



LEASE MODIFICATIONS FOR CALIFORNIA NONPROFITS AND SMALL BUSINESSES AFFECTED BY THE ECONOMIC DOWNTURN

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This information sheet is published as part of Public Counsel's "Turning the Tide" program, a new initiative designed to meet the changing legal needs of our community in light of the economic downturn. You can access answers to other frequently asked questions ("FAQ") and updated resources for nonprofits & small businesses at www.publiccounsel.org/practice_areas/community_development.

The cost of renting office space can be a primary source of overhead, and one of the first budget items that a nonprofit or small business will re-examine when it is faced with declining revenue, or has reduced its need for such space through down-sizing. But how can a tenant modify a lease obligation that it may well be legally tied to for years?

In this information sheet, the topic of lease modifications is explored through a series of questions that address many of the common experiences and concerns of organizations leasing commercial real estate in these economically challenging times. The answers offer a starting point for a nonprofit or small business to evaluate whether it can achieve a more sustainable economic future through rent abatement, rent deferral, sub-letting, or other lease concessions.

Of course, a key input for any organization's assessment of its lease options will be a thorough review of the legal document itself, including all amendments. It is not uncommon for a commercial lease of long-standing to be comprised of an original form lease and separate amendments that relate back to the original, so make sure that you have assembled the entire document for this purpose. Before attempting to negotiate any sort of concession from a landlord based on poor financial condition, you should also be prepared to present current financial statements.

This information sheet is provided for informational purposes only and does not constitute legal advice. While this information can help you understand the options available during a period of financial distress, it is very important that you obtain the advice of a qualified attorney. Qualifying nonprofits may be eligible for free legal consultation or representation to assist with these matters. For an application for legal assistance for existing nonprofits, go to <http://www.publiccounsel.org/tools/assets/files/Application-for-Existing-Nonprofits-2010.doc> or call Public Counsel at (213) 385-2977 ext 200.

OVERVIEW OF LEASE MODIFICATIONS AND ALTERNATIVES

1. My organization or business is struggling to make payments under a commercial space lease. What are my options?

Your options depend largely on how willing and financially capable you are to move out of the leased space. Many of the options listed below have both actual and operational costs attendant with them that could be significant enough to cancel or exceed any savings that might be achieved through a lease modification. A careful analysis of the cost and benefit of pursuing any of these options should be undertaken before proceeding down any of these paths. That being said, if you are open to moving (or you can give the landlord the impression that you are open to moving), then you are likely to have many more options available to you than if you are not able to move.

a. If you are open to moving out of the leased space, your options include:

- i. Assigning or subletting your lease if the lease allows: If your lease allows you to assign or sublet the lease, you can transfer some or all of your leased space (or lease term) to another tenant and thereby reduce your rent. See Question 4, which further discusses assignments and sublets.
- ii. Buying out your lease: If you would like to terminate your lease before the end of the lease term, you may try to negotiate with the landlord to *buy out* the remainder of the lease. In a buy out, you pay the landlord a certain amount of money and in exchange, the landlord allows you to terminate the lease prematurely with no future liabilities (e.g., future rent). However, before seeking a buy out, you should first pursue the other options discussed in this section because under those options, you can be released from your liabilities under the lease without paying the landlord a fee.
- iii. Exercising your early termination rights under the lease: Some leases have provisions that allow the tenant to terminate its lease before the end of the lease term. Often these provisions will require the tenant to pay some pre-negotiated amount to exercise this right. For example, the lease may say that if the tenant does not achieve a certain amount of gross sales in the first few months of the lease, the tenant can terminate the lease early for a certain fee. You should review your lease to see if it contains early termination rights and what payments, if any, you must make to exercise these rights.
- iv. Terminating the lease based on the landlord's breach: Usually the landlord is obligated to perform certain tasks under the lease. For example, leases often require the landlord to maintain the premises, repair problems, and provide the tenant with a certain number of parking spaces. You should review your lease to see what obligations the landlord must perform, and if you find that the landlord has failed to perform any of these obligations, you may be entitled to terminate the lease early without penalty.

- b. If you are not open to moving out of the leased space, your options include:
- i. Renegotiating your lease: You can try to renegotiate the terms of your lease with your landlord (e.g., lower rent, set a low rent initially and increase it over time, relocate to a cheaper space on the property). See Question 3, which discusses how you can increase your bargaining position with the landlord, and Question 11 for discusses what specific lease terms to focus on during a renegotiation.
 - ii. Subletting to another tenant if the lease allows: If the lease allows you to sublet the lease, you can transfer a portion of the leased space or lease term to another tenant and thereby reduce your rent. See Question 4, which elaborates on sublets.

WHAT TO DO BEFORE COMMENCING NEGOTIATIONS

2. We are beginning to have cash flow problems and might not be able to continue making rent payments on time. At what point should we approach our landlord to discuss a possible re-negotiation of the lease?

