



## A Legal Guide to Understanding Lease Agreements for Commercial Tenants



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## Introduction

Unlike residential tenants who have certain statutory rights and protections, practically all of commercial tenants' rights in Massachusetts are limited to what is set forth in the lease agreement. Therefore, it is critical that commercial tenants understand what is in their leases to determine what rights and obligations they will have.

We have created this commercial lease toolkit for a dual purpose: (1) to provide an explanation of common provisions in commercial leases and how to interpret and apply these provisions, and (2) to recommend provisions that commercial tenants may try to include when negotiating a new commercial lease. This toolkit is intended to enable small business owners and community organizations who work with commercial tenants to identify ways to make a lease agreement more tenant-friendly. All references in this document to "you" refer to commercial tenants.

This toolkit has two parts:

First, we have included a list of common scenarios where we identify provisions in a commercial lease that commercial tenants can initially look to in order to determine their rights and obligations. This section includes difficult situations, such as receiving a notice of eviction or discovering that substantial damage has occurred on the leased premises.

Second, we have included a sample lease containing customary lease provisions. We have included explanatory comments, drafting tips, and tenant-friendly provisions that tenants may want to include in their commercial lease.

Please note that this document is a general summary of the provisions found in many commercial leases. Not all lease agreements will include the provisions described herein. Because the specifics of your lease agreement and circumstances will affect how the law applies to you, and because laws are constantly changing and it would be impossible for this document to comprehensively address all of the legal issues that you may encounter, we strongly encourage you to consult licensed attorneys who have knowledge of real estate and business law before you take any action with respect to the matters discussed in this document. In other words, this document does not constitute legal advice and is not meant to replace an attorney.

Finally, please note that the relevant state laws discussed in this document are focused on Massachusetts law. We hope, however, that commercial tenants in other states will find much of the content to be helpful as a resource.

## Common Leasing Scenarios and How to Handle Them

As a commercial tenant, you do not have many rights beside those written into your lease. These scenarios are designed to give you an idea of where to look in your lease to determine your rights in certain difficult situations, and who to contact for further information and assistance. These scenarios are not intended to provide legal advice on any specific situation, but are instead intended to provide initial guidance to you as a commercial tenant so that you can prepare yourself for taking next steps.

**The guidance below on “how to handle” these scenarios should be seen as a first step.**

### You receive a notice of increased rent.



DO NOT: Sign and return the notice.  
DO NOT: Pay increased rent without reviewing your lease and seeking assistance.  
DO NOT: Ignore the notice.



DO: Read the notice and determine why the rent is being increased.

### Where to look in your lease:

**Rent provision and Term provision:** The basic rent and timeline sections of your lease should make the amount of rent clear. The landlord may not change the amount unless it is written into the lease; for example, has there been an adjustment to his or her costs (see below)? Or has your lease expired, and therefore your landlord is raising your rent in a tenancy at-will?

**Rental Adjustment provision:** Examine whether the landlord is allowed to raise your rent for increased property taxes, operating costs, or other costs. Does the increase seem unreasonably high? If so, see whether the lease allows you to challenge the amounts.

**Renewal of Lease provision:** If you have a renewal option, check to see any changes to your rent. It is possible that upon renewing your lease, the monthly rent will increase.

## You receive a notice in the mail saying that you have a new landlord.



DO NOT: Stop paying rent without speaking to an attorney.



DO: Look at your lease and determine how it addresses landlord assignment.

DO: Call your local Main Streets or community economic development organization to ask if anyone else has received such a letter. Perhaps there are major real estate changes happening in your neighborhood.

DO: Once you are comfortable with the change, call your new landlord to introduce yourself.

### Where to look in your lease:

Assignment, Subleasing, and Transferring provision: Usually landlords have the right to sell the building to whomever they want. However, you can double-check to make sure the lease gives the landlord a right to transfer.

## You receive a letter from a bank saying that your landlord's property has been foreclosed.



**DO NOT:** Assume your lease has been terminated and move out or stop paying rent.



**DO:** Read the letter and determine what the bank plans to do with the property.

### Where to look in your lease:

**Subordination provision:** This provision deals with this exact scenario. Usually it will say that if the property is foreclosed, the lease may be terminated by the bank. Look to see if there is a nondisturbance provision because this would give you a better chance of remaining on your lease.

