

**Thursday, November 4, 2021  
9:30 AM – 10:45 AM**

**Seminar 8**

**Assignment, Subletting & Other Transfers:  
How to Negotiate Your Lease with a Realistic Mindset and Practical Solutions**

Presented to

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- I. Introductions
- II. Why Engage in a Transfer? There are various reasons, including retirement, corporate mergers, poor performance (getting out of the business) and downsizing, to transfer a tenant's interest in a lease agreement. The two main categories of transfers that are the topic of this seminar are the assignment of a lease and the subletting of a premises (or a portion thereof).
  - A. Type of Transfer.
    - i. Assignment. An assignment of a lease is a transfer of leasehold obligations from one party (original Tenant or "Assignor") to another (new Tenant or "Assignee"), with the Assignee becoming the "Tenant" under the lease, however, the Assignor remains liable under the lease unless released by the Landlord.
    - ii. Subletting. A subletting is the leasing by the Tenant ("Sublandlord") to another party ("Subtenant") of all or a portion of the Premises for the purpose of operating therein, with the Tenant remaining in place pursuant to its existing lease agreement with the Landlord.
  - B. Documentation.
    - i. Assignment. An assignment is typically documented in an assumption agreement between the Assignor and Assignee and consented to by the Landlord (usually within the assignment document). The document includes language requiring the Assignee to expressly assume in writing the obligations of Tenant under the lease.
    - ii. Subletting. A subletting is documented in a sublease agreement between the Sublandlord (the Tenant under lease) and a Subtenant. The document requires the Subtenant to perform the Sublandlord's obligations under the existing lease (as Tenant thereunder) and may contain additional requirements and terms that are specific to the transaction between the Sublandlord and Subtenant.

- iii. Landlord Consent to Subletting. In most circumstances, a separate consent agreement is required by the Landlord. This document may be negotiated or may be as simple as Landlord consenting to the subletting of the Premises so long as the same remains subject to the existing lease agreement between the Landlord and the Tenant. Example provision:

“Lessor hereby consents to the subletting of a portion of the Premises to \_\_\_\_\_, provided that such subletting is subject and subordinate in all respects to the terms, covenants and conditions of the tenancy between Lessor and Lessee contained in the Master Lease.”

- iv. Example Provision Requiring Documentation:

“Each Transfer to which there has been consent shall be by an instrument in writing, in a form satisfactory to Landlord, and shall be executed by the Tenant and the Transferee, in each instance, as the case may be. Each Transferee shall agree in writing for the benefit of Landlord to assume, to be bound by, and to perform the terms, covenants and conditions of this Lease to be done, kept and performed by Tenant, including the payment of all amounts due or to become due under this Lease. Each subtenant shall agree in writing for the benefit of Landlord that its sublease is subject to the terms, covenants and conditions of this Lease. One executed copy of such written instrument shall be delivered to Landlord. The failure to first obtain in writing the consent of Landlord or the failure to comply with the provisions of this Section \_\_\_\_ shall constitute an Event of Default and shall render any such Transfer void.”

C. When to Select Assignment or Subletting

- i. Assignment. Tenants should propose an assignment of the lease to another entity when it is seeking to transfer its ownership interest. Reasons for assignment include:

1. Retirement/Inheritance
2. Sale of Business
3. Poor Performance
4. Mergers/Acquisitions

- ii. Subletting. Tenants should propose a subletting of the Premises (or a portion thereof) when seeking to maintain its leasehold interest but may not need to operate in the Premises (or in the entirety of the Premises). In certain instances, Tenant may wish to surrender its leasehold interest yet Landlord will not consent. Examples include:

1. Downsizing
2. Profit
3. Subsidizing Rents in a Poor Market
4. A Different Location Better Suits Tenant's Needs

III. Assignment Standard Concepts and Example Provisions.

A. Landlord Consent.

1. When Landlord's consent is required, there are two common positions taken with respect to the standard for such consent:

(a) Sole Discretion Example:

“Tenant shall not assign this Lease nor sublet the Premises or otherwise permit the Premises or any part of the Premises to be used by any one or any entity other than the Tenant, without obtaining on each occasion Landlord's prior written consent, which may be given or withheld in Landlord's sole discretion.”