The best time for you to approach your landlord to renegotiate the lease will depend on the many considerations inherent to your business or nonprofit operation. For example, you may want to delay approaching your landlord if you took out a loan for your business and you do not want your lender to know of your recent cash flow problems (e.g., your lender might recall the loan). However, all other things being equal, it is best to approach your landlord as early as possible, not only as a demonstration of good faith when seeking to modify the lease, but also because by doing so, you can pursue certain options that will increase your leverage with the landlord, but that take time to pursue. For example, if the lease allows you to assign or sublet the lease and it makes business sense to do so, then you could increase your leverage by telling the landlord that you will assign or sublet the lease – potentially to a less desirable tenant – if the landlord does not agree to certain concessions. However, if you delay approaching the landlord, you may not be able to assign or sublet your lease (even if the lease allows you to) because finding a new tenant for an assignment or sublet usually takes time.

There are also legal benefits that can be derived from a prompt and frank discussion with your landlord. For example, early communication with a landlord will put the landlord on notice about your organization's financial difficulties and may trigger a duty to mitigate damages should the landlord ever attempt to collect unpaid rent in court.

However, before you approach your landlord to renegotiate the lease, you should first determine how much leverage you truly have and what you will do if the landlord refuses to renegotiate the lease. See Question 3, which discusses how tenants might increase their leverage with the landlord.

3. Prior to the lease re-negotiation, what are some ways in which we can increase our leverage with the landlord? What types of circumstances would strengthen our bargaining position with the landlord?

How much you can increase your leverage with the landlord depends in part on how much the landlord wants to keep you as a tenant. If you believe that the landlord wants to keep you as a tenant (e.g., you are a long-time tenant and always paid rent on time), you can increase your leverage with the landlord if the lease allows you to:

- a. Terminate the lease early (aka early termination rights). See Question 1(a)(iii), which elaborates on early termination rights.
- b. Assign or sublet the lease. See Question 4, which elaborates on assignments and sublet.

The circumstances surrounding your renegotiation can also increase your leverage with the landlord. For example, if the landlord's property has an unusually high number of vacancies or key tenants have recently moved out, or you are leasing sub-prime property and the landlord will have a difficult time finding a new tenant, then you will probably have more leverage to negotiate with the landlord.

ASSIGNMENT OR SUBLEASE

4. What are the different concerns we should consider when contemplating whether to assign or sublet the lease?

- a. What are an assignment and a sublet?

In an assignment or sublet, the tenant transfers all, or a portion of, the lease to another party.

- b. What is the difference between an assignment and a sublet?

The main difference between an assignment and a sublet is that in an assignment, the tenant transfers all of its interest in the lease to another party and in a sublet, the tenant transfers only a portion of its interest in the lease. For example, suppose your lease is for 2,000 sq. ft., and the lease expires in five years. You would be assigning your lease if you transferred all 2,000 sq. ft. and all five years remaining on your lease to another party. You would be subletting your lease if you transferred only 1,000 sq. ft. for only three of the five years remaining on the lease. You would also be subletting your lease if you transferred: (i) all of the leased space, but for only a portion of the leased term (e.g., you transfer all 2,000 sq. ft. but only for three of the five years remaining on the

lease) or (ii) all of the leased term, but only a portion of the leased space (e.g., you transfer all five years remaining on the lease, but only for 1,000 sq. ft. of the 2,000 sq. ft. being leased).

