



HOW TO SAY GOODBYE

Options a non-profit may have to terminate a long term lease.

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Introduction. An office lease can be a non-profit's largest liability when the non-profit downsizes during a tough economic climate, like the one we now face. A manager making such a decision should carefully evaluate several options:

- **Restructuring or Buy-Out.** The non-profit may try to restructure the lease or possibly buy-out its obligations so that the termination is handled in an amicable, cost-effective and non-judicial manner, if at all possible. A buy-out is typically documented in a lease termination agreement. When negotiating a lease termination agreement, the tenant should try to avoid an obligation to deliver the leased space in any condition other than "as is" on the date the tenant moves out. Also, the parties should exchange general releases, including releases of any guaranties. Consider, however, how such a release may impact CAM reconciliations (if the tenant overpaid). Also carve-out landlord's obligation to return any security deposit.
- **Subletting or Assignment.** A non-profit seeking to reduce the burden caused by too much space may evaluate a sublease or an assignment. There are several factors to consider:
 - First, get a clear understanding of what the lease says. Assignment and sublease clauses are often long, complex and poorly written. Typically the landlord's consent is required, and some harshly-written leases permit the landlord to refuse to consent to the tenant's requested transfer without providing a reasonable basis (*i.e.*, sole discretion).
 - Many leases prohibit the tenant from assigning or subletting space to other parties already leasing space in the building, which limits the tenant's choice of potential subtenants to consider.
 - If a non-profit seeks to assign its lease or sublet all or most of its premises, the landlord may be entitled to recapture (take back) the premises, instead of agreeing to the transaction. If the tenant proposes to sublet only a part of the premises, this could be a problem. Well negotiated leases limit the landlord's recapture right to the portion of the space the tenant proposes to sublet. Some leases however, permit the landlord to take-back the *entire* premises even if a tenant proposes a sublease of only a *part* of the premises. Well negotiated leases also make sure that the landlord will pay for all costs of the recapture (including constructing any demising wall).
 - A key issue with subleasing is that the original tenant remains primarily liable for all of the space leased. This means that if the subtenant fails to pay rent, the non-profit will have to make up any shortfall. Also, the non-profit will be liable for any other defaults caused by the subtenant, including obligations relating to maintenance, insurance and alterations.

Once it has decided to pursue a sublease or assignment, the non-profit should contact the landlord as early as possible in the process.

- **Constructive Eviction.** A less common way to terminate a lease obligation is to assert the claim of “*Constructive Eviction*.” Constructive eviction occurs when a landlord does not actually evict the tenant, but acts to deprive the tenant of a beneficial use or enjoyment of the property, fails to supply essential services or acts to render the premises unfit for the purposes for which it was leased. It is rare, however, for a tenant leasing Class A office space to be able to assert such a claim.
 - Generally when making such a claim, the tenant must show that the landlord, not a third party, acted in a way to substantially interfere with the tenant’s intended use of the property. The act must also permanently, not temporarily, deprive the tenant of the use and enjoyment of the property. Further, the tenant must abandon the premises within a reasonable time after commission of the act – *this means the tenant must cease using the premises*. Situations in which courts have found that a constructive eviction has occurred include the landlord’s failure to furnish heat, elevator service, electricity or sanitary restroom facilities.
 - In certain rare situations, constructive eviction can be caused by the acts of other tenants if the landlord has expressly or implicitly authorized such acts. An example would include a landlord who allows another tenant to create a potential nuisance such as excessive noise or odors, despite the other tenant’s reasonable objection.
 - A tenant who can show that it suffers from constructive eviction has legal remedies similar to that of a tenant who was actually evicted.
- **Defaulting.** A non-profit may be tempted to default on the lease. The drawback under this option is that the non-profit may lose its security deposit and expose itself to liability, expenses and other distractions. Further, if there is a meaningful personal guarantee in place, defaulting is probably not feasible. Likewise, if the lease has an accelerated rent penalty, and a long time on the lease term remains, the cost of defaulting may be very high.

Next Step. This is a cursory overview of options that may be available to a non-profit seeking to terminate its lease. An experienced team focused on your organization will be able to negotiate an exit in a manner to best protect your interests.



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