



LEGAL ASSISTANCE TO
MICROENTERPRISES PROJECT

Commercial Lease Guide:

**FINDING
THE
HIDDEN
COSTS**

The Legal Assistance to Microenterprises Project (LAMP) is a project of Texas RioGrande Legal Aid and Texas C-BAR. LAMP provides free legal counsel, legal representation, pro bono referrals, community education, and legal resources to income-eligible self-employed persons and microentrepreneurs in Texas.

This publication is designed to guide and assist nonprofits and microentrepreneurs in understanding their legal obligations when entering into a commercial lease agreement. Although this guide is geared to be a useful resource to most commercial tenants; it is not intended to detail all laws and is not a substitute for the advice of an attorney.

We welcome your suggestions and comments for its improvement.

Andrea Harrington

Staff Attorney, Legal Assistance to Microenterprises Project

**This publication is made possible by the generous support of the
State Bar of Texas Real Estate, Probate and Trust Law Section.**



Table of Contents

I.	Introduction to Lease Agreements	3
II.	Overview of Different Types of Leases and Properties	5
III.	Things To Do Before Beginning Lease Negotiations	7
IV.	Hidden Costs of Remodeling and Repairs.....	9
V.	Its Not Just the Monthly Rent! Hidden Costs in a Lease	11
VI.	Thinking Ahead – Exit Strategies	15
VII.	But if You Want to Stay ... Renewals, Extensions, and Holding Over	17
VIII.	Other Lease Terms to Look Out For	19
IX.	Landlord-Tenant Disputes	23
X.	Conclusion	25

I. Introduction To Lease Agreements.

The legal considerations surrounding commercial leases are varied and complex. This guide is intended to serve as an overview of the hidden costs in commercial leases, but is in no way meant to be an exhaustive blueprint or substitute for the advice of a lawyer.

A commercial lease is a contract.

It is a written agreement. It should be very detailed. And it should explain the terms of the agreement between the owner (the landlord, also called Lessor) of a property (the Premises) and the renter (the tenant or Lessee) who wants to use the property for business purposes for a certain period of time in exchange for the payment of a certain amount of rent. *It is really important that you read your lease!* Don't sign the lease if there are blanks or you don't agree with the terms. Once you sign it, you will be responsible for abiding by its terms, and the legal assumption will be that you read and agreed to it. This means you don't have a right to back out of the lease if you decide later on that it was a bad deal.

Find the right property!

Think hard about what you need in a space for your business. What kind of space do you need - office, retail, restaurant, manufacturing? How important is location, foot traffic, or easy access to major roads, a loading dock, lots of customer parking, or security? The answers to these questions will be different for each business.

Get it in writing!

The lease agreement should be in writing, and very detailed. It should address the many different situations that can arise. Who is responsible if the roof leaks? Who is responsible if a hail storm breaks the windows? Does the lease include internet service, night time security or free parking for your clients?

Everything you and the landlord agree to should be in writing. Do not take a promise or a handshake – get it in writing. Once you sign a lease you are bound by its terms even if they are different from the agreement the landlord talked about with you. Remember that if the lease agreement is created by the landlord, it will often be more favorable towards the landlord.

You don't have to sign something that is bad for you. This does not mean that you will get the landlord to agree to everything you want in the lease. What it does mean is that you can always ask for what you want; that you should know what your dealbreaker issues are, and that you should know what the real costs will be to lease the property. Remember – you do not have to sign a lease that is bad for you.

Be prepared.

Finding a commercial space is a big deal. It is really important for you to do the work and research required so that you are well informed when looking into a commercial property for lease. This can save you time and money in the long run.

There may be a commercial real estate broker involved in the negotiations that is helping negotiate the lease agreement. The broker may represent one or both you or the landlord. Ask the broker who he or she represents. If the broker does not represent you and you alone, he or she may have a conflict of interest, and you must be extra diligent to ensure that the issues that are important to you are included in the lease.

Although the lease agreement itself will contain the answer to how most disputes between you and the landlord will be resolved, it is important to note that the Texas Property Code governs the relationship between a commercial landlord and commercial tenant. Where the lease is silent, the statute may provide guidance.

There are some parts of the law that apply to both commercial and residential leases. *There are significant differences between commercial and residential leases; and it is really important to know that some of the legal protections that extend to residential leases and residential tenants do not apply to commercial leases and commercial tenants.*

II. Overview of Different Types of Leases and Properties.

There are different types of leases, and it is helpful to be familiar with the terms:

Gross Lease.