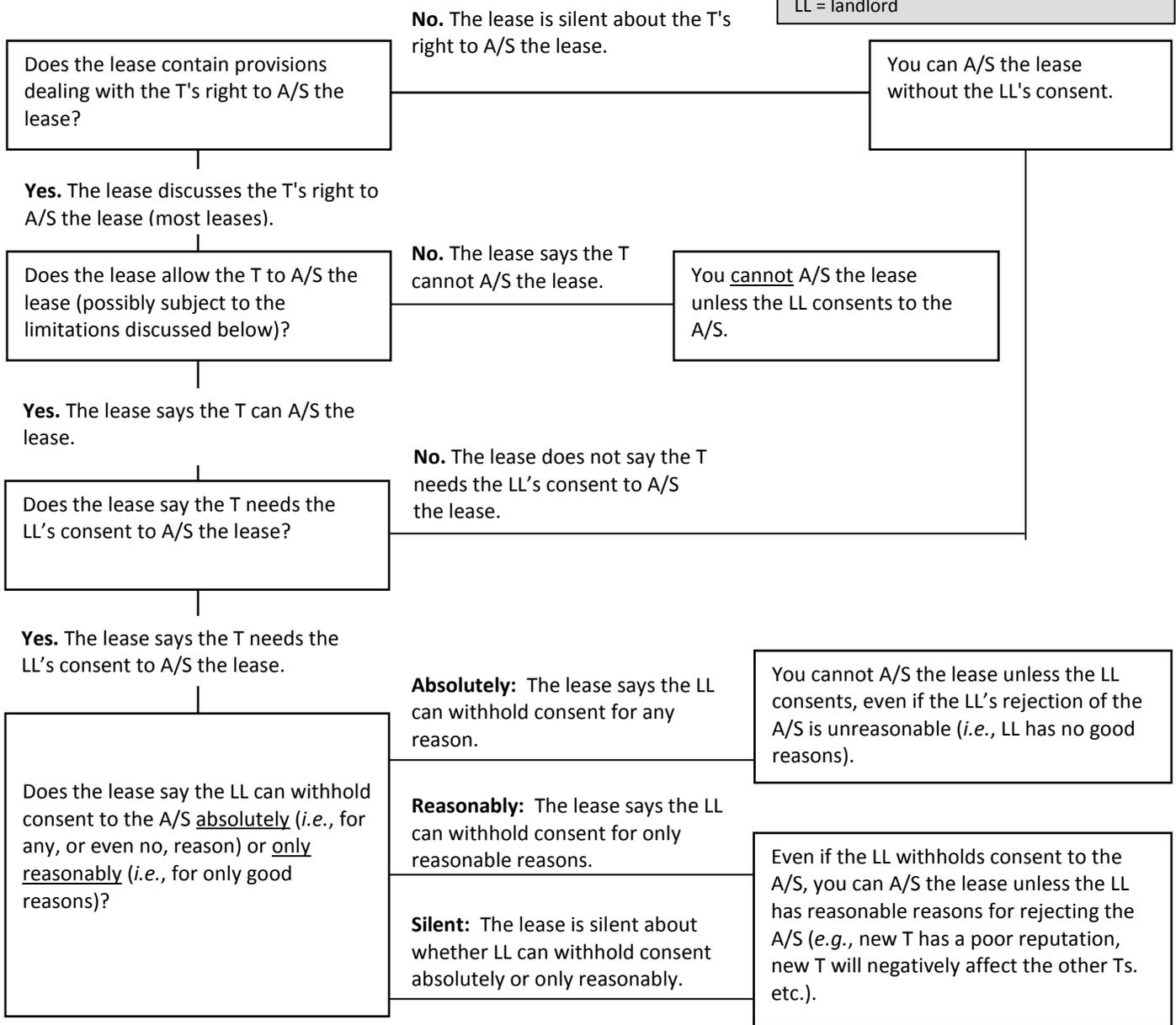
This may be an obvious point, but please note that you cannot assign or sublet an interest in the lease that is greater than the interest you possess. For example, if your lease is for ten years, you cannot assign or sublet your lease for eleven years, and if your lease gives you 5,000 sq. ft., you cannot assign or sublet 5,001 sq. ft.

c. Does the lease allow you to assign or sublet your lease?

To determine whether you can assign or sublet your lease, review the following flow chart. It is important to note that the flow chart only applies to leases governed by California law.¹

¹ The particular provisions of California law that generally govern assignments and subleases are found in California Civil Code Sections 1995.210(b), 1995.260, and 1995.270(b).

Legend
 A/S = "assign or sublet" or "assignment or sublet" as appropriate
 T = tenant
 LL = landlord



- d. If you assign or sublet your lease properly (e.g., lease not violated, landlord consented), are you still liable to the landlord for the lease’s obligations in the event the new tenant breaches the lease (e.g., stops paying rent)?

As unfair as it may seem, in most situations the answer is yes.² Even if you assigned or sublet the lease in accordance with the lease and even if the landlord consented to the assignment or sublet, you are still liable for all of the tenant’s obligations under the lease, even if the breach is caused by the new tenant, unless: (i) the lease specifically says you are no longer liable for the lease or (ii) the landlord agrees in writing to release you from your obligations under the lease. For example, if after the assignment the new tenant stops paying rent, you are obligated to pay rent on behalf of the new tenant unless the lease, or the landlord, says otherwise.

Thus, if you decide to try to assign or sublet your lease, it is very important that you also attempt to negotiate with the landlord to be released from all of the lease’s liabilities arising after the assignment or sublet because if you do not, you could be required to pay for breaches of the lease by the new tenant, even when they are not your fault. To convince a landlord to enter into such a release will undoubtedly be challenging, but not necessarily impossible. Given the financial circumstances of your organization, it may make sense for the landlord to agree to accept rent from a sublessee or assignee that you have identified and release you from further responsibility rather than pursue expensive or time consuming remedies against a “judgment proof” or bankrupt tenant in order to regain possession of the premises.

e. Related Issues

i. Use Restrictions May Prevent the Assignment or Sublet

Some leases contain provisions that restrict the tenant’s use of the leased space (aka use restrictions). For example, shopping center leases often restrict the types of businesses that a tenant can operate on the premises (e.g., restaurant, clothing store).

