

Chapter 6 Homework: Lease Checklist & Distribution Agreement Checklist

You have probably already signed at least one lease in your life by the time you read this book. But it is likely that you signed a residential lease for an apartment or house. Residential leases are subject to tenant protections set out in state and local law. Commercial leases are not. Commercial landlords are, by nature, aggressive, overreaching, and very unbalanced in drafting their contracts. If you just sign what you are given, you may end up with huge hidden risks and no real way to get out of the contract or force the landlord to make it right.

Story: Hurricane Harvey devastated the City of Houston. Water from the flooded bayous poured into basements and even ground level and first floors of major office buildings. Roofs caved in and elevator shafts filled with water. HVAC systems died. In short, the buildings became unusable – not just for a week or two but for years. Tenants are still suing landlords to try to get out of leases, force the landlords to remediate damage, and recover some funds. Those tenants who signed the form leases provided by the commercial building managers are having a very, very tough time recovering anything; and some have filed for bankruptcy. Those who negotiated some key protective terms have moved on with their lives.

A. STANDARD REVISIONS. Standard revisions made to nearly every commercial lease:

1. **Notice Addresses:** Accurate notice addressees for Tenant (including addresses for “before” and “after” the Commencement Date, if needed), including a copy to Tenant’s leasing counsel.
2. **Landlord’s Consent:** Not to be unreasonably withheld, conditioned or delayed wherever encountered, but especially as to assignments and subleases.
3. **“As Is”:** Exclude latent defects, Hazardous Materials and work required to be done by Landlord.
4. **Commencement Date:** Clarify/correct definition to protect Tenant.
5. **Leasehold Improvements:** Clarify/correct Landlord’s Work, Tenant’s Work, etc. [NOTE: Any work not specifically included in Landlord’s Work will likely become Tenant’s responsibility].
6. **ADA:** Clarify/correct the parties’ respective responsibilities (if applicable). [NOTE: Any ADA work not specifically required to be performed by Landlord could become Tenant’s responsibility].

7. **Security Deposit:** Clarify/correct provisions re Security Deposit, including Landlord's obligation to provide a detailed accounting of any portion not returned by Landlord.
8. **Rules and Regulations:** Should be enforced in a non-discriminatory manner.
9. **Maintenance and Repairs.** Clarify each party's maintenance obligations. [NOTE: Any work not specifically required to be performed by Landlord could become Tenant's responsibility].
10. **Landlord's Right of Entry:** Bolster limitations on Landlord's right to enter the Premises, such as prior notice except in emergencies; accompanied by an agent of Tenant; minimizing interference; work to be performed after hours; controlled access to "secure" areas; etc.
11. **Parking:** Clarify/correct parking rights and areas. Quite variable, depending on facilities.
12. **Service Interruptions:** Clarify/correct Tenant's rights, including Landlord's negligence, rent abatement and termination.
13. **Insurance:** Clarify/correct insurance provisions, including Tenant and Landlord requirements; blanket policies; waiver of subrogation; etc. The insurance and indemnity provisions should be reviewed by Tenant's "risk manager".
14. **Indemnities:** Make indemnities mutual. Resist "express negligence" provisions.
15. **Casualty and Condemnation:** Clarify/correct provisions regarding notice of reconstruction period; both parties' termination rights; rent abatement following event and during reconstruction; damage to common areas; right to proceeds and awards; etc.
16. **Assignment and Subleasing:** Add protections, such as Landlord's consent deemed given if no response within 15 days; original tenant's liability not continuing into subsequent renewal periods with assignee; splitting upside rent 50/50 after deducting expenses; and consent not required for assignment in connection with merger, consolidation, reorganization or sale of substantially all assets or stock.
17. **Defaults & Remedies:** Add protections, such as 5 days written notice; extendable non-monetary default cure periods; duty to mitigate with specific actions required; Landlord's Default; etc.
18. **Limitations on Landlord's Liability:** Clarify Landlord's "interest in the project" to include rents and sale proceeds.
19. **Consequential and Special Damages:** Add mutual waiver.
20. **Surrender:** Clarify/correct provisions re surrender of Premises, including disavowing any obligation by Tenant to remove leasehold improvements.

21. **Holdover:** Reduce rent multiplier factor and resist indemnity for lost deals.
22. **Hazardous Materials:** Landlord reps no knowledge; Tenant disclaimer for pre-existing HazMat or any caused by anyone other than Tenant; and right to terminate for extended contamination event not caused by Tenant. Who handles asbestos removal if required?
23. **Force Majeure:** Add or make mutual; and add pandemics.
24. **Brokers:** Clarify/correct provisions, mutual indemnity, and commissions payable by Landlord pursuant to separate agreements.
25. **Attorneys' Fees:** Clarify/correct provisions re Attorneys' Fees, making mutual based on prevailing party.
26. **Governing Law; Venue:** Should be in County and State where the Property is located.
27. **OFAC:** Make mutual and add where missing.
28. **Conditions Precedent:** Add Landlord representations re clear title and compliance with laws.

