

IF ONLY WE'D THOUGHT OF THAT: Negotiating a Commercial Lease

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Mr. and Mrs. Old, the sole shareholders of Oldco, want to retire from their business to travel. They operate Oldco from leased premises and recently signed a new, 10-year lease in the company's name. Mr. and Mrs. Old plan to sell all their shares in Oldco to Mr. and Mrs. New, who like the location of Oldco's premises and the added benefit of a long-term lease.

After the shares have been transferred, the landlord tells a surprised Mr. and Mrs. New that the lease will be terminated, because Oldco breached a provision of the lease. The landlord points out that the lease contains a clause that the landlord's consent must be obtained for any transfer of the lease. Mr. and Mrs. Old failed to obtain the landlord's consent and Oldco is now in breach of the lease. Oldco argues that it has not transferred the lease, it simply sold the shares of Oldco and Oldco will remain the tenant. The landlord, however, points to the clause in the lease which states that a change to the shareholders is a change of the effective voting control of the corporation and is considered a transfer.

The requirement to obtain the landlord's consent to a change in the corporate ownership is a common clause in a commercial lease; landlords want control over who rents the premises. Tenants who don't use a real estate lawyer when negotiating a commercial

lease often overlook such provisions. A real estate lawyer could have helped Oldco avoid this situation by negotiating a right to transfer shares without needing the landlord's consent.

Or let's suppose that Mr. and Mrs. Old decide not to sell their business, but rather to modernize the premises with major renovations. To do so, they advise their customers that they are closing Oldco for five days. The landlord warns them that if they close for that length of time, Oldco will be in breach of the lease. The lease contains a covenant from Oldco that it will continuously operate its business, closing only for statutory holidays and that it will be open during normal business hours, so as not to decrease customer traffic to the plaza. Closed units look abandoned and detract from the plaza's overall

appearance. Again, Oldco could have avoided this situation by having a real estate lawyer negotiate the original lease, so that the company could close for renovations without being in breach of the lease.

Lease audits are another provision to be negotiated in a lease. Conducted by real estate auditors on behalf of a tenant, normally at the tenant's expense, audits are detailed reviews of the lease to determine additional operating costs that the landlord can charge the tenant. There can be discrepancies in these costs; for example, where costs are allocated according to the size of premises; if the unit is incorrectly measured, the cost allocation will be incorrect. Landlords can limit the extent of the audit in a properly worded clause.

A commercial lease is a complex legal document. Always consult a real estate lawyer before signing one and review it periodically, just like a will. Provisions agreed to at the commencement of the lease may now hinder tenants' plans or trigger an unwitting breach of tenants' obligations.



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