If your lease contains use restrictions, you may not be able to assign or sublet the lease (even if the lease otherwise allows you to do so) if the new tenant’s intended use of the space violates the lease’s use restrictions.

ii. Finances

To state the obvious, you should also consider whether it is financially viable for you to assign or sublet your lease. For example, even if the lease allows you to assign or sublet, the demand for your space might be so low that no other tenants are willing to pay your current rent. In this situation, you could assign or sublet your lease only if you paid a portion of the new tenant’s

² *De Hart v. Allen*, 26 Cal. 2d. 829 (1945).

rent, and it may not be worth it for you to assign or sublet your lease. Also, as a precondition to assignment, existing office tenants may be required to guarantee the performance of the lease by the incoming tenant. In such an unstable commercial climate, providing guarantees as to the ability of another business to meet the demands of a lease which was too expensive for the guarantor in the first place may seem unwise. Assignment can also prove time-consuming and costly.

NEGOTIATING STRATEGIES FOR LEASE MODIFICATION

5. Are there any creative ways to re-negotiate the lease terms so that the landlord shares the risk of market turbulence with the tenant?

- a. Percentage Rent: One way to make landlords share the risk of market turbulence is by percentage rent. With percentage rent, the rental amount is based on a percentage of the tenant's gross sales/revenues, so that if the tenant's business does poorly, the rent decreases, and if the tenant's business does well, the rent increases. There are several different types of percentage rent. However, the most common type of percentage rent is where the rental amount consists of both a minimum fixed amount and a certain percentage of the tenant's gross sales or revenues. For example, the rent may consist of: (A) a minimum fixed rate of \$1,000 per month plus (B) 5% of the tenant's gross sales exceeding \$10,000 each month. Given the current economic downturn, landlords will probably insist on having some fixed rental amount in the percentage rent because then, the landlord is guaranteed some rent, even if the tenant's business does poorly.

Note, if your lease provides for percentage rent, you should be careful how gross sales and revenues (or whatever amount the percentage rent is based on) is determined. For example, the landlord may want to define gross sales and revenues as the sum of all sales and revenue your business receives. However, this definition would lead to a higher rental amount, so you should negotiate with the landlord to have certain amounts excluded from the gross sales and revenue definition. For example, if you accept the landlord's definition, your percentage rent will increase for items sold, even if you do not actually receive payment for the items (e.g., fraudulent credit cards or bad checks). Other items you should try to exclude from the gross sales and revenue definition are: (A) taxes on merchandise (e.g., sales tax, liquor tax, etc.), (B) sales of fixtures, equipment and other property not in your line of business, (C) merchandise that is later returned or exchanged, (D) settlement or litigation for damage to merchandise, (E) interest for merchandise sold on credit, (F) amounts not counted as income on federal tax returns, (G) assigning or subleasing the tenant's space, (H) internet sales not originating from the leased space, (I) fees paid to credit card and check verification companies and (J) insurance proceeds.

- b. Short-term leases: Another way to make the landlord share the risk of market turbulence is to make the lease term last for only a short time (e.g., a few months or a year). By shortening the lease term, you avoid owing your landlord several years' worth of rent in case your business does poorly and you want to move out of the leased space.

The lease term can be shortened in several ways. Most obviously, you and the landlord can shorten the term of the lease. However, the lease term can also be shortened by giving the tenant early termination rights (e.g., if your gross sales are below a certain amount, you can terminate the lease for a small fee). See Section 1(a)(iii) for more information on early termination rights.

6. What are some strategies that we can employ in re-negotiating the lease to reduce the overall “floor area” (and thereby reduce our rent)?

In most leases, the rent depends on how much space the tenant leases from the landlord (*aka floor area, leasable area or gross leasable area*). To obtain as much rent as possible, landlords will try to define the floor area as all square footage within the exterior walls of the building. However, you should negotiate to have certain areas excluded from the definition of floor area because if you are successful, your rent may consequently decrease. For example, sometimes landlords will agree to exclude storage areas (e.g., closets, basements) and outdoor areas (e.g., patio) from the floor area.

It is important to note that leases often define the floor area (i.e., the area used for calculating rent) differently from the area to be maintained, insured and indemnified by the landlord. Thus, even if you are successful in excluding certain areas from the floor area, you should make sure that these same areas will be maintained, indemnified and insured by the landlord under the lease.

7. We are renting space in a strip mall with other retail tenants who are thinking about closing. We only selected this space because of the presence of these other retailers. If these neighboring stores leave, our business will be severely affected. Do these changing circumstances give us the right to get out of our lease?

