

Considerations When Leasing to a National Tenant

With the prospects for the economy gradually improving, we are seeing more and more large companies beginning to utilize the stock piles of cash they have accumulated over the past three years. One way in which this economic growth has begun impacting the commercial real estate sector is in the form of an increase in leasing activity among national retailers looking to expand in new markets or re-establish themselves in markets they previously occupied.

Having a national tenant lease space can be extremely beneficial to a landlord, as the national tenant's name alone will often draw customers who might not have otherwise ventured to your complex. Among other potential benefits, this increase in foot traffic will be a boon to the businesses of other tenants, thereby making their spaces more valuable and allowing the landlord to charge higher rents. These financial benefits alone, in addition to the possible greater income stability from the national tenant itself, make the prospect of leasing to a national tenant very appealing.

Unfortunately, national tenants can also bring some fairly heavy-handed conditions to lease negotiations that a prudent landlord needs to address. To begin with, most national tenants will insist on using their overly tenant-friendly lease form rather than the landlord's standard lease form. While it may be somewhat simple to identify the pro-tenant provisions in these lease forms, deleting them often proves much more difficult. Even more difficult is trying to identify common pro-landlord lease provisions that have been excluded from the tenant lease form.

A practical and successful approach to using the pro-tenant form, and thereby securing the national tenant, is to understand the issues most important to a landlord and to negotiate the lease form to recognize these issues while still allowing the national tenant to keep their form intact. One area of the lease that can be used to illustrate this approach is the representations and warranties section. Many national tenants will have a number of representations and warranties regarding the premises that a landlord may not be used to giving but that can be easily modified to satisfy the tenant and protect the landlord. For example, landlords should limit their environmental representations to "the actual knowledge of landlord" and only "since the landlord has owned the property." Similarly, agreements to remediate environmental conditions should be limited "to the extent required by law," so that the national tenant does not

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have an argument to require, by way of example, asbestos removal when encapsulation may be a more practical solution. Some other key lease provisions that can be easily modified to protect a landlord are to: (i) make sure indemnification provisions are mutual, (ii) confirm that insurance provisions include waivers of subrogation, (iii) limit use clauses especially if the tenant is insisting on liberal assignment and subletting rights, and (iv) make sure any ADA compliance representations are made only as of the date of the lease signing so that the landlord does not have a continuing obligation to upgrade the premises for ADA compliance-related matters.

With respect to items often left out of pro-tenant forms, make sure to re-insert late fees for rent payments and be ready to offer cure periods or written notice to appease a difficult tenant. (However, even with large national tenants, no notice or cure period should be required for a second, or perhaps a third, late payment in a 12-month period.) Holdover provisions are also important to ensure that the tenant will be forced to renegotiate the lease upon expiration. In Wisconsin, it is often more beneficial for the landlord to leave holdover rent provisions out of the lease, thereby allowing holdover rent to default to the statutorily required 200% rather than attempting to argue with the national tenant on this issue in the lease form. Lastly, in order to maintain future flexibility in the center, be sure to retain the landlord's ability to recapture the space if the tenant goes dark even if the tenant continues to pay rent and limit landlord's liability under the lease to the value of its ownership interest in the property. Each of the above are often key provisions to a landlord that even a strong national tenant will be willing to negotiate.

A final note of utmost importance is to confirm it is indeed that national tenant signing the lease rather than a shell corporation with little or no assets. If it is that national tenant, a prudent landlord needs to make sure of the current financial viability of the national tenant or risk signing a national tenant on the verge of bankruptcy. [Reinhart's Informational Resource Center](#) will be more than happy to lend their expertise to assist landlords in learning more about the financial strength of a tenant.

The foregoing is a sampling of the issues a prudent landlord should consider when entering into lease negotiations with a national tenant. Keeping these issues in mind, and realizing that a complete rewrite of a national tenant's lease is unlikely, can go a long way in protecting a landlord and allowing them to reap the many financial benefits of leasing to a national tenant.



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