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**DRAFTING LEASE TRANSFER CONSENT CLAUSES—IS YOUR LEASE
LANGUAGE SUFFICIENT?**

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CONDITIONS TO ASSIGNMENT AND SUBLEASING

(OFFICE LEASES)

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INTRODUCTION

Assignment and subleasing clauses are generally structured to:

1. Prohibit assignment, subleasing, and other transactions;
2. Give landlord the right to recapture the premises if the tenant proposes to assign or sublease;
3. Impose on the landlord the obligation, if it has not exercised its recapture right, to not unreasonably withhold or delay its consent to the proposed assignment or sublease; and
4. If the assignment or sublease is approved by the landlord, give the landlord the right to all or part of the profit generated by the assignment or sublease.

With respect to item no. 3, the landlord's obligation to act reasonably is usually further conditioned on the tenant's compliance with a long list of conditions. If any one of the listed conditions is not met, the landlord will be under no obligation to act reasonably. From the landlord's standpoint, it makes some sense to condition the landlord's obligation to be reasonable on the fulfillment of a number of conditions. This is because there are some circumstances which, in the landlord's view, ought to act as a complete bar to subleasing or assignment, even if a court might find that the landlord was acting unreasonably in refusing to consent to a proposed

sublease or assignment. A prime example is the requirement, often seen in leases, that the proposed sublease or assignment *not* be to a person or entity then negotiating with the landlord for space in the building. If the landlord was simply under an obligation to be reasonable, a court might find that the landlord was acting unreasonably if it refused to consent simply because the tenant proposed to assign to an entity that had been negotiating with the landlord for space in the building.

Because such conditions operate as a complete bar to subleasing and assignment, the tenant's attorney must review such provisions with special care. In reviewing such clauses, the issue from the tenant's perspective is whether the list of preconditions protects legitimate landlord interests, is reasonable, and is not overbroad.

Some of the conditions found in assignment and sublet clauses make perfect sense -- for example, a requirement that the tenant not be in default beyond any applicable cure period. But often the list of conditions includes unreasonable and overreaching provisions -- for example, a requirement that the tenant use the landlord's managing agent to market the space. Sometimes the conditions set out in the form lease are fine in the context of one type of leasing transaction, but are impractical in other contexts. For example, a provision limiting the number of outstanding subleases to 2 subleases makes sense for a small space, but no sense for a tenant occupying 6 floors of a building. The tenant's attorney must review

each condition to see if it protects a legitimate interest of the landlord, and ensure that the specified conditions do not create unreasonable barriers to assignment or subleasing.

Below is a list of conditions occasionally seen in assignment and sublet clauses in office leases; together with a discussion of the issues raised by such clauses and possible responses.

THE LIST OF CONDITIONS/COMMENTARY

Below is a landlord-oriented consent provision, complete with commentary. The tenant's attorney should consider whether each condition (a) protects a legitimate interest of the landlord, (b) creates an unreasonable bar to assignment or subleasing, and (c) is reasonable in light of the nature of the space, the building, the landlord, and the tenant.

If Landlord does not exercise its rights pursuant to subparagraph ____ of this Article [*recapture right*], Landlord shall not unreasonably withhold or delay its consent to a proposed assignment of this Lease or subletting of the entire Premises, provided that, in each such instance, all of the following requirements shall have been satisfied: [*Note: Tenant ordinarily wants the landlord to agree to be reasonable as to any assignment of the lease or any sublease of all or part of the premises. It is unusual, but not unheard of, for a lease to limit the landlord's obligation to be reasonable to (a) assignments only or (b) assignments and subleases of the entire premises. This is one of those provisions that can slip by the tenant's attorney fairly easily because of the human tendency to think a provision reads as you think it should read, rather than as it in fact reads.*]

1. Tenant submits to Landlord by certified mail, return receipt requested [*why not allow the request to be submitted by any method, or expand to include overnight courier service*], a written request (the "Consent Request") for Landlord's consent which shall include (A) the

name and address of the proposed subtenant or assignee, (B) the terms and conditions of the proposed assignment or sublease, (C) the nature and character of the business of the proposed subtenant or assignee, and (D) current bank, financial and other credit information on the proposed subtenant or assignee. Tenant shall promptly supply Landlord with such additional information as Landlord may request [*Limit the landlord's requests to "reasonable" requests and require the landlord to make the request within an agreed time period*].

2. Tenant submits to Landlord an executed counterpart of the sublease or assignment, which assignment or sublease shall be in compliance with the requirements of subparagraph () and shall be conditioned on Landlord's consent, it being understood that no such assignment or sublease shall become effective until Landlord consents to the assignment or sublease.