Some leases contain *cotenancy clauses* (*aka cotenancy requirements*), which allow a tenant to terminate the lease if a certain number of tenants, or certain key tenants, move out. Accordingly, if your lease contains these cotenancy clauses, you may be able to terminate the lease depending on the exact terms of your cotenancy clauses. If your lease does not contain these cotenancy clauses, the fact that other tenants have moved out probably will not allow you to terminate the lease. It should be noted that most leases do not contain cotenancy clauses unless you specifically negotiated them into the lease.

Do these changing circumstances give us leverage to renegotiate?

The departure of other tenants will probably give you greater leverage when re-negotiating your lease because with the departure of several tenants, the landlord will be motivated to fill the vacancies and restore rental income from the property.

8. What is the difference between “abandoning” a lease and surrendering or “buying out” a lease?

When a lease is *abandoned*, the tenant terminates the lease prematurely *without* the landlord’s consent in breach of the lease, and as such, the tenant remains liable for all of its obligations under the lease (e.g., future rent, maintenance costs, etc.).

When a lease is *surrendered*, the tenant terminates the lease prematurely *with* the landlord’s consent, and as such, the tenant will usually be released from the lease. Often, the terms *surrender* and *buy out* are used interchangeably. Although there is a slight technical difference between the two terms,³ practically speaking, there is little difference because both terms imply that the tenant has been released from future liabilities under the lease.

PERSONAL GUARANTEES AND OTHER PERSONAL LIABILITY CONSIDERATIONS

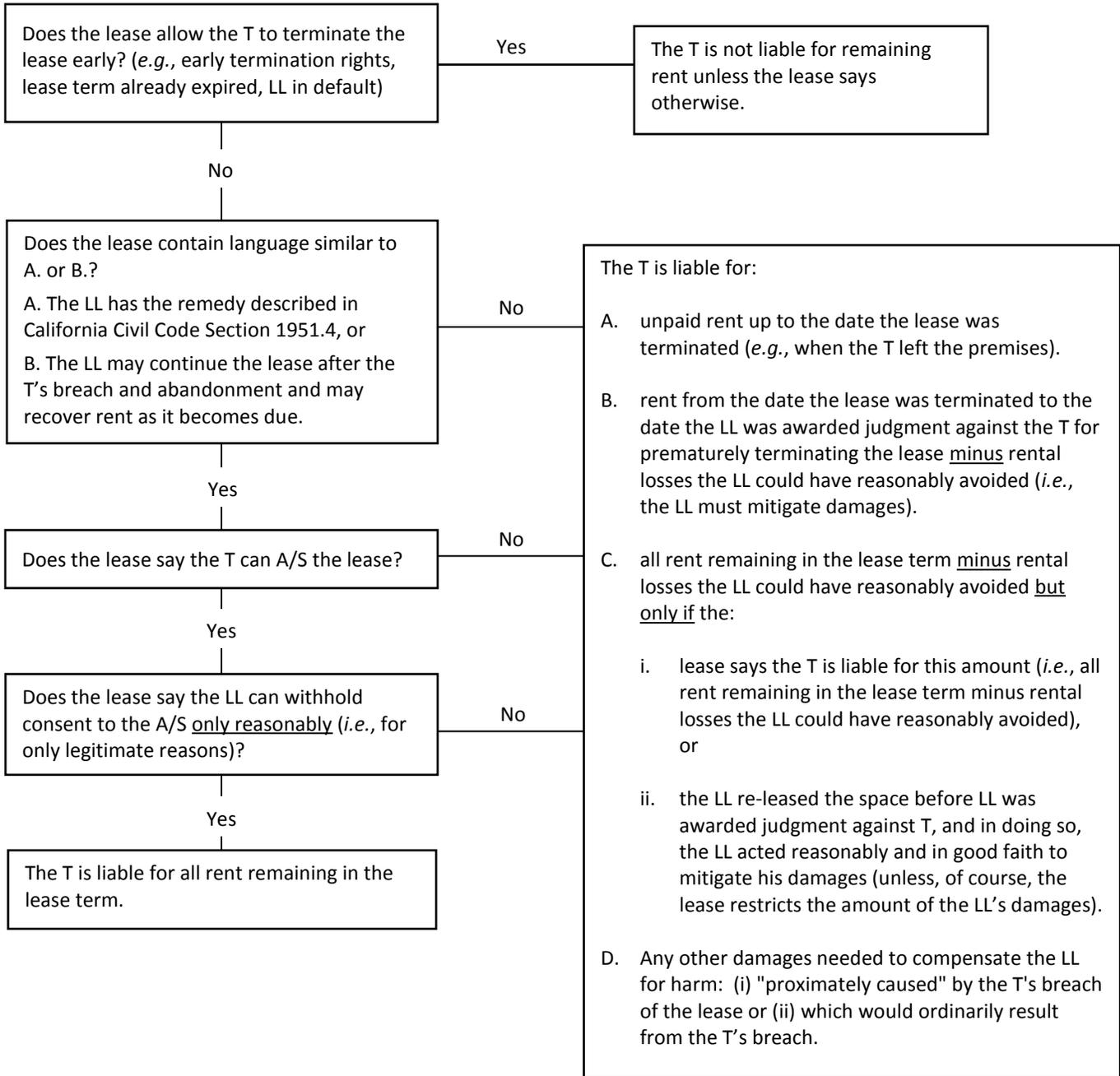
9. Is there a chance that I will be personally liable for all rent remaining in the lease term if I need to close my business and walk away from my lease?