**NOTE:** You may also have been asked to sign a subordination agreement with the landlord's mortgage lender separate from your lease. Many of these agreements require termination of your lease upon foreclosure of your landlord's mortgage, so be sure to read and understand the agreement fully and consult with a lawyer before signing the document. You should also ask a lawyer to add a non-disturbance provision or other tenant protections to the agreement.

**Right of First Refusal (ROFR):** If you have a ROFR in your lease, you could be in an excellent bargaining position. A foreclosed property may be more affordable for you to purchase, and you may want to approach the bank about purchasing the property from them.

## Severe damage or disrepair to the building is making it difficult for you to continue doing business at the property.



DO NOT: Attempt to repair or fix the damage yourself.

DO NOT: Ignore the situation.



DO: Take pictures of the damage.

DO: Notify your landlord of the unsafe conditions.

DO: If you need to fix the damage immediately, keep records of your payments.

### Where to look in your lease:

**Termination provision:** Look whether you have a right to terminate the lease and under what conditions you may do so. Also look at the Default provision to see what happens if the landlord defaults on its obligations.

**Maintenance and Repairs provision:** Look for who, and under what circumstances, is responsible for paying for maintenance and repairs. Also look for who is responsible for implementing the repairs (e.g. hiring a contractor). Liability may change depending on if the damage is your (or your guest's) fault or your landlord's fault.

**Quiet Enjoyment provision:** If the landlord is severely interfering with your use of the property to the point where you have to abandon the property or shut down your business, you may have a constructive eviction defense in court. You should consult an attorney.

Irrespective of the lease, the landlord could still be obligated to fix unsafe conditions. Under Massachusetts law, if you send notice to your landlord of an unsafe condition, the landlord is obligated to fix it. However, you may be required to reimburse the landlord's expenses. Regardless of what it says in your lease, upon receiving notice the landlord must fix any unsafe conditions that were not caused by you. See *Bishop v. TES Realty Trust*, 459 Mass. 9 (2011).



## There is minor damage to the property (for example, a window breaks).



DO NOT: Try to repair the damage before reviewing your lease or having a lawyer review your lease for you.

DO NOT: Hire someone to repair the damage before reviewing your lease or having a lawyer review your lease for you.



DO: Consider whether the damage was your fault.

DO: Take pictures and record your memory of the event.

DO: Prevent any further damage.

### Where to look in your lease:

Maintenance and Repairs provision: Look for who, and under what circumstances, is responsible for paying for maintenance and repairs. Also look for who is responsible for implementing the repairs (e.g. hiring a contractor). Liability may change depending on if the damage is your (or your guest's) fault or your landlord's fault.

## There is a fire.



DO NOT: Put yourself at risk.



DO: Call 911.

DO: If safe to do so, take pictures and record your memory of events.

DO: Alert your Landlord immediately.

### Where to look in your lease:

Fire, Casualty, and Eminent Domain provision: Look to see what your lease says about fires. Fires are an extreme emergency that often change the lease obligations substantially.

Insurance provision: If your lease requires insurance, you want to make sure to purchase that insurance. You may even be required to pay for extra fire insurance depending on your uses of the property.

## Your landlord tells you to take your signs down.



DO NOT: Take down your signs before consulting your lease.

DO NOT: Ignore your landlord and leave your signs without first consulting your lease and/or seeking assistance.



DO: Take pictures of your signs to preserve a record.

### Where to look in your lease:

Improvements, Alterations and Additions provision: These sections may discuss how you can adjust the property during your lease term. Look to see if there is any mention of signs in this section.

Signage provision: Search your lease for any mention of signs. It is possible that your ability to hang signs is subject to the landlord's approval; however, if such approval may not be "unreasonably withheld," then you have a better chance of obtaining your landlord's approval.

## Your landlord is harassing you.



DO NOT: Attempt to ignore or block-out your landlord.

DO NOT: Agree to any demands your landlord is making without first consulting your lease and/or seeking assistance.



DO: Keep a record of your interactions with your landlord and the communications he or she sends you.

DO: Consult an attorney or law enforcement if you feel unsafe.