(b) Reasonable Discretion Example:

“Tenant shall not assign this Lease nor sublet the Premises, without obtaining on each occasion Landlord's prior written consent, which consent shall not be unreasonably, withheld, conditioned or delayed.”

- (c) Reasonableness Criteria. Landlords may add reasonableness criteria so there is no question as to whether they are acting reasonable. Example provision:

“For purposes of this Section, but without limiting Landlord’s right to refuse to give such consent for any other reason or reasons, Landlord reserves the right to refuse to give such consent, and Tenant agrees that it would not be unreasonable to withhold consent, if in Landlord’s reasonable business judgment, either at the time of Tenant’s request for consent or upon the proposed commencement thereof (i) the proposed assignment or sublease (“Transfer”) is rejected by any mortgagee; (ii) Tenant is in Default of any obligation of Tenant under this Lease, or there is a matter which will become a Default of Tenant with passage of time or the giving of notice, or both, unless cured; (iii) the proposed use (a) is incompatible with the character of occupancy of the Shopping Center; (b) involves increased insurance requirements upon the Premises or Shopping Center, (c) violates an exclusive right or restriction contained in the lease of another tenant, or violates the restrictions or limitations set forth in Exhibit “\_”, or (d) conflicts with the primary use of another tenant; (iv) the tangible net worth of the proposed assignee or sublessee (hereinafter referred to as “Transferee”) is less than the aggregate tangible net worth of Tenant and Guarantor, if any, on the Effective Date of this Lease, or on the date of Transfer, whichever is greater; (v) the proposed use may (aa) require modification of the Premises, or of any portion of the Shopping Center, or (bb) increase parking requirements for the Premises or the Shopping Center; (vi) the proposed Transferee is currently an occupant of or in negotiation for space elsewhere in the Shopping Center; (vii) the proposed Transferee has less than \_\_\_\_\_ (\_\_) years’ experience with respect to owning and operating the same type of business as the Permitted Use; (viii) the use of the Premises would involve the storage or handling of Hazardous Substances; (ix) the proposed Transferee’s credit standing, history of operations and general reputation within the business community are not substantially equal to or better than Tenant’s, or are expected to not be so following the proposed transaction; or (x) the proposed Transferee will not qualify as a replacement tenant under any co-tenancy or other similar provision in any other lease or agreement in or affecting the Shopping Center.”

2. When Landlord’s consent is not required, there may be certain parameters that Landlord requires must be met by the proposed Assignee, which are built into the lease when the Tenant and Landlord are negotiating the initial lease. These criteria may include a net worth test, number of years of experience and relationship to the Tenant, among others. Example provisions (oftentimes called “Permitted Transfers”):

“Tenant shall have the right, without requirement for Landlord’s consent or approval, to enter into an assignment, sublease or other transfer of this Lease to (a) any corporation or entity which is owned by or affiliated with Tenant; or (b) any subsidiary of Tenant or of Tenant’s parent corporation; or (c) any corporation or entity which shall acquire the majority of the stock or majority of the assets of Tenant as a result of a consolidation, merger or sale; or (d) any corporation or entity which acquires not less than \_\_\_\_\_ (\_\_) of Tenant’s other locations in the state in which the Premises is located.”

“Notwithstanding anything to the contrary contained in this Article and provided the use and trade name set forth in this Lease do not change, Tenant is not in default hereunder and Landlord receives at least thirty (30) days prior written notice, Tenant may assign this Lease without Landlord’s consent and without any Transfer Fee to (i) any corporation, limited liability company, partnership or other business entity that controls, is controlled by, or is under common control with Tenant; (ii) any corporation, limited liability company, partnership or other business entity resulting from the merger or consolidation with Tenant; or (iii) any entity that acquires all of Tenant’s assets including, without limitation, all of Tenant’s assets related to its business at the Premises, provided that (a) Tenant wholly owns and operates at least nine (9) other existing locations under the same trade name and use allowed pursuant to this Lease, and (b) the entity acquiring all of Tenant’s assets has a tangible net worth (exclusive of goodwill, primary residence and retirement accounts, as applicable) and financial capabilities equal to or greater than that of Tenant and any Guarantor(s) as of the date of this Lease or at the time of the acquisition, whichever is greater, in constant dollars (each of (i)

through (iii) is individually referred to herein as a "Permitted Transfer" and collectively referred to herein as, "Permitted Transfers")."