The answer to this question depends on: (a) whether the tenant (the business or nonprofit) is liable for all rent remaining in the lease term and (b) whether you – the small business owner, nonprofit executive, or other stakeholder - are personally liable for the tenant’s liabilities under the contractual terms of the lease. As is more fully illustrated in the flow chart that follows, the outcome will rest not only on the lease terms, but on whether (i) the tenant is you (regardless of whether you signed the lease in your own name or using a DBA) or a corporation or other limited liability entity, and (ii) whether the rental payment is secured by a personal guarantee.

³ In a buy out, the landlord allows the tenant to terminate the lease prematurely, but in exchange, the tenant must pay the landlord a certain amount of money. In a surrender, the landlord still allows the tenant to terminate the lease prematurely, but the tenant is not required to pay the landlord.

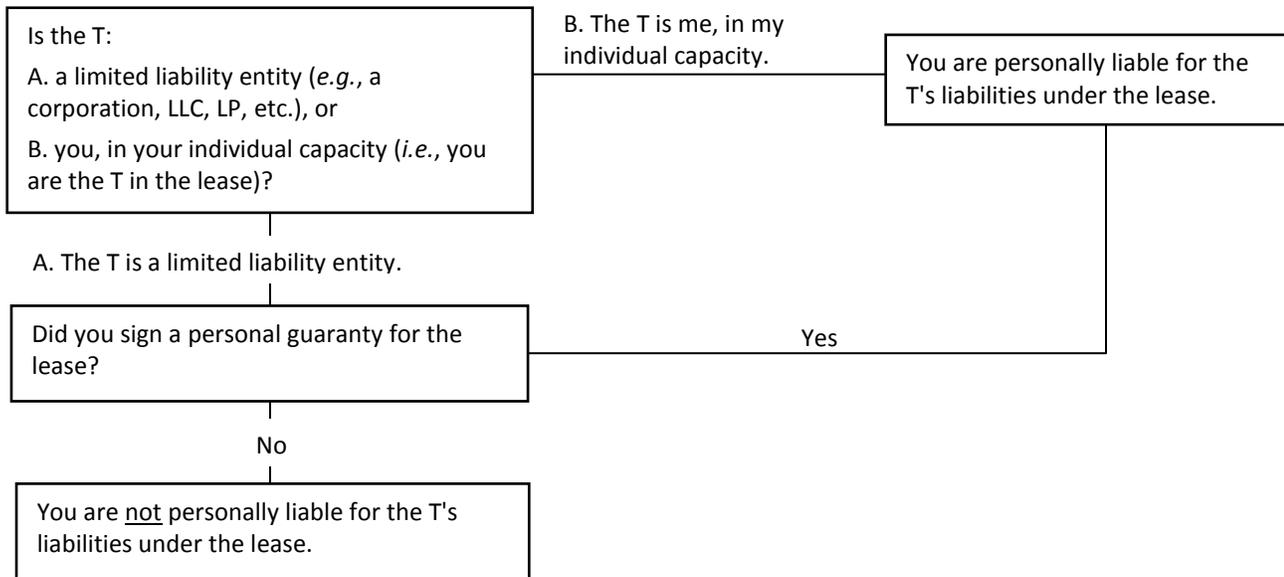
c. Is the tenant liable for all rent remaining in the lease term?⁴

Legend
 T = tenant
 LL = landlord



⁴ See California Civil Code Sections 1951.2 and 1951.4.

- d. If the tenant is liable to the landlord for all rent remaining in the lease term, are you *personally* liable for the tenant’s liabilities?



FORECLOSURE RELATED ISSUES

10. We’ve just received notice that the landlord’s lender has foreclosed on the property that we are leasing. Does the foreclosure give us any new rights (e.g., the right to terminate the lease)?

Whether you acquire any new rights (e.g., termination rights) after the foreclosure will depend on whether you signed a subordination and attornment agreement (or any other agreement, wherein you agreed to subordinate and attorn to the landlord’s lender). A subordination and attornment agreement says that if the landlord’s lender forecloses on the property you are leasing, you will treat the lender as if it was the landlord, and the lease between the new landlord (i.e., the lender) and you remains in force with no changes. Accordingly, if you signed a subordination and attornment agreement (or similar agreement), you will not acquire new rights after the foreclosure. However, if you did not sign a subordination and attornment agreement and you never agreed to subordinate and attorn to the lender, you may acquire new rights, including the right to terminate the lease, after the foreclosure because the lease only governs your rights with respect to the original landlord – not the foreclosing lender.

