

Offers to Lease

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The negotiation and signing of a commercial lease can be overwhelming for a prospective tenant. While many individuals understand the basics of residential leasing as regulated by the Residential Tenancies Branch, the commercial process is fundamentally different and offers less robust statutory protections for tenants. In order to protect themselves, every tenant should make a point of understanding the difference between an offer to lease, and the lease itself.



It is common practice for a tenant to sign an offer to lease during the negotiation stage of entering into a commercial lease. An offer to lease is a relatively short agreement that sets out the key business terms of the lease arrangement. It is usually during this stage that the landlord is willing to negotiate the terms of the lease in order to persuade the tenant to agree to lease the premises. For this reason, a tenant should review the offer to lease carefully, and consider any amendments or additions it would like before entering into a formal agreement. The landlord's willingness to negotiate terms will vary; however, some terms that a tenant may want to consider at this stage include:

1. **Commencement Date** - The tenant should consider whether the offer to lease stipulates a firm commencement date, and a clear course of action if the landlord is delayed in delivering possession of the premises. Some possibilities are that no rent will be payable by the tenant until the landlord delivers possession of the premises; or instituting a "drop dead date", where the tenant has the right to terminate the lease after a certain period of time.
2. **Fixturing Period** - A fixturing period is a period of designated time prior to the commencement date of the lease during which the tenant may have use of the premises for the purpose of outfitting the premises so that it is ready for the tenant's use. The tenant may want to consider whether the fixturing period stipulated in the offer to lease is sufficient in length for outfitting the premises.
3. **Rent free Period** - A rent free period will typically correspond with the fixturing period. A rent-free period is a period during which the tenant occupies the premises without having to pay rent. In some cases, the tenant will be required to pay additional rent and/or utilities during this period.
4. **Landlord's work** - A landlord's work provision compels the landlord to complete certain work to the premises at its cost prior to the commencement date or shortly thereafter. The landlord's work may be itemized in the offer to lease or attached as a schedule. The tenant should review the list carefully to ensure it covers what the tenant wants done to the premises - if anything - prior to the commencement of the lease.
5. **Restrictive Covenant** - A restrictive covenant prevents the landlord from renting space in the same rental complex to another tenant who carries on the same or similar type of business as the tenant. This type of provision is most common in a retail context.

6. Options to Extend – A lease may be for a term of five or ten years, but a tenant may want to think about what happens after the completion of the term. Accordingly, the offer to lease should ideally contain an option to renew the lease or extend the length of the lease.
7. Assignment and Subletting – Conversely, a tenant may want to think about what happens if it needs to get out of the lease before the end of the term. In most cases, assigning or subletting the lease will require the prior consent of the landlord; however, the tenant may want to review the assignment and subletting provisions to ensure they are reasonable.
8. Gross Lease vs. Net Lease – The offer to lease should stipulate what type of lease it is. Under a gross lease, the tenant is responsible for paying rent in the form of a single fixed amount which covers not just the premises, but also the tenant's share of operating costs associated with operating the premises. A net lease involves a base amount of rent and then additional amounts categorized as "additional rent" on top of that for operating costs. If the lease is a net lease, the tenant should ask for an estimation of what the additional rent will be, and how it will be calculated.

In some cases, signing the offer to lease compels the tenant to enter into the standard form of lease shortly thereafter. The result is that oftentimes the tenant and its legal counsel will not have been provided with the standard form of lease before agreeing to enter into it. The tenant should consider negotiating a provision in the offer to lease making the lease subject to amendments mutually agreed to between the landlord and the tenant. If the landlord refuses to make the lease subject to amendments, the tenant should ask to be provided with the standard form of lease prior to signing the offer to lease so that it can be reviewed.

These are just some of the issues to think about during the negotiation stage of commercial leasing. As with any agreement, offers to lease and leases vary in their wording and effect. Since the consequences of signing both can be significant, prospective tenants should consider having both an offer to lease and a lease reviewed by a lawyer before signing. If you need assistance reviewing and negotiating the terms of an offer to lease or a commercial lease, please contact our firm and ask to speak to one of our knowledgeable lawyers.

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