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Negotiating Relocation Rights

By Terrence M. Dunn

A relocation provision, in its simplest description, is a contractual right in a commercial lease that permits the landlord to relocate a tenant to another space. Even without further explanation, one can imagine how having such a provision in a commercial lease would be problematic for a tenant. However, despite the apparent risks, relocation provisions are frequently not a potential tenant's priority concern when negotiating the business points of a lease.

This is a serious oversight. Signing a lease with an overly broad relocation provision can lead to many issues if the landlord elects to exercise its right to relocate the tenant.

The Landlord's Perspective on Relocation Provisions

A relocation provision allows a landlord the flexibility to uproot a tenant from its leased space and relocate them to another space for the remainder of the lease term when the need arises. A landlord may choose to exercise its option to relocate a tenant for a number of reasons but, very often, these rights are exercised to make room for a more desirable tenant. Another possibility is that a reputable tenant already has a lease with the landlord and wants to expand into another space that is currently occupied but is subject to a relocation provision. Further, building redesign and construction could cause a landlord to exercise its relocation rights.

Relocation provisions are typically found in leases for commercial spaces within shopping centers, malls, strip malls, office buildings and larger mixed-use buildings. Ideally, for a landlord, the relocation provision will be exercisable within the landlord's sole discretion, at tenant's cost, and subject to few or no conditions. Assuming a tenant finds it necessary to agree to a relocation provision, the tenant's negotiation of the terms of that provision will dictate how onerous that clause becomes.

Elements of the Relocation Provision

While the language of the lease is critical, landlords are subject to some broader controls in enforcing relocation provisions. In *Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC*, 403 Ill. App. 3d 234 (2010), a landlord attempted to relocate a ground floor children's care center to another floor of the building, but the court found that local codes prohibited the enforcement of that clause.

However, without broader concerns such as those, the terms of the lease will control — in landlord's favor if written broadly, but to tenant's benefit if crafted with appropriate protections.

Negotiating the elements of a relocation provision so that it specifically addresses a tenant's concerns has proven to protect tenants' rights. In *Saran v. Chelsea GCA Realty P'ship, L.P.*, 148 A.D.3d 1197 (N.Y. App. Div. 2017), the court found that "[a] lease, like any other contract, should be interpreted according to the plain meaning of the language employed" and found that landlord failed to establish that it had the right to relocate the tenant pursuant to the plain language of the lease.

Retail tenants and office tenants will have different priorities when negotiating favorable terms to a relocation provision. What are some of the terms that should be considered?

Location and Size

All tenants should be concerned with the location and size of the relocated space. Without any restrictions as to tenant's relocation, a tenant could be relocated to a space that is a substantially different location and size, or on a different floor of a building, further away from a prime location that the tenant had negotiated for.

Retail tenants will be especially sensitive to where they could potentially be relocated. Retail tenants look for space with high exposure to potential customers and for a size that is fitting and appropriate for their operations. In a relocation scenario, a retail tenant occupying a ground floor storefront space of a mixed-use building could be subjected to relocation to a space inside of the building or on another floor, without street exposure.

As for size concerns, the retail tenant will obviously want a new space of a comparable size, but there are nuances to size that need to be addressed. Retail tenants being relocated to a different space should consider, amongst other factors, how the new square footage would affect its build-out and customer accessibility.

The location and size concerns of an office tenant will be different. An office tenant will often be concerned with factors such as the floor number of the building, elevator accessibility, the view (or lack thereof), number of private offices, or welcoming lobby area. Many of these factors are of varying concern based on the type of office tenant and the tenant's level of prestige.

The size and layout of the new office space will also have to be taken into consideration; although, it is usually not difficult to reconfigure an office layout. The square footage of the

office is, of course, a major concern, especially for offices needing to accommodate a high number of employees.

How to Negotiate

Before signing a lease with a relocation provision, a tenant should make sure that the provision addresses both the size and location of the potential relocation space. First, a tenant should confirm that the new space will be “of comparable size” to its existing space. It is advisable to include a minimum square footage requirement.

In regard to the location of the new space, a tenant should be cautious that the relocation provision does not allow the landlord to relocate the tenant to any other landlord-owned building. In the unlikely event that the tenant is amenable to being relocated to another landlord-owned building, the building(s) address(es) should be specified in the relocation provision.

Negotiating the location of the space within the same landlord-owned building will vary depending on the type of building it is. Location preference will be largely based on the type of tenant. Office tenants would typically negotiate a location on the same or similar floor of an office building, with similar views and on the same side of a building. Retail tenants will want to negotiate to keep or obtain a space that has ample exposure to potential customers.

