

Law & Accounting

Reopening offices amid a global pandemic: A tenant's view

The COVID-19 pandemic presents a number of health and safety issues for businesses. Many governmental agencies have issued guidance on the appropriate measures for masks, sanitation and distancing. Many Colorado businesses will face challenges from the terms in their leases. These issues can significantly impact planning for a full return to the office and the execution of such plan.

Multitenant office property leases can vary widely and must be analyzed on a case-by-case basis, but overarching principles exist that remain consistent through most leases.

■ **Under tenant control.** In the typical office lease, the tenant is granted exclusive right to the use and control of its space, subject to limitations set forth in the lease – often defined as the “premises” or “demised premises.” Conversely, the landlord retains control of the “common elements,” subject to tenant use of the common elements. Common elements include items like elevators, stairwells, common lobbies, hallways, restrooms and garages. Electrical and data cabling, plumbing elements, and the heating, ventilation and air-conditioning system serving multiple units generally also will be common elements under landlord control, though a tenant often has some control



Nicholas Anderson
Counsel, Lathrop
GPM LLP

(or maintenance responsibility) over the portions solely serving the premises. Some companies will want significant safety protocols that impact common elements, especially air filtration systems, and landlords must be engaged to achieve those safety protocols, or simply to determine if the landlord will consider them.

■ **Items owned by tenant.** Many tenants move in with owned furniture, fixtures and equipment, though they may be subject to a security interest. On the other hand, if a landlord gives a tenant improvement allowance for the premises, it is possible the landlord will retain title to some or all of the FF&E. Ownership can impact a tenant's ability to install safety items, such as “sneeze-guards” onto built-in components or to use furniture in a testing area that may need to be disposed of due to contamination.

■ **Building services and utilities.** The services and amenities provided to office tenants are as varied as the terms of the leases.



Bradley Hintze
Attorney, Lathrop
GPM LLP

With limited exception, landlords are responsible for determining safety protocols for building common elements. Many landlords will impose safety protocols with respect to elevators, stairways and lobbies, and tenants must work in concert with their landlord's plans.

Landlords and tenants should examine enhancements to the HVAC system and the janitorial services for the premises. If upgraded HVAC filters are desired, the parties must determine how the lease allocates responsibility for and control of the system. In the event the HVAC system is not configured to utilize upgraded filters, parties must work together to find an acceptable and cost-effective solution. Lease provisions addressing janitorial services range from the landlord providing services only to common areas to a “full-service” provision with the landlord providing services within the premises. No typical provisions deal with the sanitization suddenly necessary due to the COVID-19 pandemic. This raises two tenant

concerns: If the landlord is willing, who is best suited to provide enhanced janitorial services; and is the landlord willing to require janitorial staff to strictly observe the tenant's safety protocols?

In a net lease (as opposed to a gross lease), there will be a provision 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, tenants must remember that the landlord is operating a business and as the landlord incurs additional costs for safety protocols, some portion (or perhaps all) of the landlord's costs will be passed along to tenants as additional rent.

■ **Alterations.** Most office leases will contain 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 often have additional language that conditions landlord consent, dictates timing of the landlord's review and approval of a request to perform alterations, whether professional contractors must be utilized, whether architectural drawings must be utilized, among other things. Conversely, some provisions will allow tenants to perform alterations on nonbuild-

ing structural components up to a certain dollar threshold.

Each landlord differs, but adding or moving walls or built-in improvements (moving built-in work stations for social distancing) will require landlord consent. Similarly, any tenant should expect that landlord approval will be required to add or reroute HVAC ducts or plumbing lines.

However, as the scope of the alteration decreases, landlord oversight becomes more gray. For example, adding electrical or data lines and outlets typically requires consent, but so might adding a significant number of extension cords and power strips. Additionally, HVAC venting, lighting and electrical distribution in many offices was installed for the original floor plan, so while relocating cube walls generally does not require consent, such moves could result in employees not having the necessary HVAC services or electrical and data ports.

As noted, the terms of the lease could have a varied impact on tenant business plans and return-to-work preparations. Awareness of these issues and due consideration to their impact will offer the most efficient return to full capacity. ▲

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Catherine Hance
303.892.7375
catherine.hance@dgslaw.com



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 **Fox Rothschild** LLP
ATTORNEYS AT LAW

Rick J. Rubin
303.383.7620
1225 17th St.
Suite 2200
Denver, CO 80202