A *gross lease* is all-inclusive. You pay a set rent amount and the landlord pays all or most expenses associated with the property, including taxes, insurance, and maintenance out of the rents received from tenants.

Net Lease.

A *net lease* is not all inclusive, you pay a lower base rent, plus some or all of the expenses associated with operations, maintenance, and use that the landlord pays. These can include real estate taxes; property insurance; and common area maintenance items (CAMS), which include janitorial services, property management fees, sewer, water, trash collection, landscaping, parking lots, fire sprinklers, and any commonly shared area or service.

Single Net Lease.

Single Net (N) leases mean that you pay base rent plus a pro-rata share of the building's property tax. The landlord covers all other building expenses. You pay your own utilities and janitorial services.

Double Net Lease.

Double Net (NN) leases mean that you pay base rent plus a pro-rata share of property taxes and property insurance. The landlord pays for structural repairs and common area maintenance. You pay your own janitorial and utility expenses.

Triple Net Lease.

Triple Net (NNN) leases mean that you pay base rent and all or part of the three “nets”—property taxes, insurance, and CAM, or common area maintenance. Common area utilities and operating expenses are usually lumped in as well; for example, the cost for staffing a lobby attendant would be part of the NNN fees. You still pay the costs of your own occupancy, including janitorial services and utilities.

Ground Lease.

A *ground lease* means that you are just leasing a lot that you can build on or otherwise use. However, any improvements you make to the lot itself will usually become the property of the landlord when the lease is over.

Building Classifications.

There are also different types of properties that you can lease. Properties are divided into different classes, and you should know what those definitions mean as you search for properties. Properties are marketed as being Class A, Class B, or Class C. Class A is the nicest and most expensive, and Class C is the most basic and least expensive.

Class A: These are new buildings with good curb appeal. They look nice and are usually in a good location with high end finishes and many amenities.

Class B: These are well-maintained buildings with mid-level finishes. Though not luxury buildings, they are nice, and often a good choice for a wide variety of business owners.

Class C: These are older buildings with few improvements. They will usually have the least expensive rental prices, and may be good for businesses on tight budgets.

III. Things to do Before Beginning Lease Negotiations.

Find The Right Property!

There are several questions you should think through as you scout locations.

What is your budget?

How much are you able to spend for the initial move? Think about costs beyond just the monthly rent. How much money do you have for the finish or build out of the property, for repairs, insurance, moving costs, and signage? How much do you anticipate having for the monthly expenses – not just rent, but your share of the property taxes and maintenance, for your utilities and future repairs. It is important to think about the actual costs of moving and preparing the property so that your business can open, as well as the actual monthly costs of leasing the property.

What are your needs?

What kind of property does your business need? Does it need lots of free customer parking? What about a reception area, or a certain number of offices? Do you need really bright lighting or a grease trap? Do you need to be able to put up a large sign or do you require a security guard for night hours? What about your delivery requirements – do you need a large driveway, truck access, or loading dock availability? Are there a lot of competitors located near the property? What about the traffic pattern by the property, will it be too loud for your business or accessible to your customers? Consider other nearby businesses. Do you want to put your toy store near an adult book store? Consider all aspects of your business needs carefully as you scout out locations.

Do some preliminary research.

Once you find a potential property, you need to do some initial digging. You will be responsible for paying at least part of the property taxes as a part of the lease, so it is a good idea to find out who owns the property and how much the property taxes are. All this may take is a quick search on the County Appraisal District website or a trip to the Appraisal District's offices.

You also need to check zoning restrictions for the space to make sure that you can use the property as intended without violating the zoning rules. Zoning rules can restrict the type of business you can have at the property, or the types of activities that can take place at the property. To look up the zoning classifications for properties and the restricted and allowed uses of the different types of classifications, you will need to check with the city government – in some cities this information is on the city website. In other cities you will need to go the city offices in person; try the zoning or planning departments first.

Get help.

Have your business counselor, realtor, attorney, contractor, architect, trade association members, lenders, or other advisors ready to help you on this commercial lease project. Have your advisors ready to read over and review drafts of lease agreements, accompany you on a walk-through, provide estimates for repairs, and otherwise help you through the process.

Do an initial walk-through.

