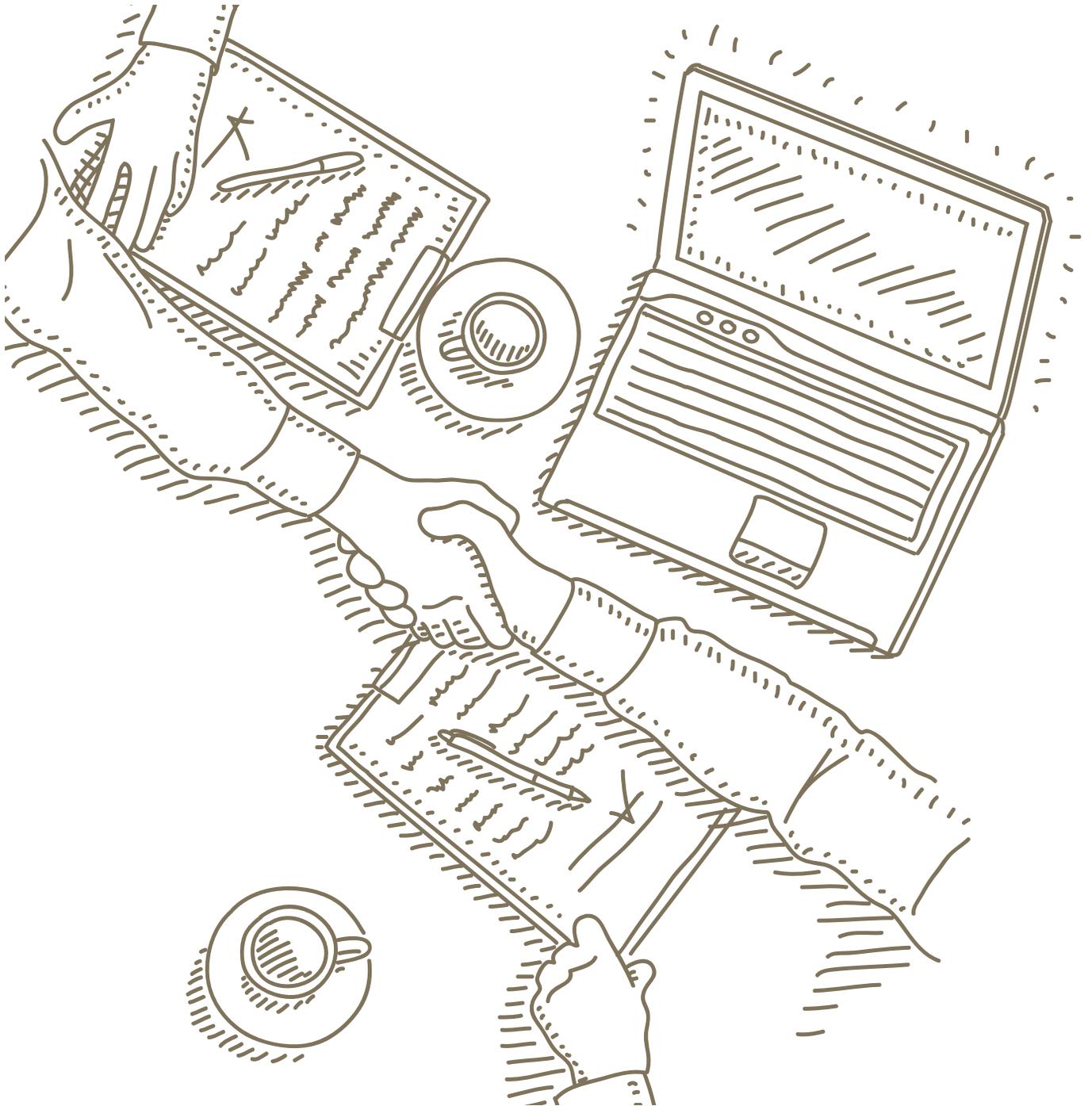


Today's
GENERAL COUNSEL



Tip Sheet for Commercial Leasing Transactions

BY JILL HAYMAN

No matter what business you are in, you will require office space to house your employees. You may also require warehouse space to store your products, industrial space to create them and perhaps retail space to display and/or sell them. For various tax and accounting reasons, leasing space is more advantageous than buying space, so commercial leasing transactions are part of the life cycle of every thriving business.

Real estate expenses usually rank among the top five of any company, and leases involve long-term relationships and the allocation of expensive risks for a variety of events that may or may not occur. An advantageous lease adds value to a commercial endeavor; a disadvantageous one is a burden to the bottom line, and poses threats of unbudgeted outlays of cash at unexpected times. Leases can be anywhere from 30 to 100-plus pages and are packed with detailed provisions that may look like boilerplate but translate into substantial amounts of money and potential disruptions to the operation of your business.