"Notwithstanding anything to the contrary contained herein, neither notice to Landlord nor Landlord's consent shall be required for: (a) transfers to an entity (i) into or with which Tenant is merged, reorganized or consolidated, (ii) to which all or substantially all of Tenant's assets are transferred, (iii) that purchases all or substantially all of Tenant's stores in the \_\_\_\_\_ metropolitan area, or (iv) that controls, is controlled by, or is under common control with Tenant, including but not limited to a parent, subsidiary or affiliate of any type, or (b) transfers to a franchisee or licensee of Tenant. In addition, a sale, transfer, assignment, conveyance, endorsement or other disposition of a member's interest or the capital stock of Tenant or of the interest in capital, profits, or losses of Tenant, or a public offering shall not be deemed to be an assignment of this Lease."

"Tenant shall have the right, without requirement for Landlord's consent or approval, to the transfer of Tenant's interest in this Lease to a joint venture partner, franchisee or licensee, or the sale of a controlling interest in Tenant's company to institutional investors, family office or high net worth individual as described below ("Qualified Investor"), where the Qualified Investor is a major banking institution, insurance company, venture arm of a Fortune 1,000 company, pension fund, reputable money management firm, reputable asset management fund, reputable private equity fund, reputable family office, or reputable high net worth individual."

- B. Transfer Fee/Review Charges. It has become industry standard to charge Tenant a fee in connection with Landlord's review of an assignment or subletting request, to reimburse the Landlord for its administrative costs and legal fees. The fee can either be a set dollar amount or language may be drafted for reimbursement of actual costs, with payment of those costs whether or not consent is ultimately granted:

"As a condition to Landlord's processing of any request by Tenant for Landlord's consent to a Transfer, such request shall be accompanied by a non-refundable fee of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) for the expense involved with the review, processing or preparation of any documentation in connection with a Transfer (the "Transfer Charge"), whether or not Landlord's consent to such Transfer is granted."

"In the event that Tenant proposes any Transfer, Tenant shall notify Landlord in writing by certified mail, return receipt requested, at least sixty (60) days before the date on which the Transfer is to be effective, and, included with such notice, furnish Landlord with... a fee of Two Thousand Dollars (\$2,000.00) to compensate Landlord for legal fees, costs of administration, and other expenses to be incurred in connection with the review and processing of such documentation (whether or not such Transfer is consummated) ("Transfer Fee"). Landlord shall respond to Tenant's request for Landlord's approval or disapproval of the Transfer within thirty (30) days after Landlord receives the request and documents and information required above, including the Transfer Fee. Landlord reserves the right to reasonably increase the amount of the Transfer Fee if Tenant requests an expedited response time from Landlord or if Tenant requests Landlord's review of any attempted Transfer already consummated by Tenant but made without Landlord's prior written consent in violation hereof."

- C. Landlord Recapture Right.

1. Termination Right. Many leases include Landlord's right to terminate the lease and "recapture" the Premises (or, with respect to a subletting, that portion of the Premises which is subject to the subletting) in the event the Tenant requests consent to an assignment of the lease or a subletting of the Premises. Example provisions:

"If Tenant requests Landlord's consent for a subletting or assignment and presents Landlord with a bona fide written offer from a third party for a Transfer in accordance with Section \_\_\_\_\_, Landlord shall have the option to terminate this Lease which option shall be exercised by a \_\_\_\_\_ (\_\_) day written notice to Tenant given within \_\_\_\_\_ (\_\_) days following Landlord's receipt of Tenant's request for consent. If Landlord exercises such right to

terminate, Landlord may elect (but shall not be obligated) to enter into a direct lease with the proposed Transferee.”