### Where to look in your lease:

Quiet Enjoyment provision: Look for whether your lease entitles you to use the premises without interruption from your landlord.

Notice provision: How must your landlord notify you? Does it need to be in writing? Determine whether your landlord is complying with these requirements.

Landlord's Access provision: Look for when your landlord is allowed to enter the premises, and whether or not he or she must notify you before doing so.

Default provision: Determine whether you are in default by looking for what events cause default. If you are in default, look for what actions the landlord is empowered to take in response.

Irrespective of your lease, if you feel your landlord is putting you in serious personal danger or committing other crimes, you can consider legal remedies through tort, unfair trade practices, or criminal charges.

## Some other unit in the building (or neighbor) is interrupting with your use of the property.



DO NOT: Modify the premises to avoid or resolve the interruption without first consulting your lease.

DO NOT: Bother the other tenant back.



DO: Keep a record of the interruptions and any interactions with the neighbor.

### Where to look in your lease:

Termination provision: If the interruption is unavoidable, determine whether and how you can get out of the lease.

Use provision: Look at the section of your lease that describes prohibited uses of your property, and determine whether the other tenant's actions would violate this provision. If so, alert your landlord to the problem.

## Your business is suffering and you need to get out of the lease.



DO NOT: Stop paying rent without speaking to an attorney and your landlord.

DO NOT: Abandon the premises without speaking to an attorney.



DO: Review your lease to see if you have the right to sublet or terminate.

### Where to look in your lease:

Assignment, Subletting, and Transferring provision: Look to see if you are allowed to assign your lease (have someone take your place). If so, does your landlord have to consent to the assignment? Will you still be liable under the lease after you assign?

Termination provision: Determine if, when, and for what reasons (if any are specified) you are allowed to terminate (end) the lease. If so, how far in advance must you notify your landlord before termination?

Surrender provision: Identify what you will need to do upon surrendering (leaving) the property. Remember to budget for any required repairs or equipment removal.

## You need to sell your business before the end of your lease term.



DO NOT: Sell your business without first consulting your lease and seeking assistance.



DO: Determine whether the potential buyers want the business to stay in the same location.

DO: Take the terms of your lease into account when deciding when to sell your business.

### Where to look in your lease:

**Term provision:** Identify the exact term of your lease and when it expires to confirm that you cannot wait until the lease term is finished.

**Parties provision:** Determine whether the lease is officially between you personally and your landlord, or between your company and the landlord. If it is between the company and the landlord, you may be able to sell your business without further complications from your lease.

**Assignment, Subletting, and Transferring provision:** Look to see if you are allowed to assign your lease (have someone take your place). If so, does your landlord have to consent to the assignment? Will you still be liable under the lease after you assign?

**Termination provision:** Determine if, when, and for what reasons (if any are specified) you are allowed to terminate (end) the lease. If so, how far in advance must you notify your landlord before termination?

## You are not using all of the space you are leasing and would like to allow another business to use part of it.



**DO NOT:** Allow the other business to move in without first consulting your lease or landlord.



**DO:** Seek assistance from an attorney to create a written sub-lease between you and the subletting business.

**DO:** Talk to your landlord about the possibility of subletting after you understand your obligations under the lease.

### Where to look in your lease:

**Assignment, Subletting, and Transferring provision:** Look to see if you are allowed to sublet under your lease (rent a portion of your space to someone else). If so, does your landlord have to consent to the sublet? Even if you sublet, you may still be ultimately liable for rent and other lease obligations.

**Use of Premises provision:** Look at how your lease describes the permitted uses of the property. Are you allowed to use the property only for the permitted uses or substantially for the permitted uses?



## You are applying for a loan and your lease term is shorter than what is required by the loan application.



DO NOT: Accept the loan without consulting your lease and seeking assistance.



DO: Seek assistance to determine how to make your lease stable enough for you to accept the loan.

### Where to look in your lease:

**Lease Term provision:** Identify the exact term of your lease and when it expires to figure out the extent of the mismatch.

**Renewal of Lease Term provision:** Look to see if your lease gives you the option to renew your lease for any period. Does that renewal period plus the amount of time left on your current term match the loan term?