You should walk through the property right away – BEFORE you sign anything. This can give you a good idea if the property will really meet your needs, and whether it needs extensive repairs or renovations. If you can, you should have a contractor or engineer accompany you on the walk-through, so you can get another perspective, and perhaps a rough estimate of how much it will cost to turn the property into your place of business. Make note of anything wrong that you need the landlord to repair or upgrade. These repairs should be included as part of the lease agreement.

IV. Hidden Costs of Remodeling and Repairs.

All Repairs Should be Done Before You Move In and Start Paying Rent!

If there are repairs or build-outs that must be done before you can open your business, make sure that you get a good estimate from a few different contractors for how much those repairs or build-outs will cost, and how long the job will take. Decide who is responsible for these repairs, you or the landlord. There are two common models for repairs and build-outs; turn-key or tenant pays.

If the landlord will be designing and constructing the repairs and improvements at its sole cost before you move in (a “turnkey” arrangement), make sure you have the right to look at, review and approve all designs and materials, and the right to make changes. In this case, *you want the work completed before you are obligated to move in or pay rent*, and that the scope of the work and the consequences for noncompletion or late completion are included in the lease agreement. If work (i.e., upgrades) is to be done after you move in, be sure that the work schedule is detailed in the lease including a completion date. Think about what it would cost to shut your business down for a couple of weeks. You do not want a landlord to make promises about repairs and improvements and then have your business shut down for weeks at a time because of ongoing work.

If you are paying for the build out or for repairs, ask for an allowance from the landlord for the cost of the remodel. In an allowance arrangement, make sure that the allowance will not be used up for non-tenant work, such as to remodel bathrooms located in common areas, asbestos abatement, or sprinkler systems. An agreement should be made as to what happens to the remaining allowance if the actual tenant improvements cost less than the allowance. Ask that the landlord to apply the allowance to the costs of other work that is your responsibility under the lease, pay it to you directly, or off-set it against future rent or other expenses. Make sure the agreement is contained in writing, in the lease.

Don't sign the lease until you know whether the allowance is enough to pay for the repairs or remodel. You should have final plans and estimates for the work so that you are not on the hook for the cost of improvements that are more than the allowance or, at the very least, will know how much you will have to pay.

Get it in writing! Is everything you negotiated, such as free rent during construction, increased tenant improvement allowance, or caps on operating expenses increases, stated clearly in the lease and its exhibits? Are there provisions like notice of delays or attorneys fees to enforce these pre-occupancy work clauses?

Lease Terms that Can Trick You

Initial Repairs, Alterations, and Fixtures:

If the first day of the lease is the same day as the completion date for any improvements or repairs that the landlord agreed to make, the lease should have specific and objective standards to measure the completion of these improvements. These standards should include requiring a certificate of occupancy, passing a city inspection, or a mutual walkthrough where you accept the property. The lease should also lay out the consequences for the landlord if he does not complete the improvements on time, such as withholding rent until the repairs are finished, or you being allowed to terminate the lease – these can be useful to protect your interests.

When you finish out or alter the interior of the property, it is important to discuss your plans for the unfinished space in detail with the landlord because some leases require that the landlord approve the alterations, plans and contractors that you are going to use. Also, this type of work may trigger the requirement to obtain additional insurance to cover liability for the construction project. Also make sure that the fixtures you install for your business will belong to you and that you have the right to remove them so long as any damage to the property is repaired upon removal of the fixtures.

Be aware that many leases prohibit you allowing any materialmen's or mechanics' liens to be placed on the property, so any dispute between you and a contractor on the finish out project that results in a lien for withholding payment could violate your lease agreement.

Acceptance of the Premises – As Is Disclaimer:

Be careful here! If you sign an acceptance of the property, or signing a lease with an “as is” disclaimer, any promises that the landlord made about the condition of the property can no longer be relied upon. This is why it is very important that you go to the property yourself and inspect it, and if necessary have an inspector or other relevant professional go with you. If you can, make sure any promises the landlord has made as to the condition of the property and its suitability to your intended use are accurate.

V. It's not just the Monthly Rent! Hidden Costs in a Lease.

When you are deciding whether you can afford to rent a specific property, you must look at more than just the monthly rent. There are other costs which can take you by surprise if you do not look for them. Unfortunately, most lease agreements will define these additional costs as rent, which means that not paying a bill for replacing a broken window, for example, can result in the same consequences as not paying your rent for the month.