“Within thirty (30) days of Landlord's receipt of any Transfer request and any additional information requested by Landlord concerning the proposed Transferee's financial responsibility, Landlord will notify Tenant of its election to do one of the following: (1) consent to the proposed Transfer subject to such reasonable conditions as Landlord may impose in providing such consent; (2) refuse such consent; or (3) terminate this Lease as to all or such portion of the Premises which is proposed to be sublet or assigned and recapture all or such portion of the Premises for reletting by Landlord.”

2. Tenant's Right to Rescind/Void Termination. Tenants may counter Landlord's termination with a right to rescind its offer and thereafter continue to operate in the Premises. Example provisions:

“Tenant shall have the right to rescind its request for consent and nullify Landlord's termination by giving written notice (“Rescission Notice”) thereof to Landlord within \_\_\_\_ (\_\_) days following Tenant's receipt of the termination notice from Landlord, and in such event, Tenant shall continue to operate in the Premises pursuant to the terms of this Lease, and Tenant shall be prohibited from seeking to assign this Lease or sublet the Premises for a period of \_\_\_\_ (\_\_) Lease Years after the date of Tenant's Rescission Notice.”

“Notwithstanding anything to the contrary contained in this Section, Tenant shall have the right to void Landlord's notice of termination pursuant to this Section if, within fifteen (15) days of Tenant's receipt of such notice, Tenant provides notice to Landlord (“Tenant's Rescission Notice”) that it rescinds its request for Landlord's consent to an assignment or subletting, and Tenant shall continue to operate in the Premises pursuant to the terms of this Lease.”

3. Reimbursement of Landlord Expenses. If the Lease is terminated pursuant to Landlord's recapture right, Landlord may require certain reimbursement payments from the Tenant:

- (a) Construction Allowance (unamortized portion)
- (b) Brokerage Commission (unamortized portion)
- (c) Rent for a period of time to cover the rents otherwise due while Landlord re-lets the premises
- (d) Costs of demising space/splitting utilities (when Landlord recaptures a portion of the premises)

- D. Change of Control. There are different situations where a change in the ownership of the Tenant entity (including any percentage thereof) will constitute an assignment under a lease. Landlords typically do not object to a change in ownership/control if the Tenant is a public company or if the Tenant wishes to transfer its leasehold interest intra-family. Example provisions:

“Without the requirement for Landlord consent, (i) Tenant shall have the right to sell its authorized stock to the public through listing on a “national securities exchange”, including “going public”, and (ii) neither the sale, issuance or transfer of stock of Tenant shall require Landlord's consent.”

“If Tenant is privately held, the sale, assignment, transfer, or disposition, whether for value, by operation of law, gift, will, or intestacy of forty nine percent (49%) or more of any ownership interests, whether in a single transaction or in a series of transactions, shall be deemed a Transfer subject to Landlord consent in accordance with the provisions of this Section \_\_\_\_.”

“If Tenant is privately held, the transfer of Tenant's stock among or for the benefit of the members of such shareholder's family; or to a living trust or by will or intestacy; shall be deemed a Transfer not subject to Landlord consent; provided Tenant shall give Landlord written notice at least thirty (30) days prior to the effective date of any such transaction.”

“If Tenant or any Guarantor is a corporation, limited liability company, partnership or other business entity, then (i) a transfer, assignment or hypothecation of any stock or interest in such corporation, limited liability company, partnership or business entity by any stockholder, partner or member so

as to result in a change in the control thereof by the person, persons or entities owning a majority interest therein as of the date of this Lease, or (ii) a change in the person, persons or entities who directly or indirectly possess the power to direct or cause the direction of the management or policies of Tenant or any Guarantor, whether through the ownership of voting securities or interests, by contract or otherwise, shall be deemed to be a Transfer of this Lease. Subsection (i) of this provision shall not be applicable to Tenant or to any Guarantor if it is a corporation whose voting stock is listed on a national securities exchange (as defined in the Securities Exchange Act of 1934, as amended) or is traded in any recognized over-the-counter market."

