



Commencement Date Agreements

from the Landlord's Perspective

By Brian D. Womac

During every lease negotiation, the issue of term is discussed from the very beginning. The process of negotiating a lease starts with many issues, but lease term is one of the biggest. Lease term is basic. The parties agree on either on a 36-, 48-, or 60-month term and move on to other issues.

The issue lingers when the parties are negotiating a lease for space that is either already occupied or requires significant improvements before the lease commences. What happens when you are negotiating a lease and there is an existing tenant who is still occupying the lease space? How do you know the existing tenant will move out in time for the new tenant to take possession? Getting a tenant out of the lease space, even if the lease has expired, could take several months.

How many new leases require landlords to build out the lease space? Time required for plan approval and permitting those plans can take several weeks to months. With occupying tenants and delays in securing building permits, the anticipated date for commencement can be hard to predict. What language is included in the lease to protect the landlord for delay in tendering possession?

Some bigger problems occur when leases are negotiated over several months and the initial tender date no longer works but wasn't changed in the negotiated lease. Commencement dates are always one of the first items agreed upon. Most tenants will require a hard date for commencement. Most landlords will try to keep the commencement date floating.

If there is a hard date for commencement, landlords should have full control over the lease space and be able to tender the space when promised. If you are going to include a floating commencement date, even if your lease form defines a commencement date adequately, landlords should require a Commencement Date Agreement or letter to be signed by the tenant after the commencement date has begun.

The Commencement Date Agreement does more than just establish the lease term. This document shuts out any possibility for the tenant to complain about late delivery or that the landlord failed to deliver the lease space as required by the lease. Commencement Date Agreements can and should get the tenant to acknowledge that the landlord has fulfilled all the requirements of tender and that the premises are acceptable.

Problems can arise if the tenant's lease commencement date is delayed and no agreement on the lease term is acknowledged in writing by the parties. The problem likely won't arise until the tenant is placed in default for nonpayment or other issue. Rest assured that if the tenant is placed in default, the tenant will bring up any issues with tender and the landlord's failure to deliver the premises timely.

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Most lease terms don't start off the first of the month or even the month anticipated. Commercial lease forms should have a paragraph included in the lease form to address this issue. Simple language to float the term could be included in the lease form as follows.

Notwithstanding any other provision of this Lease to the contrary, if the Expiration Date would otherwise occur on a date other than the last day of a calendar month, then the Lease Term shall be automatically extended to include the last day of such calendar month, which shall become the Expiration Date. Upon the Commencement Date as defined herein, the parties agree to enter into a Commencement Date Agreement setting out, among other things, the Commencement Date and Expiration Date of the Lease.

The parties' lease term should be as negotiated. Usually the 36- or 60-month lease term remains the same even if the commencement is delayed. The above language should be acceptable to both the landlord and the tenant.

A bigger issue is delay in tendering the lease space beyond what is acceptable to the tenant. Landlords don't want to be placed in default for delay in delivering possession of the lease space, yet some tenants will try to include language that places the landlord in default for not delivering the lease space by a certain date or request abatement of rent for any delay. Abatement of rent seems reasonable, but allowing tenants to terminate or self-help remedies to finish out the lease space is not acceptable to landlords.

If the lease is properly worded, the lease term will commence either on a certain date or event. The better way to protect landlords is to make the commencement date language as follows:

Commencement Date shall be on the earlier of the date Tenant takes possession or [hard date here].

Landlords should strive for this simple language dealing with the floating commencement date.

When commencement occurs, the parties should enter into an agreement on the commencement date and lease term. The Commencement Date Agreement should include at least the following:

- 1 Tenant has accepted the Premises and acknowledges that all construction and improvements performed by Landlord are in good and satisfactory condition.
- 2 Landlord has tendered possession of the Premises in accordance to the terms of the Lease.
- 3 Landlord and Tenant agree that the Commencement Date of the Lease shall be ____ and the expiration date of the Lease shall be ____.
- 4 Rent has commenced on ____.
- 5 That the Lease is in full force and effect.
- 6 Tenant has not assigned, encumbered or pledged the Lease or any leasehold improvements. Tenant has not sublet or granted any right to use or possession of the Premises.
- 7 To the extent that any part of the above conflicts with the terms of the Lease, the provisions of this agreement shall govern and control.

The above should be included in a letter or agreement, signed by the tenant, and placed in the tenant's lease file. It is advisable to go ahead and put a sample Commencement Date Agreement form as an exhibit to your lease form. By attaching the form to your lease, the tenant is obligated to sign the document and acknowledge the items you set out therein.

It is imperative that you make sure your lease form has a provision for a floating commencement date as well as an expiration date. There are lease forms out there currently being used by landlords that fail to address the floating term. If you don't float your expiration date along with your commencement date, you may end up with a shorter term than anticipated.

If you are already into the lease term and your lease file does not contain a Commencement Date Agreement or something similar and/or if you believe there is a problem with the terms of the lease, the

owner can require the tenant to sign an Estoppel Certificate. The Estoppel Certificate, like the Commencement Date Agreement, will settle any disputes on the terms and/or tender of possession. **N**

Brian D. Womac is celebrating 30 years as a licensed attorney and specializes in commercial landlord/tenant lease negotiations and litigation. His client base consists of corporations, partnerships, construction companies, lending institutions, insurance companies, investors, management and leasing companies, and many other businesses owning real estate. Mr. Womac has been board certified in commercial real estate law since 1991 and has personally negotiated and litigated commercial landlord/tenant matters for over 28 years.