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## Focus on Leasing: *Existing Equipment Issues*



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### SOMETIMES IT MAKES SENSE TO LOOK EVEN A GIFT HORSE IN THE MOUTH.

- **Existing Furnishings** – Sometimes in commercial leasing, landlords will offer to lease a premises with existing equipment left by a prior tenant. It might be existing furniture in an office building, or a restaurant with existing kitchen equipment. For many tenants this provides a great opportunity to save money and may be a key consideration for entering into the lease. To avoid any unexpected surprises, however, a tenant should think through some key issues when leasing premises with existing equipment.
- **Own or Use** – In some cases the landlord may be willing to transfer ownership of the equipment to the tenant at the beginning of the lease, so the tenant will own the equipment outright. In other cases, the landlord may let the tenant use the equipment during the term and possibly purchase the equipment (or receive it for no charge) at the end of the term.
- **Right to Use** – If the landlord is letting the tenant use the equipment during the term, here are some key issues to consider:
  - **Condition** – Is the landlord ensuring that the equipment or furnishings be in good condition and (if applicable) operational? What if some equipment (e.g., a refrigerator in a kitchen or television in a conference room) breaks shortly after the term commences?



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- **Right to Use** (*continued*)
  - **Replacement** – If the equipment wears out during the term, is the tenant responsible to replace it? Is the landlord? Who pays for the replacement? If the tenant has to replace the equipment, at its expense, consider what happens if the useful life of the replacement equipment would extend beyond the end of the term. The tenant may want to negotiate that the landlord reimburses the tenant for landlord's share of such expense, based upon the percentage of the useful life that such replacement equipment will have after the expiration date.
  - **Maintenance** – If the tenant is required to maintain the equipment, the landlord may have certain maintenance requirements in the lease. The tenant may be required to enter into maintenance contracts. The tenant may be required to use contractors selected by the landlord. In such case, tenant may want to negotiate it will not pay above market rate for such work.
  - **Insurance** – Does the landlord's insurance cover the equipment or should the tenant insure the equipment? If the tenant is required to carry insurance, the tenant may want to have its insurer review the requirements.
  - **Taxes** – Depending on the jurisdiction, the landlord may require that the tenant pay personal property tax on the equipment, even if the tenant does not own the equipment. If such taxes are significant, the tenant may want to pro-rate the tax based on when the lease begins.
- **Transferred Furnishings** – Sometimes the landlord does not value – and may not want to be responsible for – existing furnishings and equipment. In that case the landlord may decide to convey the property to the tenant at the beginning of the lease term.





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- **Transferred Furnishings** (*continued*) – If the landlord is conveying the equipment to the tenant at the beginning of the term (or even at the end when the lease expires), here are some key issues to consider:
  - **Title** – In connection with the transfer, will the landlord make any representations concerning the equipment? Are they warranting that they own the equipment and/or have the right to convey the same to the tenant?
  - **Condition** – Will the landlord convey the equipment in its “AS IS” condition, or are there any warranties from the landlord (or third-party warranties from manufacturers)? If there are third-party warranties, the tenant will want to make sure that landlord assigns its interest in any such warranties.
  - **Liens** – The equipment or furnishings may have been financed by the original owner of the equipment. When conveying the equipment, will the landlord represent that there are no liens encumbering the equipment? If not (or if the equipment is important to the tenant), a prudent tenant may want to run a lien search to confirm the equipment is unencumbered. If there are any liens, the tenant should be clear as to which party is responsible for the cost of removing the liens.
  - **Taxes** – In some jurisdictions, the tenant may be responsible for a transfer tax payable when the equipment is transferred. The tenant may also be responsible for personal property tax on the assessed value of the equipment. With respect to the personal property tax, the landlord and tenant may wish to pro-rate such tax based on the date of the transfer.
- **Your Transaction** – The issues discussed in this article may not necessarily apply to your transaction, and your transaction may raise issues not addressed in this article. In all cases, we advised you to consult an experienced commercial leasing broker and experienced commercial real estate attorney to make sure the issues for your transaction are properly addressed.



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