How to prepare for commercial tenant transfers: A landlord's guide

October 10, 2025

Are you looking for guidance on a tenant request to assign its lease or sublet a portion of its premises? This article sets out what each landlord should know in preparation for such a request.

Commercial landlords select their tenants carefully, often after a robust due diligence process on the tenant's financial covenant, as well as how this tenant fits within landlord's leasing strategies for the property. By the time the lease is signed, the landlord has satisfied itself that this particular tenant fits all of the landlord's requirements.

What if that tenant now wants to transfer? A tenant's reasons may vary but could include: sale of the tenant's business – perhaps tenant is retiring, its workforce and business operations have shrunk, and it no longer needs all the space and wants to offset costs, or tenant is restructuring for tax planning purposes. Being prepared for transfer requests can be critical in navigating what is often a complex set of rights and obligations in the lease.

1. Understand the nature of the transfer

Start by considering the types of transfers and their effect on your property.

- **Arm's length**
  - **Assignment**: Tenant transfers all its rights and obligations under the lease to a party.
  - **Sublease**: Tenant retains its leasehold interest but grants full or partial occupancy rights to a party for all or part of the remaining term, effectively grants a "subset" of its rights under the lease.
  - **Change of control**: Ownership of tenant corporation changes, shares amounting to a controlling interest are transferred to a party, while tenant entity remains the same.
- **Non-Arm's length**
  - Assignments, subleases and changes of control between related parties.
- **Legal effect**

Each transfer type has distinct implications on key considerations:

- Who is the tenant?
- Who is operating the business?
- Who is paying the rent?
- Who is liable under the lease?
- How are landlord rights and tenant obligations affected by the transfer?

2. Know your lease

- Does the lease address these types of transfers?
- Are they restricted and if so, how?
    - Is landlord prior consent required?
    - Preconditions for tenant to satisfy
        - **Examples:** no default, in occupancy and operation in entirety of premises
    - Documentation and information for tenant to provide
        - **Examples:** financial strength and creditworthiness, business references
    - Is this a "permitted transfer" without consent but with prior notice?
    - Is this a personal right to the original tenant?
- If not restricted, will the transfer be documented for record keeping purposes?
- Timing – is there a deadline for landlord response?

Other lease provisions to consider:

- **Termination or recapture rights**:
    - Is the landlord entitled to terminate the lease and take back the space as an option to consenting/not consenting?
- **Landlord costs:**
    - Is the tenant required to pay a fee before landlord will consider request, and is it refundable?
    - Are landlord's legal costs of document preparation paid by tenant?
- **Original tenant continuing liability:**
    - Does the original tenant and any indemnifier remain liable post-transfer?
- **Rights personal to the tenant:**
    - Does the original tenant have rights that are non-transferable?

3. Targeted due diligence

Have tools in place to evaluate proposed transferees:

- Financial strength and creditworthiness
- Business experience
- References
- Compatibility with existing tenant mix, exclusive use provisions and leasing strategies

These assist to determine risk, protect landlord's assets, and assess impact on existing tenants, landlord's desired tenant-mix and property operations.

4. Be ready to document the transfer – consent or acknowledgment

Develop template documentation for landlord's response to each transfer.

- Formal landlord consent agreement
- For non-consent transfers, an acknowledgement of the transfer transaction for administration purposes

Purpose of this documentation can include:

- Describing the transfer that forms the basis of landlord's consent
- "Curing" any minor default by way of lease amendments
- No release – confirming original tenant remains liable
- Stating what tenant rights continue
- Updating landlord and tenant notice details

Proper documentation minimizes the risk of future disputes and ensures the landlord has a reliable record of the transaction.

Final thoughts

Transfer requests are a normal part of the leasing lifecycle, but they can pose business and legal challenges if not handled carefully. BLG Beyond Leasing has extensive experience supporting landlords and tenants through the transfer process.

Thank you to Elaine Jair.

By

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