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Shared Workspace Leases in Wake of COVID-19: Risk Mitigation, Insurance, Negotiating Key Provisions

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Shared Workspace Leases in the Wake of COVID-19

*Risk Mitigation, Insurance, and
Negotiating Key Provisions*

Covered Today:

- Basics of Shared Workplace Agreements
- License vs Lease
- Licensor Considerations
- Licensee Considerations

“The word coworking won’t be a word in the future, it will probably just be the way we work.”

- Rahul Prakash, partner at Hatch Today

What is it?



A shared workspace agreement is an agreement between an owner of office space and another business. It can be used where the provider of the space owns the property or has a lease of the property.

What is it? cont'd

These days coworking space (or shared workplaces) is often managed by multisite companies that offer a network of shared office space.



Why Use it?

Lower cost than a traditional lease

Provides flexibility

Provides networking, collaborating and/or referral opportunities

Facilities typically provide full office setup

Licensors may want to profit off of extra space

Reduces licensor lease burdens

Lower Cost



- Great for startups, small businesses, and freelancers who don't want to commit to or can't afford a long-term lease
- Possible month-to-month terms
- Full office set up

Flexibility

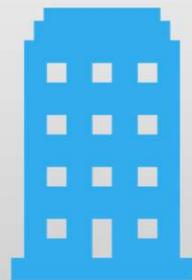


For those companies that don't need much, they can license for an office, or a desk, while others can license for multiple offices and open spaces.

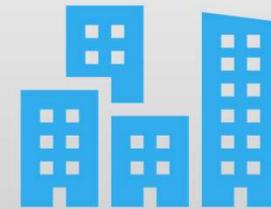


Licenses are typically short-term, so do not have to sign a lease for 1 year or more.

Networking



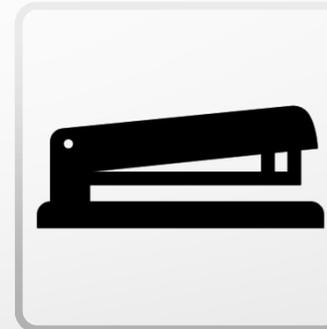
Mix of different entities
in one office space



Mix of industries in one
office space

Full Set Up

- Conference rooms, high-speed internet, printers/copiers, phone lines, coffee and kitchen, desk space, furniture
- Use of common area
- Lowers the cost and allows access to the amenities that companies want in an office space



Lease vs License

	Lease	License
Rights	Tenants have rights to exclusive possession of the space	Right is simply permission to occupy a designated portion of the space, not a possessory right
Transferability	Transferrable; however, depending on the contract, might need permission from landlord to sublease, assign, or license	Non-transferrable
Duration	Fixed duration	Generally revocable
Revocability	Can't revoke, breach of contract	Revocable at any time
Eviction	Process of notice and judicial proceeding	Depending on the agreement, can evict at any time

General Characteristics of a License

- A license is the permission to do something on the land of another that, without such authority, would be unlawful.
- As a mere personal privilege to use another's property for a particular purpose, a license is ordinarily unassignable, and revocable.
- Generally, a license is not viewed as an interest in the land

Revocation of a License

- Except as stated in Subsections (2), (3) and (4), a license is terminable at the will of the possessor of the land subject to it.
- (2) In the termination of the license of one who has entered upon land under a license, the licensee must be given a reasonable opportunity to remove himself and his effects from the land.
- (3) A license coupled with an interest can be terminated only to such an extent as not to prevent the license from being effective to protect the interest with which it is coupled.
- (4) A licensee under such a license as is described in § 514 who has made expenditures of capital or labor in the exercise of his license in reasonable reliance upon representations by the licensor as to the duration of the license, is privileged to continue the use permitted by the license to the extent reasonably necessary to realize upon his expenditures.
 - Restatements § 519

Other Ways to Terminate a License

- Courts generally have held that sale or transfer of the servient property by the licensor automatically terminates the license.
- A license granted by a tenant terminates when the lease expires.
 - A few courts, however, have qualified this rule by concluding that the license may continue when the new owner raises no objection to its usage.
- The grant to another party of a nonexclusive easement over the area of the existing license does not terminate the privilege.
- A license is terminated upon the death of the licensor or licensee by virtue of the personal character of the permissive use involved.