3. In the case of a proposed subletting, the listing or advertising for the Premises shall not include a proposed rental rate [*add: provided, however, that Tenant or its agent may quote in writing directly to prospective subtenants the proposed rental rate*],

ALTERNATE: Tenant and its broker shall not advertise the space at a rental rate lower than the Landlord's asking rental rate for space in the building [*add: provided, however, that Tenant may quote in writing directly to prospective subtenants any proposed rental rate*].

4. Tenant shall not sublease the space at a rent less than the rents then being asked by the Landlord for space in the Building. [*This provision is a no-brainer. Subleases are generally distress transactions, and the tenant, unless operating in a very tight market, will not be able to find a subtenant willing to pay full market rent. Accordingly, although the landlord's desire to prevent the subtenant from undercutting the landlord's leasing efforts by leasing at under-market rents is understandable, the tenant cannot agree to such a condition.*]

5. Tenant shall not be in default of this Lease [*Add: beyond any applicable cure period. Tenant could try to limit to material defaults that aren't cured within the applicable cure period, but landlords don't have much sympathy for defaulting tenants and don't want to get into an argument about what's material*].

6. The proposed subtenant or assignee shall be a party whose financial net worth, credit and financial responsibility is, considering the

responsibilities involved, satisfactory to Landlord. [*Query whether a landlord should care about the financial standing of the assignee/subtenant if the original tenant has a substantial net worth, since the original tenant will remain liable under the lease. The landlord's response is that the landlord will, as a practical matter, have to deal with the consequences of a default by the assignee (and by the subtenant if the lease is terminated by reason of the tenant's default and the subtenant has attorned to the landlord) and therefore the landlord should be able to evaluate the financial standing of the proposed subtenant or assignee as if it were entering into a lease directly with the subtenant/assignee. Assuming the tenant has to live with a variation of this clause, how should it be limited? A simple "fix" is to state that the subtenant/assignee's financial net worth, credit and financial responsibility have to be "reasonably" satisfactory to Landlord. For a small lease, addition of a reasonableness requirement is a good, practical solution that provides some comfort. For a larger space, the tenant's attorney might attempt to negotiate an objective standard – for example, that the assignee/subtenant's net worth is not less than ten (10) times the amount of base rent payable over the balance of the term of the lease. From the landlord's standpoint, such a standard might be too limiting – an entity with a significant net worth may have little liquidity and liquidity and income are factors in determining whether an assignee/subtenant will be able to pay the rent. Sometimes the landlord suggests that the assignee/subtenant's net worth and financial responsibility will be deemed satisfactory if at least equal to the tenant's net worth and financial responsibility at the commencement date of the lease. If the tenant is a high net worth entity, the response to such a suggestion should be: thanks but no thanks. It may not be easy to locate an assignee/subtenant with a similar net worth if the tenant is a Fortune 50 company.*]

7. The proposed assignee's or subtenant's use of the premises complies with the provisions of this lease. *Note that the use of the space is already governed by the lease's use clause. If the use clause is very narrow (e.g., offices for conduct of a public relations business), the tenant should ask for an expansion of the use clause for subtenants and assignees or broaden the use clause itself to "general office use." If the landlord agrees to expand the use, it will need to add a provision excluding undesirable uses (e.g., no doctor's offices, consulates, government offices, uses that are prohibited by the terms of another tenant's lease, etc.). The tenant's attorney should review the "undesirable" uses, determine if the list is a reasonable one, and perhaps negotiate a provision that allows the subtenant/assignee to be engaged in an excluded use if the landlord is then leasing for the*

excluded use. The landlord should also consider adding a clause that the proposed occupancy shall not, in landlord's [reasonable] judgment, cause excessive demands on the building systems or create an unreasonable or excessive amount of traffic in the Building. Such a limitation is particularly important in a small, old building.

