

Negotiating Your Commercial Lease  
by Ryan P. Farrell, Esq., CPA  
Zukowski, Rogers, Flood & McArdle

One of the most exciting times for a business owner is when moving into a new space. It can also be a time that one looks back on with the most regret. Whether moving your business from your basement to a space that is more production friendly or simply moving from an existing space to another, negotiating a commercial lease can be one of the most important things a business owner does. Both from a top line, especially if you are a retail owner, and a bottom line perspective, your lease has huge financial consequences for your business.

While residential leases are fairly generic and contain (either within a standard form or through state law) protections for the consumer, commercial leases are more open-ended with a lot of flexibility and are essentially caveat emptor (let the buyer beware). That can be scary, but also provides an opportunity for a tenant to make its lease right for them. Prior to searching for a property or negotiating the lease itself, rank your priorities – location, rent, length of term, tenant improvements, etc. The ranking of that order will partially be dictated by the type of business you have. A manufacturer will value having a certain amount of space and loading docks and care less about the location itself or the aesthetics of the building. Conversely, a restaurant might care about what tenant improvements already exist in the premises or how much the landlord will agree to provide for buildout.

One initial issue to be aware of in any lease negotiation is the distinction between what is known as a gross lease and what is known as a triple net lease. In a gross lease, the tenant is paying to the landlord a fixed amount that covers “most” costs of being a property owner. So, that generically means taxes and insurance. Depending on the type of property, single tenant or multi-tenant, it can also mean utilities and/or maintenance. Typically, in a triple net lease, the tenant is paying a base rent, plus a separate amount for taxes, insurance, and utilities/maintenance. However, the devil is in the details. Gross lease and triple net (or modified gross, etc.) can mean different things to different people. Simply because something is a gross lease doesn’t mean that you are truly only paying a flat amount to be located there. For example, you will need to look at the lease details to determine who pays for each utility, maintenance, lawn care and snow removal.

In any negotiation, leverage is key. So, a business owner needs to be realistic when entering that negotiation. But, if you don’t ask, you don’t get. Here are some terms to consider:

- Exclusivity clause – if the landlord owns or controls the property around the leased premises, can you restrict it from being used for a business likely to compete with you or that will be seen by the public as a negative?
- Co-tenancy clause – if you are counting on another tenant (such as an anchor tenant) to provide traffic for your location, can you build in a reduction in rent if that tenant leaves?
- Caps on cost increases in common area maintenance in triple net leases
- Personal guarantees – ideally, you can avoid personally guaranteeing the lease, but that is often not the case, especially for smaller or newer tenants. But, it might be possible to limit that guarantee in terms of the amount or the length of time that it is valid.

Finally, there are a few tips that might be useful as you enter into your lease negotiation. First, consider using a broker. The biggest advantage they provide is market knowledge, which can be key in knowing what your leverage really is. Try to make the first offer, as it provides an anchor for the negotiated terms. Be the first to concede on a point, especially if it is more important to them than you. This can show good faith and makes it more likely the other side will concede on something too. Finally, everything is negotiable, don't assume it is not simply because it is "boilerplate." Perhaps, most importantly, don't be afraid to walk away. Sometimes, losing the property is the best result. It is your business's home and you have to both be able to afford it and be productive in it. So, if those two things aren't present, keep looking!