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BANKER & TRADESMAN

THE REAL ESTATE, BANKING AND COMMERCIAL WEEKLY FOR MASSACHUSETTS

A PUBLICATION OF THE WARREN GROUP

SHARING CAN BE HARD

Co-Working Setups Offer Flexibility, Challenges

Risks Of Distributed Work Space May Outweigh Rewards

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SPECIAL TO BANKER & TRADESMAN

When your mother encouraged you to be nice and share with others, she likely did not have office space in mind. Otherwise, she would have warned you that office space may only be shared with others if the lease permits it.

JOHN SLATER

A new issue involving office leases has emerged as a result of the co-working space movement. Some of the multisite chains, such as WeWork, WorkBar and NextSpace, are now also offering a network of shared office space or "distributed work space." These networks of shared work space match individual workers and small companies with businesses that have leased office space but find themselves with excess capacity. The shared workspace users receive the membership benefits offered by the co-working provider, such as access to community events, amenities and other services.

While such an arrangement appears to be a win-win, there may be adverse consequences for both the office tenant and the shared workspace user if the requirements of the tenant's lease have not been taken into account.

Innovative Options For Startups

Typically, a co-working provider leases space in an office building and divides it into smaller units, including open work areas and some individual offices. Membership fees are charged to the users of the space.

The fee structure varies for the startups, small companies and freelancers that are the primary users of co-working space. Members receive office support services and amenities like kitchenettes. Co-working centers usually include conference rooms and social events for networking. Users of co-working spaces generally do not work for the same employer or even know each other before hand.

There are various reasons why startup companies and others are drawn to these spaces. Many like the flexibility that a short-term occupancy agreement offers over a lease. Others seek to collaborate with people in the same field. The social interaction offered by co-working spaces is also an attraction. Reflective of the growth of co-working, Deskmag.com was developed as a resource to track co-working developments.

The Distributed Work Space Model

Most office leases restrict the tenant's right to allow third parties to occupy the leased space, whether by assignment or sublease. Landlords impose these restrictions for various reasons, including a desire to maintain control over the type and character of the businesses located in their buildings, concerns about security and the potential adverse impact on other building tenants.

If there is vacant space in a landlord's building, the landlord does not want competition from its existing tenants. Also, if there has been an uptick in rental rates, landlords typically believe that they, not their tenants, should receive the benefit of rental increase.

The specific language of such lease restrictions is critical to determining the rights of the respective parties and has important ramifications for landlord, tenant and the shared space user. Typically, in adding a portion of leased space to its network, the co-working provider will enter into a license agreement with the tenant that has the excess space available. In turn, the co-working provider sub-licenses portions of this excess space to users who are in the market for short-term space.

From the landlord's perspective, the lease may not specifically prohibit licensing, but only prohibit assignment or subletting. In this instance, the landlord may not be able to prevent its tenant from licensing excess space to a co-working provider who will in turn grant occupancy rights to third parties. Landlords must therefore give careful consideration to the scope of the occupancy restrictions in its lease.

A tenant may be committing a default by entering into a license agreement with a co-working provider without the landlord's consent. In addition to the risk of the lease being terminated, while the default continues the tenant may be prohibited from exercising other important rights, including the right to sublet or to extend the term of its lease.

The shared space user needs to be assured that the tenant has the right to allow the shared space user to occupy the premises either as of right under the lease, or by obtaining the landlord's consent. Otherwise, the shared space user may find itself having to relocate to another space, causing disruption to its business and additional cost. If the shared space user is at a critical stage in development of a new product or rolling one out, a forced move may be particularly disruptive.

Since this is a relatively new phenomenon, there is little or no case law regarding the potential liability of the co-working provider to a landlord, tenant or to a shared space user who is forced to leave space earlier than anticipated.

Each shared office space arrangement presents different issues based on the language of the lease and the law of the jurisdiction in which the space is located. While there are many benefits to co-working arrangements, each party needs to carefully consider the implications of shared space arrangements. ■

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