8. The character and reputation of the proposed assignee or subtenant and its financial standing and proposed use is in keeping with the Landlord's standards *[A general provision such as this one potentially gives the landlord carte blanche to grant or deny consent, since landlords tend to have high standards, which may be honored in the breach. It is preferable simply to provide that the subtenant/assignee will be reputable. To the extent the landlord wants the right to exclude a prospect because its character, financial standing or proposed use are not in keeping with the landlord's standards, the tenant may want to add the qualifying phrase "as exemplified by the existing tenancies and occupancies in the building." This can be a two-edged sword if the Building is occupied solely by Fortune 50 companies.]*

8. The proposed subtenant or assignee shall not be (x) a Person with whom Landlord or any Landlord Affiliate has negotiated or is then negotiating or discussing the leasing of space in the Building or in any building owned or leased by Landlord or any Landlord Affiliate (a "Prospect"); or (y) a tenant in or occupant of the Building; or (z) any Person that, directly or indirectly, is controlled by, controls or is under common control with any such Prospect, tenant or occupant. *[This provision is far too broad. The landlord is arguably entitled (at least, if it has sufficient leverage) to protection against a tenant raid on prospective tenants if there is space available (or shortly to become available); but this clause extends to other buildings, including buildings owned by affiliates. This particular clause was used by a real estate developer that owned or leased a significant number of buildings in New York City. If the clause had not been severely limited, it could effectively have prevented the tenant from leasing to any Class A tenant. How broad should the clause be? One possible compromise is that the tenant have the right to lease to adjacent tenants (up, down, and sideways), but be prohibited from assigning or subleasing to a person or entity if (a) that person or entity is currently in negotiations with landlord or was in negotiation within the last 6 months, and (b) the landlord has comparable space available or will have comparable space available within the next six months.]*

9. Tenant shall have granted to Landlord or its agent, at Landlord's election, the exclusive right to act as broker for the sublease of the Premises or assignment of this Lease. *[This clause is overreaching and should always be deleted. The tenant can't agree to it because the landlord's broker can be expected to lease the landlord's space first, the tenant's space last. That aside, this is not a good provision for the landlord either. If the tenant uses the landlord's broker and the broker fills the landlord's space before it leases the tenant's space, the tenant may stop paying rent on the ground that the landlord, through its broker, has deliberately sandbagged the tenant's efforts to sublease or assign.]*

10. Any subletting shall be expressly subject to all of the terms, covenants, conditions and obligations on Tenant's part to be observed and performed under this Lease and any assignment or subletting shall be subject to the further condition and restriction that this Lease or the sublease shall not be further assigned, encumbered or otherwise transferred or the subleased premises further sublet by the subtenant in whole or in part, or any part thereof suffered or permitted by the assignee or subtenant to be used or occupied by others, without the prior written consent of Landlord in each instance, which consent shall be granted or withheld in Landlord's sole discretion. If Landlord shall consent to any such further subletting by the subtenant or the assignment of the sublease, Section ____ *[profit recapture]* of this Lease shall apply to any such transactions as if the further subletting or assignment of the sublease were a proposed subletting or assignment being made by Tenant under this Lease so that Landlord shall be entitled to receive all amounts described in such Sections. *[This is a very long sentence that does one simple thing. It prevents a subtenant or assignee from further assigning or subleasing. If the lease has a short term (e.g., 5 years), such a provision may not be of much concern (except that a large company cannot let a provision like this prevent subleases and assignments to affiliates, merger transactions, consolidations, reorganizations, and a sale of substantially all of the assignee/subtenant's business). However, if the lease has a significant term, the tenant should make sure that assignees and subtenants have the same rights of assignment and subleasing as the tenant.]*

11. No subletting shall be for less than one-half of the Premises and shall be regular in shape and at no time shall there be more than two (2) occupants, including Tenant, in the Premises, all of whom shall have direct access through existing public corridors to elevators, fire stairs and core rest rooms. *[This is a provision that must be reviewed in context. If the space leased is a small space (e.g., 5,000 rsf), such a*

limitation is not unreasonable. The landlord doesn't want its building turned into a warren of small offices. On the other hand, if the tenant is leasing 6 floors, this provision limits the tenant to subleases involving at least 3 floors, which is an unreasonable limitation. Tenant's attorney should consult with the tenant and with its broker to determine what kind of limitation would be reasonable.]

12. Tenant shall reimburse Landlord on demand for any costs that may be incurred by Landlord in connection with said assignment or sublease, including, without limitation, any processing fees, attorneys' fees and disbursements, and the costs of making investigations as to the acceptability of the proposed assignee or subtenant. *[This is a common provision usually accepted by the tenant. But the tenant will usually negotiate to limit costs and attorneys' fees to "reasonable, out-of-pocket" costs and attorneys fees. Or the tenant may negotiate for a cap on attorneys fees.]*

