



When do I **PAY RENT?**

By Thad Armstrong

Question #1: When Am I Required to Start Paying Rent?

I recently wrote an article for NBIZ titled “Ten Questions You Need to Ask about Your Lease.” Each of the questions in that article touched upon an important issue facing tenants when negotiating a commercial lease agreement. Following will be the first in a series of articles in which I will focus on one of those ten questions, giving you a better understanding of the critical issues controlling your and your landlord’s rights and obligations under your lease agreement.

The date on which a tenant is required to start paying rent is typically referred to in the lease as the “commencement date” or the “rent commencement date.” This article will use the term “rent commencement date” for the sake of consistency.

Rent Commencement Date
The rent commencement date of the lease should be determinable by objective means. In other words, at the moment the lease is signed, both the landlord and the tenant should know exactly when the rent commencement date will occur; nothing should be left open to differences in opinion or interpretation. It is common for the rent commencement date to occur upon the occurrence of a future event—the completion of construction, for example. If this is the case, the event that will trigger the rent commencement date should itself be determinable by objective means. In the case of the completion of construction, for example, the objective means for determination could be the issuance of a certificate

of completion by an architect or the issuance of a certificate of occupancy by the local authorities.

Tenants should avoid any circumstance that could result in the rent commencement date occurring prior to the date on which the tenant’s space is ready for the tenant’s occupancy. If, for example, the landlord is responsible for preparing the space for the tenant’s occupancy, the rent commencement date should never fall prior to the date on which the landlord has completed the improvements to the space.

Although there are many ways to set the rent commencement date of a lease, the following methods are the most common.

Exact Date
The advantage of simply stating an exact date for the rent commencement date is obvious: certainty. Stating an exact date for the rent commencement date will allow both the landlord and the tenant to plan without any chance for disagreements or questions about when the payment of rent is to begin. Stating an exact date for the rent commencement date is appropriate if possession of the space will be given to the tenant at the same time the lease is signed. If this is not the case, then tenants should resist stating an exact date for the rent commencement date. The risk is that the rent commencement date may occur before the space is ready for the tenant’s occupancy. For example, let

us assume that the lease is signed on January 1 and the lease states that the rent commencement date will occur one month later, on February 1. Let us assume further that the tenant expected to receive possession of the space by January 7, a week after the lease was signed. If possession of the space is actually not given until January 14, the tenant will have been deprived of an entire week of expected occupancy of the space, but the rent commencement date will remain unchanged at February 1. Many tenants count on being in possession of the space for some initial period of time before being required to pay rent in order to install furniture, computers, and other equipment and do whatever else is necessary to operate their business. If the tenant will not be given possession of the space at the same time the lease is signed, then the method described below for determining the rent commencement date is more appropriate.

A Period of Time after Possession
A common method for determining the rent commencement date is simply to state that it will occur after the expiration of a period of time following possession of the space. For example, the lease could state that the rent commencement date will fall 90 days after the landlord gives the tenant possession of the space. One advantage of this strategy for the tenant is that the tenant will not be faced with any obligation to pay rent prior to being in

control of the space. One advantage for the landlord is that it will have the flexibility to deal with the possibility of a prior tenant's holding over in the space. There is also some certainty: once possession is given to the tenant, the rent commencement date can be determined by objective means.

When Does Possession Occur?

Before answering this critical question, a related question must be answered: Who is responsible for preparing the space for the tenant's occupancy? If the tenant is responsible, then possession should occur when the space is vacant and the sole right to occupy the space has been turned over to the tenant. If the landlord is responsible, then possession should not occur before the landlord has completed the improvements, irrespective of vacancy. Put another way, the clock should not start ticking on the rent commencement date until (1) the space is vacant, (2) the space is in the condition on which the landlord and the tenant have agreed, and (3) the tenant is in exclusive possession of the space.

Delay

There are risks to using the period-of-time method of determining the rent commencement date. The greatest risk to the tenant is delay in receiving possession of the space. Most businesses lease new space because of an immediate need to expand or improve their current situation. If a tenant expects to be in possession of its new space at a certain time, delays could have real consequences for its business. For instance, the tenant may be forced to pay double rent for holding over in its current space, or the tenant may have hired new employees under the assumption that a larger office would be available. These situations could be disastrous for the tenant. To help deal with these risks, the tenant should have certain rights and remedies for delayed possession, which will be discussed in detail in the forthcoming third installment of these articles, titled "What If the Landlord Does Not Have My Space Ready When I Need It?" **N**

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**The information in this column is not intended as legal advice but to provide a general understanding of the issues. Readers with legal problems, including those whose questions are addressed here, should consult attorneys for advice on their particular circumstances.*