

Unique Office-Leasing Issues For Tech Companies: Part 1

By **Daniel Suckerman** (March 19, 2018, 5:15 PM EDT)

This article discusses issues that commonly arise in the negotiation of a lease of office space to a technology company. Specifically, this article covers (1) the tenant's use and operations, (2) assignment and subleasing, and (3) term provisions and expansion and contraction options. Although this article is written from the tenant's perspective, the considerations discussed herein are relevant to the landlord and its counsel as well.

This article focuses on leasing issues that arise due to the unique nature of tech companies and does not address general office leasing concerns.



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Introduction

The negotiation of an office lease for a tech company triggers most of the considerations that arise in the negotiation of a lease for traditional office space. However, a tech company's preferred manner of operating its business and its business life cycle present unique challenges and considerations. The prevailing theme is flexibility, and this is what a tech company's counsel should always strive to protect.

Use and Operations

When you represent a tech company, you need to understand, in detail, what your client intends to do in the space as it is often not as simple as operating a conventional office.

Permitted Use Provision

Tech companies are extremely nimble in their business operations and their leases should never impede operations. Thus, the permitted use provision of a lease should not limit the tenant's uses. The best formulation is general administrative and executive office, expanded to include any ancillary uses your client intends to conduct in the premises (e.g., conferences and events). The permitted use clause should never be limited to a particular line of business (e.g., marketing or app development). Although it is tempting to agree to this landlord requirement, even if the particular line of business is accurate when the tenant signs the lease, it may not be true in six months.

Moreover, in an assignment or sublet scenario (discussed in greater detail below), an overly limited or

restrictive permitted use clause will potentially hamper the tenant's ability to market the premises or, at the very least, give the landlord an unnecessary control lever.

Your client may come from a co-working environment (like WeWork) where coffee bars and beer are commonplace. Does your client want to have beer or other alcohol generally available for employees' consumption? Discuss this with your client's insurance consultant / risk manager to ensure the appropriate coverages are in place to protect against risks arising from this use. The landlord will potentially insist on these coverages in the lease.

If your client intends to host events, parties, conferences, etc., consider the following details that you may need to add to and negotiate for in the lease:

- Will these events just be internal for employees, or would a broader audience be invited?
- Will alcohol be served?
- Will catering be needed, and will the design and build-out of the premises satisfy these needs? Anything beyond a typical office kitchenette or warming kitchen will likely require specific negotiation.
- Does the applicable fire code or certificate of occupancy for the premises allow these intended uses and events?
- Does the building's lobby and elevator infrastructure support the rush of people that will come through the building at the start and end of events?
- Does your client want the right to have a representative or table in the building lobby to direct guests to the premises?

Density

It is essential to understand how many employees your client intends to have in the premises and to confirm that the necessary density (i.e., number of individuals permitted in the premises, usually denoted by people per rentable square feet) is permitted under the lease and applicable legal requirements. You should also confirm that the building services, and HVAC in particular, will support this density. This analysis is especially important when representing a tech company because of a tech company's typical space layout: open floor plan with very few private offices. Employees need very little space to use a laptop connected to the cloud. So, from the tenant's perspective, an open floor can support many more people than may be permitted under the lease and applicable legal requirements.

Not all leases will explicitly state a maximum density. All leases, however, will require that the tenant operate in accordance with applicable laws, regulations and codes. This requirement will capture the applicable building code sections and the premises' certificate of occupancy, which will likely impose a maximum occupancy of the premises. A typical formulation for office use is no greater than one person per 100 rentable square feet, but sometimes this is pushed to one person per 150 or even 200 rentable square feet. Failure of the applicable legal requirements or certificate of occupancy to support the density a tenant needs is sufficient reason for the tenant to move on and find different premises.

It is important not to think only about how many employees the tenant intends to bring to the space at the lease commencement, but how much growth the space will support. Successful tech companies can go through explosive employee growth. Once the space is maxed out from a density perspective, it will be time to think about subleasing and assignment, but the lease's density provisions should not create a premature move.