13. Any sublease shall be in form and substance acceptable to Landlord. Any sublease shall expressly provide that any proposed sublease shall be for a term ending not later than one day prior to the Expiration Date, and shall provide as follows: (A) the sublease is subject and subordinate to this Lease and to the matters to which this Lease is or shall be subject and subordinate; (B) the subtenant shall not, without Landlord's consent or approval, take any action, which, if to be taken by Tenant, would require Landlord's consent or approval; (C) the subtenant shall, upon notice from Landlord that Tenant is then in default of this Lease, pay the rent under the sublease directly to Landlord, to be applied to the base rent and additional rent under this lease (and Tenant hereby consents to that payment and agrees that any such payment shall be credited against the subtenant's rent obligation under the sublease); (D) the subtenant shall, with respect to the subleased space and the subtenant's property, carry the insurance and furnish to Landlord the evidence thereof required by this lease to be carried and furnished by Tenant, and shall name Landlord and any other party designated by Landlord as additional insureds on its commercial general liability insurance, and (E) in the event of any termination, re-entry or dispossession by Landlord under this Lease, the subtenant shall vacate the sublet premises, unless Landlord, at Landlord's option, elects to take over all right, title and interest of Tenant, as sublandlord, under the sublease, in which event the subtenant shall, at Landlord's option, attorn to Landlord pursuant to the then executory provisions of the sublease. In the event of such attornment, Landlord shall not be (i) liable for any previous act or omission of Tenant under such sublease, (ii) subject to any offset that

theretofore accrued to such subtenant against Tenant, (iii) bound by any previous modification of such sublease or by any previous prepayment of more than one month's rent unless previously approved in writing by Landlord, (iv) bound by any covenant to undertake or complete or make payment to or on behalf of a subtenant with respect to any proposed alterations, improvements, or construction, or (v) bound by any obligations to make any other payment to or on behalf of the subtenant. *[This provision is a very good one for a landlord to include, especially the part about being able to collect rent from the subtenant. If the lease is a highly negotiated lease, the tenant may want to tinker with the limitations on landlord's liability. For example, the tenant might want to provide that the foregoing will not exculpate the landlord, if there is an attornment, from providing those services, repairs, maintenance, restorations and other obligations which landlord is required to perform under the lease with respect to the subleased space at landlord's expense after the date of such termination, reentry or dispossession. Also, the tenant will want the landlord to be reasonable with respect to its right to approve the form of the sublease, and should try to eliminate any right of the landlord to approve the substance of the sublease (especially the economics).]*

14. Any assignment shall be in form and content satisfactory to Landlord and shall include an assumption by the assignee of all of the Tenant's obligations under this Lease. *[Again, the form of the assignment agreement should be "reasonably" acceptable to the Landlord.]*

15. Tenant and any proposed subtenant or assignee shall execute and deliver Landlord's then standard form of consent. *[In some markets, Landlord consent forms have become bloated, overreaching agreements that unconscionably expand the liabilities and curtail the rights of the parties. Accordingly, at a minimum, the tenant should negotiate for the consent to be in a form reasonably acceptable to the tenant.]*

16. The nature of the occupancy and the use and the manner of use of the Premises by the proposed subtenant or assignee shall not impose on Landlord any requirements of the ADA *[Americans with Disabilities Act]* in excess of those requirements imposed on Landlord in the absence of such proposed subtenant or assignee or such occupancy, use or manner of use, unless such proposed subtenant or assignee shall have agreed to comply with each of such excess requirements and, at Landlord's option, shall have furnished Landlord with such security as Landlord may require to assure that such subtenant or assignee shall so comply. *[This provision seems like overkill and it's hard to see how*

it could be objectively applied. If the permitted use is an office use, this provision seems completely unnecessary. If the permitted use is a retail use or other place of public accommodation, the landlord is already exposed to ADA risks. The tenant is likely to argue that the landlord is already protected by the use clause and that the tenant is unwilling to live with such language because it cannot predict what impact such a clause would have on subleasing or assignment.]

There are as many clauses as there are landlords and they can all be negotiated to within an inch of their lives. Such an approach may not make much sense in the context of a small lease, but may be critical for a large space user. Accordingly, the tenant's attorney should review such clauses with an eye toward the size of the transaction, its client's subleasing and assignment needs, the practical effect of the various limitations, and the landlord's legitimate interests.

III. OTHER PROVISIONS

When negotiating any sublease or assignment clause, the tenant's attorney should always bear in mind that there are other lease provisions that indirectly limit subleasing and assignment rights. Overly restrictive alterations clauses and use clauses can effectively negate subleasing and assignment rights, as can provisions limiting the tenant's remedies (i.e., a waiver of monetary damages and limitation of remedies to injunctive relief). Accordingly, the tenant's attorney needs to review the lease as a whole, with attention to the practical impact of such provisions on the tenant's subleasing and assignment rights.