B. CUSTOM PROVISIONS. Provisions typically customized to each deal:

1. **Delayed Delivery of Premises:** Tenant may need to terminate if Landlord fails to deliver the Premises in the required condition by a specified "outside date" through no fault of Tenant.
2. **Early Access:** Tenant usually needs early access to the Premises for inspection, measurements, photos, space planning, monitoring work progress, installing FF&E, etc.
3. **Building Permits:** Tenant may need an "outside date" by which the building permit must be issued, whether being obtained by Landlord or Tenant.
4. **Operating Expenses:**
 - (a) Annual cap on "Controllable" Operating Expenses.
 - (b) Grossing-Up only applies to occupancy-related expenses.
 - (c) Cap on management fees (3%).
 - (d) Exclusions from Operating Expenses and Taxes – full bore or basics?
 - (e) Audit Rights?
5. **Related Users:** Will any independent contractors or other non-employees be routinely occupying and using space in the Premises?

6. **Tenant Self-Help:** Does Tenant need the right to make repairs if Landlord fails to do so after written notice or in emergencies? Usually not appropriate in multi-tenant office or retail leases; more appropriate in single tenant facilities.
7. **Utilities:** Premises already metered for utilities? If not, who is responsible for installing them?
8. **Signs:** Any building, door, monument or pylon signage rights? If so, get pre-approval of Tenant's standard signage package and attach as a lease exhibit.
9. **SNDA:** Does Landlord have a loan on the project? If so, does Tenant need a Subordination, Non-Disturbance and Attornment Agreement from Landlord's lender?
10. **Landlord's Lien Exclusions:** Will Tenant need any purchase money or leasehold financing?
11. **HVAC:**
 - (a) Existing or new rooftop units? If new, who installs and at whose expenses?
 - (b) If existing, ask for an inspection report and a warranty from Landlord (12-24 months).
12. **Guaranty:** Seek limitations such as base rent only, initial or shorter term, burn-off, \$\$ caps, etc.

C. SPECIAL RETAIL PROVISIONS:

1. **Exclusive:** Do Tenant need an exclusive to protect its business?
2. **Percentage Rent:** Exclusions from "Gross Sales".1
3. **Continuous Operations/Go-Dark Clause (Retail Only):**
 - (a) Is Tenant willing to covenant to continuously operate its business in the Premises?
 - (b) Does Tenant need the right to close shop for an extended period (60, 90 180 days)?
4. **No Build Zone:** Does Tenant need to block off area to ensure visibility to main road?

NOTE: This Checklist is not a comprehensive catalog of all potential issues a tenant may encounter in a commercial lease submitted by a prospective landlord; rather, this is an overview of the most common issues a tenant will likely face. It should be clear from the foregoing checklist that leasing is far more complex and fraught with risk than most people think. Moreover, the issues raised above are stated in short-hand fashion, which will not suffice in a

formal legal lease agreement. Finally, every lease transaction is different in certain ways from other deals, however, similar they may seem. The facts on the ground matter greatly. For these reasons and more, please retain an experienced leasing attorney to assist you in reviewing, understanding and negotiating your commercial lease.

Distribution Agreement Checklist

D. Key Elements of Independent Distribution Agreement

(Pro Distributor)

1. **Definition of Product** (exactly what are you authorized to sell)
2. **Definition of target market/buyers:** Are there specific targeted customers? (e.g. State of Texas, First Responders, US Coast Guard, St. Luke's Hospital System)
3. **Are there any excluded markets in the territory?** (e.g. reserved to other Distributors)
4. **Definition of Territory:** regional, national, or multi-national
5. **Definition of Exclusivity** per product, territory, or target buyers
6. **Term:** How long does the contract last?
7. **Who can terminate it?**
 - a. Why/when/how?
8. **What commissions does distributor receive?**
 - a. % of gross
 - b. Fee per item
9. **Warranties:** *The Company warrants that Company Products will conform to published specifications and be free from defects in material or workmanship for a period of one year from the date of delivery or for the period of the Company's standard warranty for Company Products, whichever is greater.*
10. **What samples or product demo/marketing material are paid for and authorized by Seller?** (Will you receive a "kit" with samples, demos, product promotional materials etc.)
11. **Is the Distributor required to attend certain conventions, demos, or events?**
 - a. Who covers the cost of attendance?
12. **Are you allowed to set up your own website and social media presence?**
13. **Can you rep other, non-competitive products?**
 - a. Can you rep competitive products?

14. Does Distributor have any minimum sales requirements?

- a. Over what period of time?
- b. Is this reasonable in the marketplace?

15. What sales terms does Seller promise?

- a. Price
- b. Delivery
- c. Quality
- d. Warranty
- e. Special qualifications, like medical certifications etc.

16. Can Seller "compete" in the same market?

17. Can Seller agree to change terms for one prospective buyer but not for others?

18. Is Distributor allowed to offer "most favored nations" terms?

19. Contract should have complete and explicit anti-bribery terms applicable to both Seller and Distributor.

20. Who owns the Seller? OFAC rules, Anti-money laundering rules

21. Can the materials be legally imported?

22. Indemnification of Distributor for damages directly or indirectly arising out of:

- a. Material breach by Seller of Distribution Agreement or any PO or Sales Agreement
- b. Misrepresentation by Seller
- c. Named in a lawsuit by a buyer for any reason other than malfeasance, material misconduct, or fraud by Distributor
- d. Breach of NDA
- e. Breach by Seller of exclusivity arrangements

23. Standalone or integrated NDA – recommend term of agreement plus 1 yr.

24. Optional

- a. Non solicit
- b. No hire