Moving Expenses and Costs

As with location and size, all tenants should be concerned with any costs and expenses associated with the move. Landlord-drafted leases will frequently provide that the commercial tenant is solely responsible for the moving expenses associated with the relocation. Not only would the commercial tenant have to be concerned with the uprooting of its business, but it would also have to bear all costs related to the move in addition to the more obvious expenses, such as hiring a moving company. Other costs to consider are information technology reconfiguration, modifying the business’ website and updates of all materials and promotional items to reflect a new address.

Perhaps more significantly, a relocation would cause the tenant to incur costs for the build-out of its new space, as well as the loss of its initial investment. Depending on the type of retail use, having to recreate the initial build out, which was probably tailored to the specific business, could be extremely costly. While a new office build out, if necessary, would likely cost less than a retail space build out, it is still an additional cost that the tenant would not have typically needed to factor into its accounting.

How to Negotiate

The commercial tenant of any kind should request that the landlord pay for all moving expenses and related expenses, including the buildout. Typically, if a landlord agrees to pay, it will want to pay for only “reasonable” or “actual” moving expenses. If the landlord is not agreeable to language obligating payment for *all* moving expenses, tenant should request that landlord pay a flat amount to cover a portion of the expenses. This amount should be determined at the time of signing the lease and could be based off of several factors: the

size of the space, the cost of the initial build out, moving expense quotes and other anticipated variables.

Notice to Tenant

A commercial tenant will want a relocation provision that allows for ample notice of a move so that it can properly prepare and assess potential business issues that may arise from the sudden change. What constitutes “ample notice” will vary, depending on the needs of a particular tenant. For example, a small office tenant may not require as much notice of relocation as a large chain restaurant would.

How to Negotiate

A commercial tenant should request a notice period that it believes would allow enough time to successfully move its entire business, including time for a new build-out. Typically, reasonable landlords agree to relocation notices between 60-120 days.

Rent

A commercial tenant will want the rent owed for the new space to be appropriate to the size and location of the space to which it is relocating. Leases will frequently simply state that the lease will remain in full force and effect. Accordingly, the rent schedule in the lease will not change no matter what the size of the new space is, nor how much the tenant's business is disrupted.

How to Negotiate

If the new space is substantially the same size as tenant's original space, it is likely that the landlord and tenant will agree that the rental terms will remain the same. A tenant should also be cautious of the possibility of the new space being larger than the original space, thus warranting higher rent. A relocation provision should explicitly state that in the event of a larger relocation space, rent shall not increase.

If a tenant was not able to negotiate the space requirement terms and the new space is substantially *smaller* in size than the original, tenant should request a proportionate rent reduction. Similarly, additional rent, CAM charges, proportionate share of real estate taxes, and other relative additional charges, should only decrease with size change, not increase.

For a dissimilar space, a new rent schedule could be determined by the fair market value of the new space at the time of relocation, provided it is not more than that of the original space. The relocation provision in the lease should have a formula of some sort that will be used to determine fair market value.

Other Negotiation Points

As a general proposition, a tenant should insist that all final terms of a relocation be memorialized into a separate relocation agreement. While it is helpful for specificity

purposes to have as many terms as possible expressed in the relocation provision in the lease, a relocation agreement will properly effectuate the new terms, provide clarity and, hopefully, eliminate any possible ambiguity in the terms. Points other than those mentioned above could include:

Rent Credit

A rent credit should be requested if there will be a substantial time in between moving from space to space. It is likely that a tenant will be forced to close for business for a certain amount of days, depending on the business and how long moving will take. A rent credit, perhaps on a day-by-day basis, would halt the payment of rent for the days in which tenant is moving and is not able to operate its business. A landlord may want to protect itself from a long or delayed moving process. In such a case, tenant should suggest that a rent credit be given during the days tenant moves, but in no event shall the rent credit exceed "X" amount of days.

Termination Options and Renewal Options

If a landlord is free to relocate the tenant at any given point during the lease term, a tenant may be forced to relocate at the tail end of its lease. One way a tenant may protect itself in this situation is to set a timeframe within which the renewal may take place. This way, a tenant could prevent the relocation from being too close to the lease commencement or expiration. Minimally, a tenant should suggest that no relocation may take place during the first three or last two lease year of the lease term. Further, a tenant should suggest that if a relocation does occur during the final lease year (or whichever timeframe tenant proposes) that tenant will have the option to terminate the lease.

Conclusion

The lease term providing that the landlord has the ability to relocate a tenant is sometimes a short clause that does not attract much attention. Any landlord would want the ability to relocate tenants if the need arises, with as few restrictions as possible. Tenants must be careful to negotiate terms that protect the advantages established when their lease was first entered into. If the lease is silent on requirements that are essential to them, they may find themselves in a much less desirable setting.

Terrence M. Dunn, a member of this newsletter's Board of Editors, is a founding partner of Einbinder & Dunn, in charge of the firm's business, real estate, trusts & estates and fashion law practices.