Rent:

If your rent is not a set amount, you need to know how your base rent is calculated, when and where it is due, any grace period, late fees, or penalties for paying rent after the due date, any applicable interest rate on overdue rent, insufficient funds penalties or fees, and the terms regarding setoffs, demands, deductions and offsets.

The agreed upon rent should be clearly and consistently stated. Whether the rent is shown on a monthly or annual basis or based on square footage or a total for the full term, make sure the amount is stated and calculated correctly. The rent should be prorated for the first and last month to the extent the term does not begin or end on a full month.

Do not pay rent in cash! And, keep records of the amounts you have paid.

Rent Increases:

Carefully review the method by which and the amount by which the rent may be increased during the term of the lease. Make sure that the lease is clear as to when any increase in the rent begins, if rent does increase year to year, you may want to negotiate a cap on rental increases.

Percentage Rent:

Look out! If you have a percentage rent clause in your lease, look at it carefully because it allows the landlord to charge you additional rent if your profits are above a certain amount. Additionally, it generally allows the landlord to look at your books to ensure that the additional rent is in the correct amount. These clauses are more common in mall and sometimes strip center leases.

Common Area Maintenance (C.A.M.)

The lease may require that you pay a pro rata share of the landlord's operating expenses for that year. Find out what types of expenses are included! You should ask to look at prior years amounts so that you have an idea of how much the costs may be. Ask how the landlord is coming up with the numbers, for example, whether the allocation of expenses is based upon percentages of a fully occupied building or just by square footage rented, and what kinds of expenses are included. Certain

costs that should not be passed on may be the salaries of the landlord's staff, capitalized expenses, income taxes or costs related to a landlord's violation of any governmental regulations (fines or attorney fees), or repair costs that are the responsibility of the landlord in other parts of the lease. Watch out for any provision making the landlord's determination of CAM charges final. You should reserve the right to audit the landlord's expenses and to review the landlord's calculations.

Utility Costs:

The tenant is usually responsible for utility costs. This provision will tell you how the utilities will be charged. If there are individual meters, you will have the utilities in your name and pay for them directly. If there is only one meter, then the landlord will allocate the costs of the utilities to the different tenants. It is important that you know how your share of the utilities will be calculated. Will it be per square footage rented or equally divided per unit? Are there any allowances for businesses that may use a lot of a certain utility? For example, if you are opening a bookstore you will not use as much water as the hair salon next door.

Maintenance and Repairs:

It is really important to look at the repair clauses, because they can vary widely from property to property. You want to look at what 'big ticket' items you would be responsible for maintaining or repairing, such as the roof or structural repairs, HVAC repairs, foundation, floors, and plumbing. If the landlord is responsible for these items, take another look at the CAM charges and make sure that the landlord is not going to charge you for these expenses anyway! Make sure that any services you expect the landlord to provide are included in the lease.

If the landlord wants you to be responsible for a lot of these big ticket items, think twice! These are large and unpredictable costs; you may want to negotiate a maximum amount that you will be responsible for spending on needed repairs over a given period of time, and ask that the landlord pick up the tab for the rest. For the repairs that are the landlord's responsibility, it is helpful to include a requirement that a repair be addressed in a reasonable time following notice. An additional term allowing for you to take care of the repair and deduct the repair from the rent, for example can be useful.

Tenants are usually responsible for fixtures, furnishings, lighting, glass and windows, signage, doors, electrical, and the like. You will also be responsible for damages caused by you, your guests, employees, and customers' negligent or intentional acts. You may have the duty to keep plumbing from freezing and maintain the grease traps for example. You may also be responsible for trash and pest control. Double check to see if there are certain types of repairs that you must get the landlord's permission to do before you start work, such as a requirement that plumbing or electrical contractors be approved by the landlord.

The landlord's obligation must be spelled out in the lease; once the contract is signed there is no duty that the landlord conduct any repairs that are not listed in the lease agreement. You may want to negotiate the right to do the work yourself and deduct the costs from the rent, in case the landlord cannot get to them right away.

The landlord should be obligated to minimize the disruption to your business that these repairs cause. The lease will usually allow the landlord to enter the property to perform maintenance and repairs with notice to the tenant. Notice is usually all the lease will require, not your permission. If emergency repairs are needed, the agreement will not require the landlord to give you any notice. You may want the lease to state that the landlord only enter the property for repairs during non-business hours unless it is an emergency.