Other Ways to Terminate a License



ABANDONMENT OR
SURRENDER BY THE LICENSEE



LICENSES FOR SPECIFIC
PURPOSE END ONCE THE
SPECIFIC PURPOSE HAS BEEN
ACCOMPLISHED

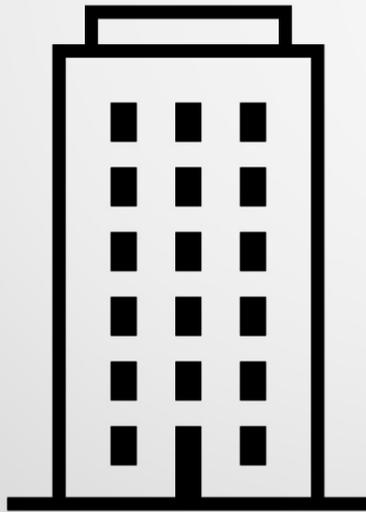


LICENSE IS ALSO ENDED WHEN
RELINQUISHED BY THE
LICENSEE

Assignability of Lease

- Licenses are generally not assignable by the licensee because they are personal in nature and are thus limited to the original parties
- Some courts say that an attempted assignment terminates a license
- Some courts say a license may be transferred when the parties intend the privilege to be assignable.
- Some courts say when a license arises from a commercial transaction, courts infer that the parties intended the license to be assignable unless they had expressed a contrary intention.

Owner Issues



- Licenses may diminish landlord's control over tenant mix
- Consent provision will cure this
- Do licensees have insurance coverage; or does licensor's insurance coverage cover licensees
- Are there restrictions in the license to prevent licensees from disturbing other tenants in building?

Owner Issues cont'd

- What services do the owners need to provide
- Do they get a share of the profits from the sublease/license
- Provision Landlord should require in Licenses between Tenant and License:
 - Licenser has provided Licensee with a copy of the Lease and Licensee acknowledges receipt thereof. Licensee agrees to comply with the terms and provisions of the Lease with respect to its use of the Licensed Area and the common areas.

Licensor Issues

- Lease price increases at the end of the term
- Need consent of the landlord before entering into license or sublease
- Whether licensees conform with permitted uses of space
- If the license has similar characteristics of a lease, courts may determine that a leasehold interest is created



Licensor Issues cont'd

- Does licensor have free access to the area
- What happens if furniture or common spaces are damaged, who is liable
- Licensor may be contributorily liable for Trademark infringement
- Is the licensor liable for any services the landlord did not provide

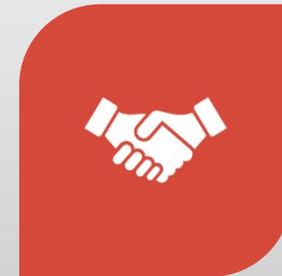
Licensor Issues cont'd



WHO IS RESPONSIBLE FOR
REPAIRS TO THE LICENSEES
AREA



IS THE LICENSOR LIABLE FOR
DAMAGES TO LICENSEES
PERSONAL PROPERTY OR
EQUIPMENT



IS THERE ENOUGH FLEXIBILITY
IN LEASE AGREEMENT TO
ACCOUNT FOR MARKET RISK

Licensee Issues

- Are alterations allowed
- Concern that license is revocable at will
- Are there limitations to licensee's permitted use
- Can the licensor modify the underlying lease agreement unilaterally
- What services can the licensee expect the licensor or landlord to provide