Your real estate broker will assist your business team in finding a suitable site and negotiating basic commercial terms. However, your real estate attorney will be responsible for identifying and mitigating hidden costs and risks. A vital but often overlooked factor in securing the best possible lease is the quality of client-attorney communication. No matter which side of the deal you are on, it is essential to clearly

stipulate what you need from your legal team.

Below are 10 tips to help you preempt potential issues and pave the way for a productive, cost-effective transaction:

1. Conventionally, the landlord's attorney holds the pen. As a result, first drafts of leases tend to be completely landlord-oriented. Landlord parties should consider beginning with a first draft that contains clauses that are more balanced in treating the landlord's and the tenant's respective interests. Tenants with any degree of leverage should request a balanced first draft before final rental terms are agreed. Ultimately, both parties will save time and money if negotiations start with a document that includes reasonable concessions that are granted on request in your market.

2. Ask that documents be written in plain English without redundancies. Going forward, both you and your counter party will want to understand your rights and obligations without having to go back to your lawyers for a translation. Ask that your attorney avoid the "belt and suspenders" approach to drafting. Point out that often saying the same thing twice results in inconsistencies in the document that can be used in an adversarial manner if there is a dispute during the lease term. Beg your lawyer to write like Hemingway. Short sentences and short paragraphs are easier to understand and to administer over the course of a 10- to 20-year relationship. Remind your lawyer that judges are usually

former litigators, not former real estate lawyers, so your lawyer should draft for comprehension by non-real estate professionals.

3. If your lawyer does not “hold the pen,” discuss with him or her when it makes sense to provide the other side

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with specific language and when it may be more cost effective to offer conceptual comments only and not pay for substantial drafting work that may be ignored by the other side. Discuss with your lawyer his or her experience with the lawyer representing your adversary, and what you can expect in terms of that lawyer’s style and response times. A lease negotiation is like a tennis game in that you only control one side of the court, so whatever knowledge you can gain about the player on the other side will help you predict and manage outcomes.

4. Be explicit as to whether you want a memo of open points after each round of negotiations and the level of detail you expect. A hybrid approach may be best, with formal memos at the beginning of the transactions, and bullet point emails as the transaction progresses and the number of open points decreases. You may want to appoint an internal team member to take notes, and prepare these memos for your review and the distribution to your business team.

5. Set realistic deadlines for your legal team. They are preparing an intellectual work product and need time to read, analyze and articulate the business risks you face. Unduly rushing the process could end up costing you much more in the long term. Manage the expectations

of your business team. It is often helpful to distribute an estimated legal work milestone schedule showing the overall process involved in negotiating and redrafting a lease.

6. Check that your lawyer is aware of how liability and all risk policies work in real life, and how claims are made and adjusted. Many lease negotiations drag out because of arguments over language, even when the potential out-of-pocket impact is nominal due to the existence of applicable insurance coverage. Indemnifications in leases should be covered by contractual endorsements in your general liability policies, so impassioned arguments over responsibility for negligence may be entertaining but not useful. Introduce your risk manager or insurance broker to your lawyer. They should collaborate on the review and negotiation of clauses relating not only to insurance coverage but also to casualty restoration and indemnification.

7. Make sure you have the right mix of senior and junior lawyers representing your interests. The more seasoned

your team, the less time it will take to close the deal and the better the results. Make sure that you understand the roles of the senior and junior lawyers, so you can ensure that each amplifies the efforts of the others in the manner most cost effective for you.

8. Assemble your internal and external team of experts on facilities, technology, design and construction, and tax and accounting. Appoint an internal team leader to coordinate delivery of information to your lawyers that will be needed to negotiate and draft the technical points of the transaction. If you lack the internal resource and need your lawyer to fill that role, express that need to your lawyer and discuss how it will impact his or her fee. Try to coordinate communications with your legal team so that they are not receiving multiple calls with the same information or being given contrary directions on deliverables.

9. Verify that your lawyer is familiar with all phases of construction. Architects, engineers, project managers and owners’ representatives know how to construct and outfit buildings but may not know how to properly reflect your needs in legal language. Your lawyer must be able to ask the right questions so the right terms and conditions are incorporated into the lease.

10. Confirm that your lawyer understands how utilities are delivered and priced to ensure you are not left covering unreasonable hidden costs, such as fees for supplemental or overtime services. Electric service can be charged in a variety of ways containing a variety of profit centers. Make sure your lawyer can explain to you how the electric service provision in your lease operates. ■



Jill Hayman is special counsel in Hunton Andrews Kurth LLP's New York office, where she heads the New York real estate leasing platform. She brings more than 35 years of experience in executing sophisticated real estate transactions.

jhayman@HuntonAK.com

HUNTON
ANDREWS KURTH

Jill Hayman | Special Counsel
jhayman@HuntonAK.com
New York
+1 212 309 1028 direct