Insurance:

Most commercial leases require the tenant to purchase and maintain significant insurance coverage to protect the landlord in the event a customer or employee gets injured on the property. The lowest limit typically seen is \$1 million in general liability coverage, and you may be responsible for maintaining rental insurance or other insurance on the property that is kept within the leased premises. You may also be responsible for any increases in the landlord's premiums that result from your tenancy (perhaps due to the types of activities that will be occurring due to your operations). Also be aware that these provisions are usually not reciprocal. Even though the landlord may be an additional insured on your policy, you will not be an additional insured on the landlord's policies. You may want to obtain casualty insurance as well because it can protect you and your business equipment from damages cause by a fire or flood!

Additional Rent:

The clause making these all these payments "Additional Rent" is very important because it makes the other money due under the lease (late charges, pro rata taxes and insurance payments, etc.) treated the same way as the monthly rent. This means that if you do not pay these other charges on time, it will trigger the same penalties for not paying rent on time, such as late fees, interest, and more serious consequences, including lockout and eviction.

VI. Thinking Ahead – Exit Strategies.

You should think ahead, especially if you are signing a long-term lease, to a day when you may want to get out of the lease agreement. There are unforeseen circumstances that may make you decide you need to move your business to a different location or close down. You should look at the lease to make sure you can do that with as little disruption as possible.

Disasters:

The lease will set out the conditions under which the property will be repaired or rebuilt if there is a fire or other disaster. It will also set out the conditions under which you will be able to decide whether to wait for the repairs to be completed or terminate the lease and move out.

Look out! Because sometimes, the landlord is the only one who gets to decide whether to continue the lease or to terminate it. When the landlord decides to repair the property and continue the lease, this term can provide for an abatement of rent in the same proportion that your use of the property is impaired. In other cases, the prorated rent is based on the amount of square footage of the property that is damaged or destroyed. This is unfair since sometimes the entire property may not be useable for your business even though the damage is to a small area.

You will want a limit to the time within which the landlord has to repair and complete the repairs, as well as to also have the right to terminate the lease in the event of a disaster. Otherwise, you may find yourself bound by a lease but unable to use the property for a significant time while the repairs are made. Another issue to pay attention to is whether you have the right to complete your interior repairs (after the landlord's repair is complete) before your rent obligation resumes.

Subletting:

Subleasing is a built-in exit strategy – you find someone else to step into your place as the tenant, and you are free to move your business. You may also want to rent out part of your space to another business to help you pay the rent. You typically cannot sublease without the landlord's approval. Often, giving that approval is completely up to the landlord, though the lease may prohibit the landlord from unreasonably refusing to approve a sublease. A landlord may be willing to negotiate specific terms and conditions under which you may have the free right to sublease, including establishing a set of baseline standards which, if met, guarantee the landlord's approval. These may include the creditworthiness or financial strength of the proposed subtenant, compliance with existing use restrictions, and the like. Also ask that consent shall have been deemed given if the landlord does not respond within a certain time of your request for permission to sublease to a particular tenant. If you can, negotiate other exclusions from the consent requirements, including assignment or sublet for reorganization purposes or space-sharing arrangements up to a defined square footage.

Moving Out:

Document the condition of the property when you move out. Make sure the property is clean and that you have repaired all damage other than regular wear and tear. Pictures and video are really good tools for doing this. The landlord has to refund your security deposit within 60 days after you move out once if you give written notice of your forwarding address. The landlord may deduct damages, charges for which you are legally liable under the lease, and charges resulting from a breach of the lease, but not for wear and tear. If there are deductions, the landlord must give you a written description and itemized list of all deductions unless you owe rent at the time you move out, and there is no dispute regarding the amount of rent owed.

You may not withhold payment of any portion of the last month's rent on grounds that the security deposit is security for unpaid rent. If you do this, you may be liable to the landlord for an amount equal to three times the rent wrongfully withheld and the landlord's reasonable attorney's fees if he sues you for back rent.

If the landlord does not give you back your security deposit, he is liable for an amount equal to the sum of \$100.00, three times the amount of the deposit wrongfully withheld, and your reasonable attorney's fees if you sue for the deposit. A landlord who does not give you an itemized list of deductions may forfeit the right to withhold any portion of the security deposit or to bring suit against you for damages to the property; and might be liable for your reasonable attorney's fees if you sue him for the deposit.