Licensee Issues cont'd



Who is responsible for repairs to the licenses areas



Privacy concerns



Appearance of partnerships

Top Negotiating Points



Responsibility for
the space



How will decisions
be made



How will costs be
divided



How will common
space be shared

COVID-19

Virginia Law

- Force Majeure is a French word. Literally means “Superior Force”
- Definition from Black’s Law Dictionary
 - “An Event or effect that can be neither anticipated nor controlled.”
- Some examples of Force Majeure Events include: wars, revolutions, riots, labor strikes and certain “Acts of God”

Force Majeure

Sample Clause

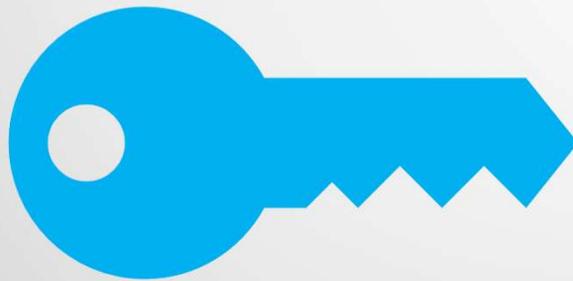


Force Majeure is a creature of contract. Thus, Force Majeure clauses are **VERY** fact specific. You have to review each contract and review the specific language/definition of "Force Majeure."

Sample Clause - *"Neither party is responsible for any failure to perform its obligations under this contract, if it is prevented or delayed in performing those obligations by an event of Force Majeure."*

Force Majeure

Definition is Key



- In the previous clause, the definition of Force Majeure is the key
- Force Majeure shall mean an event or circumstance which is beyond the control and without the fault or negligence of the party affected and which by exercise of reasonable diligence the party affected was unable to prevent provided that event or circumstance is limited to the following:

Defining Force Majeure

- (a) riot, war, invasion, act of foreign enemies, acts of terrorism, civil war, rebellion, revolution, insurrection of military, compulsory acquisition by any governmental entity
- *(b) Acts of God including earthquakes, flood, fire, and other physical natural disasters.*
- *(c) strikes at a National Level or industrial disputes on a national level*

Commercial Leases

Read the Clause



- Most commercial leases contain a force majeure clause.
- Typically this clause is considered “boilerplate” and not negotiated.
- Normally the clauses are pro-landlord and expressly exclude rent as an obligation that can be forgiven.*
- But not all force majeure clauses are the same and you have to read the language. Some do not expressly exclude rent and some do not include pandemics as a force majeure event.

Doctrine of Impossibility

For leases that do not have force majeure clauses, or even those that do depending on the circumstances, another defense tenants will raise is the *doctrine of impossibility*.

Think about situations where the Governor has shut down your business and it is impossible to make use of the premises.

Doctrine of Impossibility

The party relying on the defense must typically establish

- (1) the unexpected occurrence of an intervening act
- (2) that such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties
- (3) that the occurrence made performance impracticable. A critical factor is whether the party agreed in the lease to assume the risk of performance, whether possible or not.

Impossibility vs Force Majeure



If the Force Majeure clause expressly excludes rent but the tenant cannot make use of the premises, what to do?



Normally courts will enforce the language in the contract (i.e., the force majeure), but these are unprecedented times and there is case law where impossibility trumps the Force Majeure clause.

Business Interruption Insurance



Most landlords require tenants carry this and they also carry it themselves.



Insurance industry so far is saying no coverage.



A common ISO Endorsement expressly excludes coverage for viruses.



But other arguments can be raised.



Businesses should compile their financial statements, tax returns and payroll to document their losses.

Landlords and Commercial Loans



Landlords should also contact their lenders.



Many banks are offering 90 day moratorium on payments.



TBD how stimulus package will offer relief.

What should Tenants do?



Facts matter.



Language in the lease matters.



Tenants should consider giving Landlords notice of the force majeure event.



Many retailers and some office tenants are not paying rent in April.

Questions and Thank you!



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