

Opening Your Office for Business: A Tenant's Perspective

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As America returns to work, each business will need to address COVID-19 related health and safety issues for its employees, customers and others who may utilize the company's workplace. As of this writing, each of the Occupational Safety and Health Administration (OSHA)[1] and the Centers for Disease Control (the CDC)[2] has issued guidance on best practices for return to work and sanitation and safety protocols, respectively. Further, many states (including Minnesota)[3] have or are contemplating requiring businesses to institute "Preparedness Plans" as a pre-condition for allowing businesses to re-open.

Other articles[4] have discussed in detail the best practices for business re-openings, but these articles have generally focused on the "what" to do, rather than "how" your business will go about constructing and implementing your Preparedness Plan. One challenge that most businesses will face is that the terms and conditions of your lease will have a great deal of impact upon both what is in your Preparedness Plan and how your business is able to execute it.

Of course, the terms and conditions of leases for multi-tenant office properties can vary widely and will need to be analyzed on a case-by-case basis, but there are some over-arching principles that will remain consistent through most leases. The following is a collection of the most relevant lease concepts that you should consider in preparing your Preparedness Plan:

1. **What does your business control?**

The first step in compiling your Preparedness Plan is to determine what portions of your physical plant that your business is responsible for (and therefore should be included in your Preparedness Plan) and what portions are the responsibility of Landlord. In the typical office lease, the tenant is granted the exclusive right to the use and control of the area within its demising walls, subject to the limitations set forth in the lease - generally defined as the "Premises" or "Demised Premises." Conversely, the landlord retains control of the property "Common Elements," subject to the tenants' non-exclusive rights to use portions of the Common Elements. Common Elements will generally include items like elevators, stairwells, common lobbies, vestibules, hallways and restrooms, parking lots and garages and the like. Electrical and data cabling, plumbing elements and the HVAC unit and ductwork serving multiple units will generally also be Common Elements under the landlord's control, though a tenant will often have some level of control (or at least maintenance responsibility) over the portions of those systems that solely serve the Premises. If significant safety protocols that you desire will be to property components that are Common Elements, you will want to engage your landlord in discussions on how to best achieve

those safety protocols - or simply to determine whether the landlord is willing to consider them.

2. **What does your business own?**

A related issue is confirming what your business owns within the Premises. On one hand, if your business brought the desks, partitions and other furniture, fixtures and equipment (FF&E) with you when your business moved in, your business most likely owns them - though these items may be subject to a security interest from your lender or even in favor of the landlord. On the other hand, if the Landlord gave the business a "tenant improvement allowance" for build out and fixturing of the Premises, it is possible that the landlord retains title to some or all of the FF&E. This issue may be relevant, for example, if you desire to install "sneeze-guards" onto built-in components or to use furniture in a testing area or containment room that may need to be disposed of if it becomes contaminated.

3. **Building Services & Utilities.**

The services and amenities provided to tenants of an office property are as varied as the terms and conditions of the leases. With limited exceptions, it will be your landlord who is responsible for determining what safety protocols to impose upon the building Common Elements and then putting them into place. We expect that many landlords will impose safety protocols with respect to usage of elevators, stairways and lobbies and it is advisable to work with your landlord to make sure that your businesses' Preparedness Plan works in concert and not in conflict with your landlord's plans.

Two common features that should be examined are enhancements to the Premises' HVAC system and the janitorial services provided to the Premises. If you desire upgraded HVAC filters to be a part of your Preparedness Plan, you will first need to determine how your lease allocates responsibility for and control of the HVAC system. HVAC systems are very expensive, so even if your business has been allocated responsibility for and control of the HVAC for your Premises in the lease, you should work with your landlord to confirm that the system is designed to utilize these upgraded filters. If the HVAC system that serves your Premises is not configured to utilize upgraded filters, you will need to work with your landlord to find a solution that is acceptable to both you and your landlord and one that is cost-effective. Similarly, lease provisions addressing "janitorial services" range from the landlord providing janitorial services only to building common areas to a "full service" janitorial services provision whereby the Landlord also provides services within the Premises. Of course, none of the typical provisions deal with "sanitizing" at a level even remotely close to what businesses are contemplating in the COVID-19 world. Two ancillary concerns arise out of any janitorial services to your Premises that will need to be discussed with your landlord: (i) presuming that your landlord is willing to do so, who is best suited to provide enhanced janitorial services; and (ii) is the landlord willing to require its personnel providing janitorial services (whether at a standard or enhanced level) to strictly observe the protocols in your Preparedness Plan?

As an overarching note, you should keep in mind that if you have a "net" lease (as opposed to a "gross" lease), there will be a provision in the "CAM" or "Additional Rent" sections that states something similar to: "*Tenant shall reimburse landlord, as additional rent, for all costs incurred by landlord in the operation,*

control and ownership of the building, including, without limitation ..." In short, remember that the landlord is also operating a business and as the landlord incurs additional costs in enacting these safety protocols, you can expect that some portion (or perhaps all) of the landlord's costs will be passed along to tenants as Additional Rent.

