

Real Estate in the U.S.

Location. Location. Location.

Where a company chooses to locate its business may be the second most important decision it makes after determining its corporate structure. The decision rests on understanding the operational processes and the facility needs as well as determining the appropriate communities and neighborhoods for the business. Although management may embark on looking for space on its own, it will probably want to seek out an experienced real estate agent who understands the region, the going rates for spaces and the terms of a lease in that area.

Commercial property consists of seven major categories: office, retail, industrial, high-tech, land brokerage, investment property and hotel/resort properties. Real property consists of land, easements, improvements, buildings, and fixtures permanently attached to buildings. Choosing the right space involves zoning, employee pool, and customer base, industry/ nature of the business and size of the firm. Each locality regulates zoning and building construction and alteration, as well as the use and safety of the premises. The location and building must be appropriately zoned for a company's operation and have a "certificate of occupancy". From an exterior perspective, consider the edifice, the surrounding block and community, location to customer base and any necessary supporting facilities such as parking lots and loading docks. One should check for special tax incentives for locating in certain designated areas. Expansion and relocation laws generally do not distinguish between domestically owned and foreign-owned firms.

A company's place of business contributes to its profitability. Therefore, any space considerations should include an analysis of how will a particular space foster efficient business operation, present the business in a positive light, and allow for future business growth in an economically viable manner. Failure either to comply with regulations or to obtain proper permits and licenses can result in substantial fines. The balance of this section covers issues to consider prior to signing a lease¹. Most lease terms are subject to negotiation. All agreement terms should be obtained in writing.

Signing a lease

A foreign party may lease real property for the purposes of occupancy. In many states, commercial leases are not covered under consumer protection laws that normally safeguard tenant rights. Rather, the law treats commercial leases as contracts between knowledgeable business people. Leases represent a significant financial investment on the company's part and since they are legally enforceable documents, having an attorney review the lease is highly recommended, even if it's a form lease, to make sure the management understands exactly what it is agreeing to and to ensure that its interests are protected. The lease should spell out exactly the space to which the company is entitled and when and who is granted access, including the exact square footage of the premises as well as the total rentable square footage of the building. Any discrepancy in reported space and actual space becomes a bargaining tool. If the premises are not in move in condition, the lease should spell out any needed repairs, who has responsibility for the repair, replacement or maintenance, and the timeline. A redress clause

¹ This section also includes three appendices: Glossary of Real Estate terms, Metric conversions, and Property Category and Sub-Category Definitions.



should account for any business delays. Lease provisions generally prevail over the rights of other parties. A lessee must be especially vigilant with repairs that must be made to bring the property into compliance with any legal codes. The building must be “up to code” for fire, health and safety regulations. In addition, all legal requirements must be met. A company should check its C of O for the permitted uses of the space and make sure that its operations are in compliance. If the C of O does not include your proposed use, either you or the landlord must be deemed responsible to obtain a new certificate. In the event that a landlord fails to bring the property into line with all codes and laws or it falls out of compliance, the company should have a lease cancellation provision. A “pre-lease” covers space in a multi-tenant office building that has not yet received a C of O.

The U.S. has no set formula for pricing and structuring a lease. A lease structure may be for any periodic payments; payments may be paid in advance, in arrears, deferred, waived or abated; rent may be fixed or have escalation triggers. In the U.S., it is not uncommon to be charged for building operating costs, taxes, and utility fees as well as a security deposit, late fees, etc. A business must be clear on how these charges are calculated and on what basis. Services should be adequate for the business. A company may want to require its landlord to provide a detailed, certified list of expenses to support proposed increases. A provision that gives your company the right to audit the landlord’s books can be included into the lease contract. These variable and complex formulas are generally handled by engaging an expert.

The Term of Lease and Permitted Uses

Most leases try to balance the security of a long-term economic relationship with the flexibility to manage changing market conditions for both the lessor and the lessee. The U.S. imposes few limitations on duration. A lease term of one year or more must be in writing. A lease term of over three years should be acknowledged and recorded in the County where the property is located.

For any commercial lease, secure explicit clauses that permit early departure, sublease or assignments. The renewal terms and rates, any limitations on use of the premises, landlord’s obligations to obtain a non-disturbance agreement from current and future lenders in the event of a sale or transfer and the dispute settlements processes should also be clear in the lease contract. A retail establishment may be able to attain a non-compete provision. If your company defaults or becomes delinquent on its lease, a landlord may terminate the lease, accelerate payments, or try to collect damages.

To secure rent payments, some states allow the landlord to have a lien for two months back rent on commercial property; this lien has priority over all other liens except for tax, labor and prior recorded tenancy. A lender may require the landlord to waive his lien if granting a loan secured by a lien on the asset. State laws vary on available remedies and ease of eviction.

A Word About Real Estate Personnel

Most states have adopted laws and regulations affecting professionals engaged in real estate sales and brokerage. Certain basic principles apply nationwide. Real estate professionals, as well as potential buyers and sellers, must familiarize themselves with the specific rules in their own jurisdiction.²

² Common Law Agency & its Application to the Real Estate Profession by Alan R. Seher and Marc S. Weissman, Weiss & Weissman, Inc.