"Notwithstanding anything to the contrary contained in the Lease, a sale, transfer, assignment, conveyance, endorsement or other disposition of a member's interest or the capital stock of Tenant or of the interest in capital, profits, or losses of Tenant, shall not be deemed to be an assignment of the Lease."

"If Tenant is a partnership, a withdrawal or change (voluntary, involuntary or by operation of Law) of any partner owning 20% or more of the partnership, or the dilution or liquidation of the partnership, shall be deemed an assignment of this Lease."

E. Liability After an Assignment.

1. Joint and Several Liability with Tenant. Landlords almost always require the Assignor to remain liable for the leasehold obligations of the "Tenant" notwithstanding an assignment of the lease. Example provision:

"Tenant and any assignee shall be jointly and severally liable for the full and timely performance of all of Tenant's covenants and obligations in this Lease, and if there is an Event of Default under this Lease, Landlord may, at its sole option, enforce its rights and remedies against Tenant or any such assignee in any order as Landlord shall determine, and without obligation to enforce its rights and remedies against the other, and without resorting to any property that Landlord may be holding as security for Tenant's obligations under this Lease."

2. Limitation of Assignor's Liability. Similar to a guarantor, Assignor's liability may be limited in some instances (especially when an assignment is to an unrelated entity).

"The assignor Tenant shall remain liable for the Rent provided for under this Lease for a period not to exceed \_\_\_\_\_ (\_\_) years from the date of such assignment. In connection with the foregoing, Landlord shall provide assignor Tenant with any notice of monetary Default and assignor Tenant shall be afforded time pursuant to the notice and cure period under Section \_\_\_\_\_ to cure in accordance with the terms of this Lease.

"Notwithstanding the foregoing, should the assignor Tenant be required to satisfy a monetary Default of the assignee in accordance with the terms of this Section during the first \_\_\_\_ (\_\_) years after the date of the assignment, assignor Tenant shall remain liable for the Rent for the remainder of the Term."

"No amendment or extension of the Term made by an assignee shall be deemed to increase the liability of the assignor Tenant, unless such assignor Tenant has agreed otherwise in writing."

"Should Landlord fail to provide notice and afford Assignor an opportunity to cure such Default, Assignor shall not be liable to Landlord."

"No such assignment by Tenant to Franchisee shall relieve Tenant or any Guarantor of any liability under this Lease, it being understood and agreed that Tenant and any Guarantor shall continue to be obligated hereunder irrespective of any transfer as provided in Article \_\_\_\_\_ of this Lease; provided, however, Tenant and any Guarantor of this Lease shall be released of liability accruing here after if the tangible net worth (exclusive of goodwill, primary residence and retirement accounts, as applicable) of Franchisee and any new guarantor(s), immediately prior to and following such assignment, shall not be less than \$\_\_\_\_\_, in constant dollars, in the aggregate."

- F. No Circumventing Landlord Consent. In instances where the Tenant has the right to assign the lease without the Landlord's consent, it is important for landlords to emphasize that tenants may not deliberately structure a transaction for the sole purposes of avoiding the Landlord's consent. Example provisions:

"In no event shall Tenant strategically structure a Permitted Transfer, or use a series or combination of Permitted Transfers, to intentionally circumvent Tenant's obligation to obtain the prior written consent of Landlord to a Transfer that would otherwise require Landlord's consent under this Lease, it being understood and agreed that Tenant shall act reasonably and in good faith with respect to effectuating any Permitted Transfers."

"In no event shall Tenant be permitted to use a series of one or more transactions permitted under this Section \_\_\_\_ ("Permitted Transfer") solely for the purpose of "spinning-off" this Lease to an independent third party that would not otherwise be considered a Permitted Transfer. For clarity, Tenant shall not assign to a newly created affiliate corporation whose assets consist solely of this Lease and the rights granted herein and thereafter sell the stock of such affiliate corporation to an unrelated third party that is created to be an affiliate of the transferring entity, with the intended result being to defeat the purpose of this Section \_\_\_\_ by the transfer of this Lease to an independent third party by means of what would otherwise be two (2) separate Permitted Transfers."