VII. But if You Want to Stay ... Renewals, Extensions, and Holding Over.

Renewal and extension are very different from each other. Renewing a lease may require a new lease to be negotiated and agreed to by both parties. Extension is simply continuing on with the same terms as the original lease. A landlord is under no obligation to extend or renew a lease unless a clause has been specifically negotiated and included in the original lease. With such a clause, extension may only require you to send the landlord notice that you are going to exercise the option to extend the lease.

An option to renew provision may also require you to provide notice of intent to exercise the option to the landlord, the lease will set out the mechanism for negotiating new terms, which usually includes some sort of rent increase. Notice should be required well in advance of the end of the lease term to prevent the landlord from beginning a search for a new tenant.

You should to make sure that the method for exercising these rights at or near the end of a lease term are set out in detail in the lease and that you understand how to exercise them. A lease may automatically renew for an extended period of time or automatically terminate unless written notice is received by the landlord by a certain deadline. The time of the deadline varies widely; it can be as much as six months (or more) prior to the end of the initial term or as little as 30 days before the term end.

If you do not move out on the date your lease terminates, you are holding over, and a court will typically construe this as a month to month lease. If your lease does not contemplate this situation, the general provisions of the Texas Property Code will govern, which provides that a month to month lease can be terminated by either party by giving notice of at least one month.

VIII. Other Lease Terms to Look Out For.

Following are commonly found terms and clauses often found in a commercial lease that you need to look at carefully to ensure complete understanding of the lease itself.

Identity of the Parties:

Look at the identity of the parties. The landlord and the tenant should be named, including contact information. Especially when dealing with corporations or LLCs, make sure that the parties are identified correctly. The parties should be identified by entity's name, not storefront name, and not the name of the individual who is negotiating. If your business is incorporated make sure that the business entity is identified as the tenant, not you personally.

Personal Guarantee:

If the tenant is your LLC or corporation, you or another person will probably be asked to sign a personal guarantee. This makes the person who signs as the guarantor personally responsible for the entire amount due under the lease contract if the corporation or LLC cannot fulfill the obligations of the lease – notably, the payment of rent and other monies due under the lease.

Contact Information For Notice:

This is where the landlord will send you notice of important items related to the lease. This is also where you will send notice to the landlord of issues such as repairs and where to send the rent. Anytime you change this address, you must notify your landlord to keep the notice address good. If you do a lot of business via email, you may want to include email as vehicle for giving notice – be careful; you must check your email regularly if you do this!

Description:

The property description should contain the street address of the location, the legal description and the square footage, and if needed, a drawing or schematic to show specifically which part of the building is being leased (including parking spaces or storage spaces). Knowing the square footage and how it is calculated is important because costs and expenses are often tied to the square footage of the premises.

Term of the Lease:

The term is the time period during which you have the right to exclusive possession of the property and the obligation to pay rent. The date the lease terminates is the date you have to have removed all your possessions, and leave the property in good, clean condition. The length of the lease term is important. A short-term lease will work for a small business owner looking for flexibility, and a

long-term lease can guarantee a stable location for your business. One way to combine the positive aspects of both is to negotiate for a short-term lease with options to renew for several one year additional periods.

Security Deposit:

This clause sets out under what conditions the landlord can use the security deposit to cure a default. Typically, you will need to replenish the security deposit to its original amount if the landlord uses the security deposit to pay for damages due to a default.

Permitted Use:

This clause not only tells you what you can use the premises for, it functions as a limitation as well. So before you sign the lease agreement make sure that the permitted use in the lease will allow you to grow your business as you anticipate in the future.

Prohibited Use:

The lease may disallow some activities or types of businesses. Common prohibited uses are liquor stores, sexually explicit businesses, businesses handling hazardous materials, and the like. However, it is important for you to review any prohibitions to make sure this clause does not adversely affect your operations. This is because a lease may prohibit anything from nightclubs to drive-in or drive-through restaurants; a bowling alley; skating rink; health spa; studio or gymnasium; cooperative store or second hand store. The lease, through noncompetition clauses may also prohibit activities which may compete with previously existing tenants' businesses. (You may also want to seek to prohibit competing businesses from leasing space in the same building or shopping center.) The landlord may also seek to restrict certain types of advertising, such as handbills, flashing lights, and so forth. A clue as to whether this may be an especially restrictive clause for you to look out for is to check as to whether the property looks to have a certain "theme" or uniformity of appearance amongst the tenants. Be careful because these restrictions may also make it harder to find someone to sublease the premises or assign the lease in the future.

