MODEL LEASE CLAUSE

Set Clear Limits on Landlord Duty to Mitigate

Many states require landlords to mitigate the damages they incur as a result of a tenant's breach by actively seeking a new tenant to take over the space. In states where it's not mandatory, tenants may ask to include mitigation of damages language in the lease to ensure that the landlord won't simply let the space remain vacant knowing that the tenant is on the hook for the resulting income losses. This is an acceptable demand, a New York City leasing attorney advises, provided that you establish clear limits on what your duty to mitigate does and doesn't require you to do, as the Model Lease Clause below does. While designed for use in non-mandatory mitigation states like New York, the clause can also be adapted for use in mandatory states. But speak to your attorney first. Thus, for example, the "reasonable commercial efforts" language may be unsuitable in states where statutes or court rulings dictate that landlords use "best efforts" to mitigate their damages.

MITIGATION OF DAMAGES

a. Landlord Duty to Mitigate. In the event that Tenant voluntarily surrenders the demised premises, Landlord shall endeavor to use commercially reasonable efforts to mitigate its damages in accordance with the terms set forth below.

b. Limitations. Notwithstanding the immediately preceding sentence, Landlord shall be under no obligation in re-letting the demised premises for purposes of mitigating damages to:

(i) Give priority to the rental thereof over other available space in the Building;

(ii) Modify the tenant mix in the Building that Landlord seeks to achieve;

(iii) Contract with any party on a rental below fair market terms, as determined by Landlord in its sole discretion;

(iv) Contract with any party that fails to meet Landlord's financial standards and qualifications for tenants, including but not limited to Landlord's standards of adequate creditworthiness;

(v) Contract with any party that does not meet the requirements of any ground lease or mortgage encumbering the Building;

(vi) Contract with any party that could impose an increased burden on the services, facilities, or infrastructure of the Building; or

(vii) Contract with any party represented by a broker, agent, or salesperson who requests of Landlord a commission in an amount or on terms unacceptable to Landlord.