**Termination provision:** Determine if, when, and for what reasons (if any are specified) you are allowed to terminate (end) the lease. If so, how far in advance must you notify your landlord before termination? It might make more sense to terminate this lease and start a new one concurrent with the loan term.

**You are a holdover tenant (you remain on the premises after the term of your lease has expired), but the lease is silent on what happens with holdover tenants.**



DO NOT: Holdover without seeking assistance.



DO: Remove any property of value in case you get locked out.

### What rights do you have outside the lease?

Holding over when your lease is silent on holding over makes you a tenant at sufferance, which means you have no right to remain in the space and the landlord can evict you at any time. In Massachusetts, landlords are not permitted to resort to self-help to forcibly evict commercial tenants. Therefore, if your landlord does not want you to holdover, he or she will need to go to court and file a motion for summary process before you can be evicted, which could buy you a few more days.

Under Massachusetts law, the landlord can charge you rent for any holdover at the fair market value of the use of the space, which could be more than you currently pay.

## You receive an eviction notice.



DO NOT: Vacate the premises without first consulting your lease and/or seeking assistance.



DO: Read the notice and determine the reason for the notice.

DO: Call an attorney to help you defend yourself.

DO: Call your local Main Streets or economic development corporation to see if they can help you negotiate for relocation expenses.

DO: Remove any property of value in case you get locked out. Your landlord may have the right to confiscate any of your property left in the space.

### Where to look in your lease:

Term provision: Look to see if your lease has already ended. See if you have an option to extend that you have not had a chance to exercise.

Default provision: Look at whether you are in default. It is possible that your landlord has tried to communicate with you and you have not received the notice. It is possible your landlord is not following the notice procedures required under the lease.

Force Majeure provision: You should not be evicted for a reason that is outside of your control; for example, an external event such as a natural disaster, eminent domain, or other extraordinary circumstance.

## You do not have a lease, and you are trying to get one.



DO NOT: Approach your landlord about creating a written lease without first seeking assistance.

DO NOT: Postpone getting a lease.



DO: Collect and record all of your previous communications with your landlord and the details of how you have used the space so far.

### Who can help you negotiate a new lease?

The Transactional Law Clinics of Harvard Law School provides legal assistance to small businesses and entrepreneurs in a variety of areas, including commercial lease negotiations. For more information, call our intake line at 617-998-0101 or visit us online at <http://clinics.law.harvard.edu/tlc/>.

## Introduction to Sample Lease

Signing a lease is an opportunity to negotiate for your best interests. No two leases are alike – every tenant and landlord has their own needs and desires for the property. Therefore, before signing a lease, you should think about your own business model and future strategy. Most importantly, ***you should try to negotiate with your landlord*** to improve your lease in your favor.

The following section includes a sample lease with explanations and suggested ***tenant-friendly*** changes. Please note that the sample lease is NOT in and of itself a tenant-friendly lease. Further, not every landlord will be open to changes; therefore, we have attempted to include several suggested provisions – some short, some long – to provide you with options depending on your landlord and your circumstances. Our goal is to enable you to make key changes during your lease negotiation that will make the agreement more beneficial for you.

Your lease may not look like this sample lease. In fact, our sample lease is intended to include more provisions than commercial leases that many small businesses enter into. However, your lease will likely have similar provisions, and we suggest looking at the section headings of our sample lease or the table of contents of this toolkit to quickly identify analogous provisions in your lease.

Before you negotiate your lease, it is important to take a moment to reflect on your needs and priorities. Here is a sample list of questions you should consider:

- Will I sign the lease personally or as an entity?
- How long do I want to be committed to this space, and what options do I want at the end of that time? For example, do I want a long-term lease or a short-term lease with a renewal option? (See “Lease Term”, Section 3).
- How much do I expect to pay for rent? Will I be able to afford any increase in this amount? (See “Rent”, Section 4).
- What do I want my exit options to be, that is, how do I want to be able to get out of the lease? (See “Termination”, Section 20).
- What business will I be doing on the property? (See “Use of Premises”, Section 10).
- What utilities will I need at the property? How much can I afford to pay for these services on a monthly basis? (See “Utilities”, Section 9).
- Do I need to perform construction before occupying the leased premises? If so, do I want the landlord to pay for that construction? (See “Improvements, Alterations, and Additions”, Section 13).
- If the landlord decides to sell the building, would I or a non-profit community organization be interested in having an opportunity to buy the building to avoid relocation? (See sample Right of First Refusal provision in “Assignment, Subleasing, and Transferring”, Section 14).
- Will I need to use the common areas? Will I need parking? (See “Common Areas”, Section 8).