Compliance with Applicable Law:

Be careful here! The provisions in many commercial leases calling for tenant's compliance with "all applicable laws" may make you responsible for making repairs or other costs for problems with the property which were not in compliance with the laws before the beginning of your lease term. This term can be narrow, such as agreeing to comply with all applicable laws related to your business' use of the property or broad, such as making you responsible for all compliance issues.

It is important to first obtain a warranty and statement from the landlord that the property is currently in compliance with all applicable laws, regulations, ordinances and governmental

requirements as of the beginning date of the lease. For example, if the building is not accessible to persons in wheelchairs, it may not be in compliance with the Americans with Disabilities Act; and you want to know who is going to be responsible for building a wheelchair ramp, widening doors and adding accessible bathrooms, which can be very expensive.

Relocation:

Your lease may give the landlord the right to move you to a new location within the same building or strip center. Terms to consider include whether your business must remain on the same floor, within the same building, at certain heights (ground floor for visibility and street traffic or the top floors for views, etc.) or other location based considerations that are important to you. If the landlord can relocate you without your agreement, the the landlord should pay all costs and expenses of the move, including the costs of printing new business papers with the new address, changing phones, and technology or internet wiring.

Liens:

In your lease, you may not be permitted to allow a lien on the property or any of its contents. This is because your landlord wants to have priority for his lien, the landlord's lien, on the contents of the property; that will protect the landlord if you are unable to pay the rent. This prohibition on liens can be an issue if you have financing for your business, and the collateral for the loan is your equipment, property or inventory. If your business loan lender has first priority on all your property, the lease should include landlord's agreement to subordinate the landlord's lien to the lender. The lender may have a "landlord's consent" form to negotiate with landlord – this should be done early in the process because the lender's form may not start out as being acceptable to the landlord.

Default:

This provision will tell you what the landlord's remedies are in case you default under the lease, and what your remedies are if the landlord defaults under the lease, as well as what will cause default. Often, this clause will be accompanied by a nonwaiver clause, which allows the landlord to enforce parts of the lease he may have not used against you before.

Remedies for the landlord often include the right to terminate the lease, the right to accelerate the lease (this makes all money due under the lease due immediately), the right to take possession of the property, and the right to hold you responsible for all expenses incurred in exercising the remedies for default, including attorney fees. In contrast, your remedies may only be that after giving notice, and opportunity for the landlord to fix the problem; that you can abate the rent or terminate the lease. Look at these terms carefully. Default by the landord could put you out of business and you will need to be able to hold the landlord responsible.

Subordination and Attornment:

These clauses deal with the effects on you from a change in ownership of the property. Typically, the lease is subordinate to the rights of a new owner, who will have the right to terminate the lease if he or she wishes. An attornment provision generally obligates you to recognize the new owner as your new landlord under the existing lease agreement. If you have a long-term lease, ask for a non-disturbance clause to ensure you can continue the business under the current lease terms if there is a new owner.

Miscellaneous Clauses and Exhibits:

Each term affects your legal responsibilities. Here are a few more to look out.

1. A *severability* clause holds that if any part of the lease is unenforceable, the rest of the lease is still valid, and only that clause will be stricken.
2. *Waiver of jury trial* and the governing law and jurisdiction section; will tell you where – what state, county, or even city will have jurisdiction for lawsuit and waives your right to have a jury trial regarding lease disputes.
3. *Joint and several liability* means that if there is more than one “tenant” or a personal guarantor, all such signatories to the lease are equally responsible for all the obligations of the lease.
4. *Hazardous substances*; usually not allowed, tenant will be responsible for any damages and clean up costs.
5. *Deceptive Trade Practices Act (DTPA)* waiver. Tenant may qualify under DTPA as a small business consumer, but can waive the DTPA’s protections under the lease.
6. *Telecommunications*; you may need to get consent from landlord to have specialty wiring installed for internet access.

At the end of the lease, there will also usually be additional documents for you to review and sign. These are the exhibits. It is important that you look at these as carefully as you do the lease. They may include the site plan, which will identify exactly what portion of the property will be leased under the agreement (ie. Which 1000 square feet of the building). They may include a legal description of the property, rules and regulations for the tenants of the property (ie. hours of operation, and the like), a tenant acceptance of the premises – such as a walk-through statement and waiver, the signage criteria, and so on.