In most cases, you do not obtain new rights after the landlord’s property has been foreclosed on because to get a loan, the landlord is almost always required to have its tenants sign a subordination and attornment agreement. It is also worthwhile to note that most subordination and attornment

agreements contain provisions also dealing with non-disturbance, which is discussed in the next section. Often these agreements are called “Subordination, Non-Disturbance and Attornment Agreements.”

Does the foreclosure give the new landlord (i.e., now the lender) any new rights (e.g., the right to terminate the lease)?

Whether the lender, as the new landlord, acquires any new rights after foreclosing on the landlord’s property will depend on whether the lender signed a non-disturbance agreement (or any other agreement that obligates the lender to non-disturbance). A non-disturbance agreement says that if the lender forecloses on the landlord’s property, the lender, as the new landlord, will not disturb you (e.g., terminate the lease) as long as you fulfill all of your obligations under the lease. Accordingly, if the lender signed a non-disturbance agreement (or any other agreement, in which the lender agreed to not disturb the tenant), the lender, as the new landlord, would not acquire new rights after foreclosure. However, if the lender did not sign a non-disturbance agreement and the lender never agreed to non-disturbance, the lender, as the new landlord, may acquire new rights after foreclosure because the lease only governs the original landlord’s relationship with you – not the lender’s relationship with you.

In most cases, the lender does not obtain new rights after foreclosing on the property because: (i) the lender usually signs a non-disturbance agreement in connection with the landlord’s loan and (ii) often the lease itself contains non-disturbance provisions.

TERMS TO CONSIDER IN NEW LEASES OR MODIFIED LEASES

11. Given the current market conditions, do significant opportunities exist for nonprofits that wish to move into newer and larger spaces? What types of concessions from the landlord should we consider when negotiating a lease in the current economic environment?

- e. Early Termination Rights: If you are not sure that you will be able to meet all of the lease’s obligations for the entire lease term (e.g., pay rent), you may want early termination rights, which would allow you to terminate the lease early and stop paying rent. Early termination rights are particularly helpful for those starting a new business or operating a business with financial difficulties. See Question 1(a)(iii) for additional information on early termination rights.
- f. Percentage Rent: With percentage rent, your rent rises and falls with the financial performance of your business. In an economic downturn like the current one, percentage rent provides your business with some relief, in the form of reduced rent, should your business face difficulties. However, by the same token, percentage rent also increases your rent should your business be successful. See Question 5 for additional information on percentage rent.

- g. Assignment or Sublet: If your lease allows you to assign or sublet the lease, you can transfer all, or a portion of, the lease to another tenant and thereby partially or completely reduce your rent. The two key variables to consider in an assignment or sublet are: (i) whether the landlord's consent is required for you to assign or sublet the lease and (ii) if the landlord's consent is required, whether the landlord can withhold consent absolutely (i.e., for any, or even no, reason) or only reasonably (i.e., for only reasonable reasons). See Question 4 for additional information on assigning and subletting a lease.
- h. Liability for Costs: One issue in leases is whether the landlord or the tenant pays for insurance premiums, property taxes and operating expenses (e.g., water, utilities, maintenance costs, etc.). In the current economic environment, you are probably looking for ways to cut costs, and, to that end, you may negotiate to have the landlord pay for these expenses. If the landlord pays for these expenses, the lease is called a *gross lease*. If the tenant pays for these expenses, the lease is called a *triple net lease*.

If you are obligated to pay for these expenses (i.e., a triple net lease), you should negotiate for a cap on your liability for these expenses (i.e., a maximum amount you are obligated to pay). This is particularly important in the current economic environment because if other tenants close their businesses and terminate their leases, your lease may require you to cover a greater share of these expenses, which would in turn increase your rent.

- i. Right to Reduce Space: You may want the right to reduce the amount of space you lease, so that if your business faces difficulties, you can decrease the amount of space you lease and thus, decrease your rent.
- j. Exclusive Rights to Conduct Business: You may want the right to be the only tenant on the property allowed to operate a certain type of business. For example, if you are a convenience store in a strip mall, you probably want to be the only convenience store in the entire strip mall, so that your business faces less competition.
- k. No Use Restrictions: Some leases contain provisions setting restrictions on how tenants can use the space being leased. For example, the lease may say that the leased space can only be used as a restaurant. You should try to have these restrictions taken out of the lease, so that in the future you can use the leased space in a different more profitable manner.

Perhaps even more importantly, you should try to have these use restrictions taken out of the lease because they could interfere with your ability to assign or sublet the lease. Even if your lease allows you to assign or sublet the lease, you could be prevented from doing so if the new tenant's intended use violates the lease's use restrictions. See Section 5(e)(i) for additional information on how use restrictions might prevent assignment or sublet of a lease.

