant should negotiate with the landlord in an amicable, cost-effective and non-judicial manner. A buy-out is typically documented in a termination agreement. When negotiating a termination agreement, assuming the tenant has maintained the premises properly as required under the lease, the tenant should try to get the right to surrender the premises in its current condition (perhaps agreeing only to remove furniture and personal property), but not be required to remove alterations or other leasehold improvements. Also, the parties may wish to exchange general releases, including releases of any guaranties. Consider, however, how such a release may impact CAM reconciliations (if tenant overpaid). Also, making sure not to release landlord from its obligation to return any security deposit.
- **Retail Tenants** – Retail tenants have other unique considerations. Some retail tenants may have a co-tenancy clause in their leases and consequently may have some protection in the form of reduced rent. These clauses allow tenants to reduce rent if an anchor tenant or certain number of tenants vacate a space or cease operations.

Retail leases often have a continuous operations clause. Such a clause requires a tenant to continuously operate its business in the leased premises throughout the term of the lease. Given the current environment, if negotiating any amendment to the lease the tenant should negotiate changing the continuous operation provision to reflect current constraints.

- **Subletting or Assignment** – A tenant seeking to reduce the burden caused by too much space may evaluate a sublease or assignment. However, given the current environment, this may not be feasible. For a discussion on subletting and assignment, please refer to our prior articles.
- **Next Step** – This is a brief overview of a few options that may be available to a tenant seeking to restructure its lease. An experienced team of a commercial real estate broker and commercial real estate attorney will be able to assist the tenant in negotiating the lease to best achieve tenant's objective.