Reviewing the “Rules and Regulations” that often accompany a lease can ensure that they don’t conflict with your expectations.

IX. Landlord-Tenant Disputes.

When you have a disagreement with your landlord, you should always first look at your lease. The lease often has the answer as to how the dispute should be handled.

A lease dispute can happen by accident; you can fail to do something that you did not know you had to do only because it was required by the lease. This is why getting written notice of a default from the landlord is so important. Ask for 15 to 30 days after receiving a written notice to fix non-monetary lease defaults (i.e., failure to provide evidence of insurance). Ask for a grace period or a short cure period after written notice for a rent default.

The Law:

If the lease does not provide guidance on a dispute with your landlord, you will have to look to the Texas Property Code. According to the Property Code, a landlord who breaches the lease against a tenant who is not in default will be liable to the tenant for damages. Be careful, though, it is easy to be in default!

Some laws apply specifically to commercial leases and limit what the landlord can do in the event of a dispute. So, for example, a landlord cannot cut off your separately metered utilities unless it is for repairs, construction, or an emergency. A landlord also cannot take off doors or windows or remove your property unless for repair or replacement, which must be promptly performed. A landlord cannot lock you out without court order except for certain circumstances.

Lock Outs:

The landlord CAN lock you out of the property if you do not pay the rent!! If the landlord locks you out for not paying rent, he has to put a notice on the front door of the property giving the name and address or telephone number from where the new key can be obtained. The new key must be given to you during your regular business hours but only if you pay the delinquent rent.

If you get locked out illegally, you must follow several specific steps to get back into the property. You have to file a Sworn Complaint for Reentry in the Justice of the Peace Court in the precinct where the premises is located. The Complaint has to specify how the lockout was illegal. You also have to testify under oath as to these same facts in front of the JP.

If the JP reasonably believes that the lockout was unlawful, then she can issue a Writ of Reentry without notice to the landlord. The Writ means that you can get into the property immediately, pending a final hearing on your Complaint. You will need to serve the Writ on the landlord, and you will need the Sheriff or Constable to execute the Writ.

The landlord is entitled to a hearing within a week of the Writ's execution. If the landlord does not request a hearing by the 8th day after service of the writ, a judgment for court costs can be rendered against the landlord. Damages for an illegal lockout are for you to recover possession of the property or terminate the lease, and to get actual damages, one month's rent or \$500.00, whichever is greater, plus attorneys fees and court costs, minus money owed to the landlord. All this can be changed in a lease, so check your lease carefully.

Abandoning the Premises:

A landlord has a duty to mitigate or lessen his damages if you abandon or move out of the property in violation of the lease. This cannot be changed by the lease! This means that if you have to leave the property, and are unable to sublease it, the landlord has to try to re-rent it out. So, if you walk away from the property, you will still owe the rent due under the entire term of the lease, minus the income the landlord gets once the property is rented to someone else.

If you leave personal items or business equipment in an abandoned premises, the landlord may get rid of it if you do not claim it within 60 days. The landlord has to send you a certified mail letter to your last known address stating that he may dispose of the property if it is not claimed within 60 days after he began storing the property (NOT after the date of the letter!).

X. Conclusion.

Leasing a space for our business is an extremely important investment in your business. This is why the time and energy you give to this process is so important. Finding the right property, understanding what your true costs are, and knowing the terms of your agreement are crucial to a successful commercial lease.

While you may not like with all the terms in your lease, it is always important to know what the lease says; so that you at least know what you have agreed to, what obligations you have to your landlord, and what obligations your landlord has to you.

So, remember to get everything in writing, read your lease, and make sure you understand the lease before you sign it!



LEGAL ASSISTANCE TO
MICROENTERPRISES PROJECT

4920 N. IH-35, Austin, Texas 78751

<http://lamp.texasbar.org>

lease agreements
disclaimer
security
extensions
hidden costs
tenant
repairs
subletting
liens
hidden costs
landlord
budget
renewals
repairs
negotiations
lease strategies
hidden costs
terms
subletting
rent
liens
terms
lease
hidd
cost
insurance
liens
lease agreements
properties
negotiations
hidden costs
remodeling
lease agreements
repairs
tenant
rent
terms
insurance
extension