- l. Lower Rent in Exchange for a Longer Lease Term: Almost all tenants would like to lower the rent, but to lower the rent, you will probably need to give the landlord some sort of concession. One

concession that tenants frequently offer their landlord is a longer lease term. A longer lease term is often attractive to the landlord because with a longer lease term, the landlord is assured that he or she will receive rental income for an extended period of time.

However, before you offer the landlord a longer lease term, you should consider whether you are able to fulfill all of the lease's obligations for the longer lease term. For example, if you are a new or struggling business, it may not be in your best interest to offer the landlord a longer lease term because if you eventually decide to close your business, you could be obligated to pay for all of the rent remaining in the lease term, and this amount could be substantial given the longer lease term. See also Question 9, which discusses whether you will be held personally liable for all rent remaining on the lease if you close your business before the lease expires.

- m. Limit Automatic Increases in Rent: Some leases contain provisions that automatically increase the rent a certain amount every year during the lease term. Given that rents in certain areas could decrease due to the current economic downturn, you may want to negotiate with the landlord to do away with any automatic rent increases.

If the landlord insists on having an automatic rent increase, you should try to have the rent increase based on a certain fixed amount (e.g. 2% per year) rather than an index (e.g. the Consumer Price Index). Often, the rent increase will be based on the Consumer Price Index (aka CPI). However, you should avoid relying on CPI because in economic downturns such as the current one, CPI can rise at an unusually high rate due to inflation, and this could lead to a large increase in your rent each year.

- n. Limit the Landlord's Right to Relocate You: Some leases give the landlord the right to move the tenant to another location within the property. For example, often shopping center leases give the landlord the right to relocate the tenant to another location within the mall. If the lease gives your landlord these relocation rights, you should try to have certain restrictions placed on the landlord's exercise of these rights. For example, you may want to negotiate with the landlord, so that the landlord can move you only to certain pre-determined locations within the property (e.g. locations with high foot traffic).
- o. Tenant Improvements: Sometimes, landlords will agree to pay for certain improvements to the tenant's space (e.g. new paint, carpet). If you have certain improvements that you would like performed on your space, you should consider negotiating for these improvements.
- p. Free or Reduced Rent for an Introductory Period: Sometimes, landlords will agree to waive rent for the first few months of the lease. This may be worth negotiating for, especially if you anticipate lacking substantial cash flow in your first few months of occupancy.

12. I am trying to renegotiate the lease with my landlord, but so far, the landlord has rejected all of my proposed changes to the lease. Effectively, the landlord has said the lease is a "take it or leave it" proposition. Why might the

landlord be taking such a hard position and refusing to negotiate the lease terms?

There are many reasons why the landlord might refuse to negotiate the lease terms. There is the obvious reason that the landlord believes it has the superior bargaining position (e.g., there is high demand for the space). The landlord may have its own financial limitations which limit its ability to modify a lease. For example, the landlord may have taken out a loan on the property, which requires it to use a specific leasing contract (with no changes) when leasing space to tenants. Often, lenders will require landlords to use a specific leasing contract, so that the lender can make sure its collateral (i.e., the property) is protected, and in these situations, the landlord is often not able to change the terms of a lease contract by virtue of its contract with the lender for the loan.

The landlord may simply be dissatisfied with the terms that you have offered. It may be helpful to consider some of the landlord's likely strategies and motivations before engaging in renegotiation, and bargain with the inclusion of provisions that you can live with that also would be attractive to the landlord. Here are some examples:

- a. **Financial Statements.** Offer proof of your organization's economic distress in the form of gross sales reports and/or financial statements. These materials will help demonstrate to your landlord that your business or nonprofit is in as dire financial straits as claimed and that rent relief is justified. Your financial statements can also support your position that your organization would essentially be judgment proof if the landlord were to pursue legal remedies for rent against it, thus making a renegotiation more attractive to the landlord.
- b. **Short Term.** Suggest a relatively short term (no more than 24 months) for rent relief. Agree that at the end of the reduced rent term, rates either return to the rents in the original lease, or will be renegotiated based on the fair market rates at that time.
- c. **Default Terminates Rent Relief.** Condition your receipt of a rent modification on not being in default. Provide that if, as the tenant, you go into default, then the rent reduction automatically terminates, and your business or nonprofit must resume full payment of the original contract rent. You might also consider offering, in the case of a default, immediately to repay the landlord the total amount of unpaid rent you would have owed if rent relief had not been granted.
- d. **Confidentiality Provision.** Provide that the terms of the rent relief negotiation and agreement are to be kept confidential. This strategy is often favored by landlords to keep other tenants from seeking comparable concessions.
- e. **Defer Rent.** Agree to structure rent relief as a deferral, rather than as an abatement. Offer to treat deferred rent as a non-interest loan that is payable at the end of the lease term or at some other future date.