Sometimes the density caps in a lease are effectively buried in the HVAC provisions. The lease may explicitly state that the HVAC system supporting the premises is designed to heat/cool a certain density. In this situation, if the tenant wants a greater density, it may not be a lease default, but it would result in an uncomfortable working environment with no remedy to pursue the landlord for insufficient HVAC service. Your client may mitigate this by installing a supplemental HVAC unit, but that is a potentially costly expense that your client may not anticipate. In addition, your client may also need to go through the landlord for approval.

Building Services and Amenities

Tech companies, and their employees, have desires different from what typical office tenants have. If the tech company is moving into a building that does not already have a lot of tech company tenants, you may be in for a learning curve with the landlord. The guiding principle is to dig in deeply with your client to understand its business and its desired working environment to ensure everything is covered in the lease or at least raised and resolved. You should be mindful of the building services and amenities discussed below. This list, however, is not exhaustive.

Consider the following questions:

- Will the tenant have employees working after business hours and on weekends? The lease should explicitly state that the tenant has 24/7 access and that at least one passenger elevator will always be available.
- Does the building have 24/7 security?
- What are the building's standard business hours? The tenant may be able to negotiate here, resulting in less after-hours charges.
- What is the process and cost for obtaining after-hours and weekend HVAC? For example, how much notice will the tenant need to provide? Is there a minimum number of hours the landlord will charge the tenant? Is the per-hour charge negotiable?
- What amenities does the building offer? The lease must explicitly provide access to amenities (like a conference center, roof deck or gym), and the tenant needs to understand the process of how to reserve and utilize these amenities if they are shared with other users of the building. The landlord should not be able to discontinue the amenities unless they are discontinued for all similarly situated tenants and comparable alternates are provided.
- For buildings with parking lots, do any of the tenant's employees have electric vehicles, and does the building have electric vehicle charging stations?
- Do the tenant's employees want to bring pets to the office? This is a popular request at tech companies, and many landlords find it problematic. Service animals (an antiquated term is seeing-eye dogs) are typically permitted by applicable law, whether or not the lease provides for their use. However, the lease should clearly state that service animals are permitted. Beyond that, you must find out whether the tenant has a culture that invites employees and guests to bring pets to the office, and, if so, this must be specifically negotiated in the lease. Landlords that have experience with tech companies and operate buildings catering to these types of tenants will likely have a form lease provision permitting dogs with certain reasonable limitations (like size of the dog, number of dogs permitted at a given time, right to discontinue allowance if dogs are a problem, etc.).
- Do the tenant's employees bike to the office? If so, consider the following:
 - Are employees permitted to bring bikes in the passenger elevators?

- Will employees be required to use the freight elevator? Will there be a charge for using the freight elevator?
- Is there an area in the building for bike storage? Can that be used at no additional cost?
- Will part of the premises be used for bike storage?
- Is there a bike sharing station at the building?

Build-Out

Often with tech companies, the build-out (i.e., the initial construction of tenant improvements at the premises) is straightforward: a few private offices and lots of open space for collaboration. The network is wireless, so employees do not necessarily need to be tied to a set workstation. You should consider the following build-out related issues when representing a tech company:

- Does the premises have sufficient electrical capacity for the tenant's desired uses?
- Does the premises have sufficient HVAC capacity for the tenant's intended density?
- Are there any aspects of the tenant's intended build-out that may be considered "specialty alterations" by the landlord that would need to be removed and restored at the expiration of the lease term? In particular, consider the following:
 - If the kitchenette/pantry area is beyond the typical office user, you should be sure to exclude this from the definition of "specialty alterations" requiring removal and restoration.
 - Landlords may require the removal of wiring and cabling prior to expiration of the term. Even if the tenant is cloud-based, the wiring and cabling can be substantial. The tenant should be sure the contractor that installs the wiring and cabling will facilitate its removal at the end of the term. This is of concern if the premises is eventually subleased, because the sublessee will need to assume the obligation to remove and restore, or the sublease will need to end early enough prior to the lease expiration date to allow the tenant to come back in and remove.
 - Sometimes something less obvious is deemed a specialty alteration such as a special paint (whiteboard or chalkboard) that cannot be simply painted over but rather needs to be removed.

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