

The Fine Print, or Understanding Key Clauses in Retail Leasing

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While every clause in a lease is important, there are certain clauses that are of more interest to owners and managers of retail business, than others. Some of the more important clauses include the "use," "assignment and subletting," and "common area maintenance cost" clauses.

"Use" Clauses

A landlord's lease form will limit your use of the premises to a specified purpose (for instance, "solely for the retail sale of cameras"). You need to make sure that the use clause is expanded to permit the sale of all the merchandise that you customarily sell and that you anticipate selling in the future. In addition to cameras, you may sell camera equipment, provide repair services, sell instructional tapes, books, or other peripherals such as film, camera cases or photograph albums. In addition, future technology may significantly alter your business and the products you sell. Therefore, a "Use" clause needs to be broad enough to give you the flexibility to change and adapt to the merchandise that you may need to sell in this ever changing world.

"Assignment & Subletting" Clauses

A landlord's form lease will generally prohibit any assignment of the lease or subletting of the premises without landlord's consent. While the new location may be just perfect for you right now, remember that each business owner needs an exit strategy: your business may grow and you need a larger location; you may want to sell your business; or this location or business may turn sour and you may need to assign the lease or sublet the premises to minimize your exposure. Each of these transactions and others may be thwarted by a lease provision that prohibits the assignment of the lease or subletting of the premises without the landlord's consent. While you might assume that the landlord is not able to arbitrarily withhold its consent or assignment, that assumption is wrong under Texas law. There is no obligation in Texas for the landlord to act reasonably in granting or withholding its approval to proposals that you make, unless the lease otherwise specifically requires the landlord to do so. Therefore, make an effort to include a requirement for the landlord to act reasonably in granting or withholding consent to a proposed assignment or sublease.

"Common Area Maintenance Cost" Clauses

In most retail environments there are common areas such as parking lots, driveways, landscaping, and sidewalks that require maintenance. The landlord typically passes these costs on to the tenants, with each tenant paying its prorata share of those costs based upon the square footage of its premises compared to the total square footage of the retail center. It is recommended that you pay careful attention to the nature of these costs. Exclude items of capital expenditures as those are not operating expenses and are generally proper for the landlord to bear. Limit the costs that the landlord can pass on to "reasonable amounts" to incentivize the landlord to keep the costs lower. Limit costs for services that are performed by affiliated companies to comparable costs provided by independent third parties. In order to give you the ability to plan your operating expenses on a yearly basis, try to limit the amount of annual increases in your share of common area operating expenses on a cumulative basis, so that with the exception of certain "uncontrollable expenses" such as utilities, insurance premiums and taxes, your share of common area maintenance costs cannot exceed more than five percent per year, as an example. Also, work to obtain an audit right so that you can check the landlord's books to make sure that everything is being properly accounted for.

Every clause in a retail lease is very important. However, these clauses may have more relevance to you, as a business person, than some of the other provisions. In addition to your own review of the lease and making certain that you understand its terms and provisions, it is always advisable to engage the services of a knowledgeable real estate lawyer to assist you in negotiating the sometimes confusing terms of a retail lease.

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