4. **Signage.**

Many businesses have posted signage containing their COVID-19 related policies and/or adopted unidirectional traffic patterns by using wall signage or floor tape. This is good practice and governmental reopening guidance documents recommend these strategies. However, before implementing these strategies, businesses should consult the signage provision of their lease. Often, these provisions will prohibit all signage without the landlord's approval (which may be in the landlord's sole or reasonable discretion), but a reasonable percentage of leases only prohibit signage on the exterior of the building or that is otherwise visible from the exterior of the Premises. Our expectation is that landlords are quite unlikely to prohibit professional, well thought-out signage, but knowing what standards need to be met and permissions need to be obtained before signage is erected is advisable.

5. **Alterations**[5].

The vast majority of office leases will have a provision that contains language similar to: "*Tenant shall not make any addition or alterations to the Premises without obtaining the prior written consent of the Landlord...*" These provisions will often have significantly more language conditioning the landlord's obligation to consent (upon landlord's sole or reasonable discretion, can the landlord condition the consent, etc.), the timing of the landlord's review and approval of a request to perform alterations, whether or not professional contractors must be utilized, whether or not architectural drawings must be utilized, whether additional security against construction costs and liens must be posted and the like. Conversely, some of these provisions will also have carve-outs allowing tenants to perform alterations that do not involve building structural components up to a certain dollar threshold.

Each landlord will have its own opinion as to how far their oversight extends, but you can expect that adding or moving walls (adding a testing alcove or re-apportioning offices) or built-in improvements (moving built-in work stations for social distancing) will require landlord consent. Similarly, if your Preparedness Plan requires adding or re-routing HVAC ducting or plumbing lines, you can also expect that landlord approval will be required.

On the other hand, as the scope of the alteration decreases, whether the landlord retains oversight typically gets more "gray." As an example, adding electrical or data lines and outlets will typically require consent, but so might adding a significant number of extension cords and power strips. Consider also that the HVAC venting, lighting and electrical distribution in many offices was installed to comport with the space plan your business utilized when you moved in - so while simply relocating cube walls would generally not require landlord consent, if the move is significant enough your employees may find that their new work area does not have the appropriate HVAC or electrical and data ports to support their needs.

6. Surrender.

A "Surrender" provision in a lease sets forth the landlord's expectations for the condition that the Premises will be in upon the expiration or earlier termination of the term.[6] Surrender provisions can run the gamut from surrendering the Premises in "broom clean condition" to restoring the Premises to a "white box" - stripping it down to the drywall. Many, if not most, of the physical plant improvements that are likely to be implemented as a part of your Preparedness Plan will be either easily removable upon expiration or will be seen by the landlord as a net benefit to the Premises. However, as physical plant improvements become more tailored to your business' specific needs or to things that are useful only with respect to COVID-19 or another pathogen, the more likely it is that your business will be required to remove them (e.g. a testing room or adjusting built-in work stations or offices to account for social distancing) at the end of the term. As such, best practices include both considering the removal/demolition costs of any more substantive improvements and working with the landlord on the front end to negotiate what will need to be removed.

7. Other considerations.

Outside of the lease itself, there are a handful of other potential challenges to consider. The first is that in connection with any substantial alteration to the Premises, you will likely need to obtain a permit, which entails some additional cost and will impact the timing of your project. Secondly, in addition to the surrender requirements discussed above, consider the short-term/long-term benefit of any substantial alterations that you are considering making as a part of your Preparedness Plan. No one knows what the long term will look like, post-COVID-19, but will the alterations that you are making today lessen the long-term utility of your Premises or force you to unwind them later? Additionally, while the Federal government has made some exceptions to the HIPAA rules as they relate to employee safety screening, we have not yet seen any published exceptions to other laws applicable to your Premises - for example the Americans with Disabilities Act and State and local building and zoning codes. When you are designing and implementing your Preparedness Plan, you will need to confirm that any alterations you make do not create a non-compliance with these other laws. Finally, consider how you are going to pay for the improvements in your Preparedness Plan. Some of the most common improvements are fairly inexpensive (e.g. directional signage or tape, erecting stanchions, etc.), but any significant alterations are likely to be costly and may require professional services. Depending on a number of factors, your landlord may be willing to contribute to or bear the initial cost, but such contribution will likely be coupled with an increase in rents and/or a requirement to extend the term.

As mentioned above, how your lease will impact your business' Preparedness Plan and other back-to-work preparations will vary widely. We encourage you to work with trusted advisors to understand the terms and conditions of your lease as you develop and implement your business' Preparedness Plan.

For more information, please contact Bradley Hintze, Real Estate & Tax Credit Practice Group Lead Chris Pierce or your regular Lathrop GPM contact.



[1] <https://www.osha.gov/Publications/OSHA3990.pdf>

[2] <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>

[3] <https://mn.gov/governor/news/executiveorders.jsp>

[4] <https://www.lathropgpm.com/services-practices-14208.html>

[5] The lease provisions discussed in this section are sometimes split between "Alterations," "Repairs and Maintenance" and/or "Initial Buildout" or similarly titled sections or exhibits in the lease.

[6] You should also reference the Alterations clause on surrender issues - there will often be surrender condition concepts within the Alterations clause as well.