- G. Loss of Lease Rights with a Transfer/Rights Personal to Original Tenant. There may be certain instances where the Landlord grants certain leasehold rights to the original Tenant, however, Landlord will not agree to such rights if the lease is assigned (depending upon the consent rights that may have been negotiated in the original lease, a Landlord may also condition its consent to an assignment or sublet by incorporating these restrictions into Landlord's consent). Examples include:

- (a) Option to Extend the Lease Term
- (b) Exclusive Use
- (c) Co-Tenancy
- (d) Right of First Offer/Refusal

#### IV. Subletting Standard Concepts and Example Provisions.

- A. Landlord Consent. There is no substantive difference between Landlord's consent to an assignment of the lease or a subletting of the Premises. In fact, they will more than likely be addressed together with the same consent standard for both. (See III.A. above)
- B. Tenant Liability. The Tenant will remain primarily liable to the Landlord for all leasehold obligations, including the payment of Rent. Unlike a lease assignment, where the Landlord will look first to the Assignee for the payment of Rent and the satisfaction of all leasehold obligations, the Landlord will continue to collect Rent payments from Tenant and will continue to look to Tenant to satisfy all leasehold obligations. The Landlord may have little to no interaction with a subtenant.

The Subtenant will have liability to the Sublandlord for Rent payments and all other leasehold obligations pursuant to the Sublease agreement.

- C. Subletting a Portion of the Premises. Many Landlords prohibit subdividing the premises for various reasons, including costs to demise the space, or Landlord wanting to keep the original Premises as one unit without separate entrances/storefronts, split utilities, etc. However, if Landlord does consent to the subletting of a portion of the Premises, there may be criteria set forth so that the subleased portion does not appear to be a separate business. Examples include:
- (a) the sublease shall not have a separate exterior door or exterior signage (other than the name of such professional on the door of the Premises);
  - (b) the sublease shall be operated under Tenant's Trade Name in order that such department appears as though it is a part of Tenant's operations; and
  - (c) the sublease shall not be advertised to the public as being a separate entity.

If the Subtenant's operation is separate and distinct from the Sublandord, Landlord may alternatively require that both portions of the Premises be subdivided so as to create two separately demised spaces, both of which are of a commercially reasonable size with separate entrances/storefronts, and utilities split. Thus, once the Lease Term expires, and if Tenant is not required to "unsubdivide" the Premises as a condition of surrendering the Premises, Landlord may not incur additional expense in creating separate spaces for future leasing.

- D. Excess Profits. Oftentimes Landlords will look to share in the financial benefit gained by a Tenant in subletting the Premises for a higher Rent rate. Examples include:

"If Landlord consents to any Transfer, Tenant shall promptly pay to Landlord, as and when received, seventy-five percent (75%) of all rents **and other consideration** received by Tenant, of whatever nature and however denominated, payable by the Transferee (or receivable by Tenant) relating to or as a result of such Transfer, which exceed (i) in the case of a sublease of a portion of the Premises, the portion of the Base Monthly Rent and Additional Rent that is allocable to the portion of the Premises subleased, or (ii) in the case of any other Transfer, the Base Monthly Rent and Additional Rent."

"If Tenant receives rent from the sublessee which exceeds, in the aggregate, the amount which Tenant is at that time obligated to pay Landlord under this Lease, Tenant shall pay to Landlord \_\_\_\_ percent (\_\_\_%) of the difference between what Tenant is obligated to pay Landlord under the terms of this Lease and what Tenant actually receives from a sublessee for rental; provided, however, Tenant shall first deduct from such payments all costs incurred by Tenant in effecting such sublet, including but not limited to attorneys' fees, rent concessions, improvement costs, brokerage expenses and advertising expenses. Any amount payable by Tenant pursuant to this paragraph shall be paid by Tenant to Landlord within thirty (30) days after receipt from the sublessee."