

# Real Estate Issues for Franchisors

**Collaborative. Accountable. Authentic.**  
**Legal Solutions for Business Objectives.**



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# Today's Topics

- Key Lease Provisions of Interest to Franchisors
- The Franchise Agreement and the Franchisor's Lease Rider
- Enforcement of Franchisor Rights/Lender Considerations

# Key Lease Provisions of Interest to Franchisors

# Use Clause

- Broad – ““the premises may be used for any use permitted by applicable law””
- Narrow – “the premises may be used only and exclusively for the sale of red shoes.”
- Franchisor typically prefers a narrow use clause while franchisee may want something with more flexibility
- Be careful not to be overly restrictive - “including such products or services that are being offered by the franchise system from time to time”
- Continuous Operations – Franchisor and Landlord want continuous operations clause (subject to temporary closures) to maximize traffic to the site and center
- Avoid “go dark” clauses

# Radius Restrictions

- Purpose – avoid nearby alternatives diluting business
- Important to Landlord where percentage rent involved
- What's the right distance?
- How is a violation defined – Same concept? Same owner?
- Maintain flexibility for Franchisor and franchised system

# Exclusive Use

- Helps franchise to avoid competition in the center
- Concept specific – the only insurance company or financial institution in the center
- Product specific – list products no one else can sell
  - Be careful to allow for product expansion
- Beware of existing prohibited uses
- Remedies for landlord's breach of exclusive use clause

# Trade Marks, Signage, Improvements

- Landlord Approvals
- Center limitations
- Governmental Approvals

# Rights to Remodel

- Future Improvements pre-approved or clear process
- Match up with Franchise Agreement requirements
- Landlord Perspective – review and approval rights, but won't unreasonably withhold consent if consistent with improvements of similar franchised locations

## Other significant provisions

- Term of the Lease
- Nondisturbance
- Lease Amendments
- Site Selection

# The Franchise Agreement and the Franchisor's Lease Rider

# The Franchise Agreement

- The triangulation of Landlord, Franchisee and Franchisor – balancing act
- Approval of Real Estate (lease and its term, other tenants, the Site and its parking, traffic patterns, visibility, access) – consistent expirations, different processes for review
- Development Timeline and Opening – be specific, but realistic
- Cross Default with Lease – a breach of the lease is a breach of both agreements / franchisor's remedies (if franchisor is the landlord, note the state relationship laws)
- No Guarantees of Franchisor of Success or Revenue – we approve the site, but...
- Same Legal Entities: franchisee and tenant, especially when the franchisor is the landlord
- Related Issues – approved vendors (e.g., construction, real estate broker, lawyer), local zoning issues, signage permits, and obtain lien waivers from contractors and subs

*“The Franchisee is responsible for the development and construction of the Premises, and for opening the business at the Premises.”*

# Franchisor's Lease Rider

- Franchisor's Approval of the Lease Agreement – thus, this Rider!
- The Delivery Date - Specific Requirements and Deadline
- The Delivery Date's sibling: the Rent Commencement Date – starting the clock, avoid hard dates
- Repairs and Maintenance Obligations – obligations apart from CAM of structural elements, foundation, floor slab, roof structure and roof membrane
- Franchisor's Notice and Cure Rights – optional, receive notice, additional cure period, turf war
- “Approved” Assignment to Franchisor (and Future Franchisees) – cost? approval / consent? release? assist the landlord find tenant
- Assumption Upon the Expiration or Termination of the Franchise Agreement – notice and option to assume if strong site
- Access During and After the Term – ensure compliance with franchise agreement, protect the system, remove trade dress + equipment (e.g., Coke fountain), and surrender (no welding!)
- The Rider Trumps the Lease Agreement – or, “organ transplant”

*“The Delivery Date is the date of this Lease [or the Commencement Date].”*

# Enforcement of Franchisor Rights/ Lender Considerations

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- Simultaneous default notice requirements
  - Consider requiring both Landlord and Franchisee to provide written notice of a tenant-default
- Additional days to cure and simultaneous tolling of cure periods
  - Tenants typically have 0-5 days to cure monetary defaults and 30 days to cure non-monetary defaults
- Franchisor entry rights; de-imaging the premises
- Franchise Agreement assignment requirements and permitted assignment rights in the Lease
  - Right of first refusal to assume the lease (Franchise Agreement); Permitted assignment to Franchisor (Lease)
  - Be cautious of assuming past liabilities and ongoing tenant obligations; partial performance
- Landlord is NOT a party to the Franchise Agreement; Franchisee as a landlord
- Franchisor as Landlord and cross-default

# Enforcement of Franchisor Rights/Lender Considerations

- Landlord lien rights to franchisee-tenant's goods, equipment, fixtures, etc.
  - State-specific statutory rights
- Franchisee-tenant lending agreements
  - Security interests in franchisee-tenant's leasehold estate; assignment of leases
  - Priority rights
- Landlord's lien v. Franchisor's lien v. Franchisee's lender's lien
  - Importance of subordination

# Q&A

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