- Am I worried about competitor businesses moving into the same building and affecting my profits? (See sample Exclusive Use provision in “Use of Premises”, Section 10).

Then, as you read your lease, ask yourself the following:

- Does this lease reflect *everything* the landlord and I agreed upon?
- Is the information about the parties, lease term, rent, and notice addresses correct?
- Do I understand *when* and *how* I should act on my obligations, such as paying rent or providing notice?
- How can I get out of this lease if something goes wrong?
- What is the landlord responsible for in terms of utility payments, insurance policies, and maintenance and repairs of the building?
- What am I responsible for in terms of utility payments, insurance policies, and maintenance and repairs of the building?
- When is my landlord required to notify me before taking a particular action? When am I required to notify my landlord before taking a particular action?

## COMMERCIAL LEASE AGREEMENT

This COMMERCIAL LEASE AGREEMENT (“Lease”) is entered into and dated as of [Month] [Date], [Year] (“Effective Date”), between [Landlord’s Name] (“Landlord”) and [Tenant’s Name] (“Tenant”).

### 1. PARTIES

Landlord, which term includes Landlord and its heirs, successors, and assigns where the context so admits, does hereby lease to Tenant, which term includes Tenant and its heirs, successors, and assigns where the context so admits, and the Tenant hereby leases the Premises (as defined below).

**Explanation:** This section describes the parties in a lease. Only those parties listed in this section will have the rights and obligations established by the lease.

#### Keep in Mind:

If you want the lease to apply to your business, make sure that you list the official name of your business here instead of your own name. When your own name is included in the lease, you will be personally liable under its terms and conditions.

In many leases Landlord is called “Lessor” and Tenant is called “Lessee.”

### 2. PREMISES

**2.1 Building; Premises.** The leased premises comprise [number] square feet of [retail or office] space located on the [number] floor of the commercial building (the “Building”) located at [Address] (the “Premises”) together with the right to use in common, with others entitled thereto, the Common Areas (as defined below).

**2.2 Project.** The Building of which the Premises is a part, the Common Areas, the land upon which the Building is located, and all other buildings and improvements thereon or thereunder are herein collectively referred to as the “Project.”

**2.3 Condition.** Except as may be otherwise expressly set forth herein, Tenant shall accept the Premises “as is” in their condition as of the commencement of the Lease Term, and Landlord shall be obligated to perform no work whatsoever in order to prepare the Premises for occupancy by Tenant. Tenant, upon delivery of the Premises, shall at its sole cost and expense complete any improvements that may be required for Tenant’s use of the Premises (“Initial Improvements”). All such work related to the Initial Improvements shall be performed in accordance with Section 13.2.

**Explanation:** This section describes the area that you will lease from the landlord. Make sure

that this section describes every part of the property that you will use. This lease says that you will accept the premises “*as is*.” If those words “*as is*” are in your lease, make sure you inspect the entire property and that it is satisfactory. If there are changes you want the landlord to make, you should list those explicitly in the lease. Separately, if there are changes you would like to make before the lease term starts (e.g. building in restaurant equipment) this lease gives you the ability to make “Initial Improvements” in Section 13.2.

In Section 2.1, you should specify the exact square footage of your space. It is important to write down the square footage because the landlord might use this to calculate your portion of real estate taxes (See Section 6).

#### **Suggested Provisions:**

To ensure the property is in good condition, add to Section 2.3: *The Premises shall be delivered to Tenant in good, clean and tenantable condition, with all Building systems working, and in compliance with all applicable laws in effect as of the Occupancy Date.*

### **3. LEASE TERM**

This Lease shall become fully effective and binding as of the Effective Date of this Lease. The term “Lease Term” means that period commencing on the date that Tenant commences occupation of the Premises (“Occupancy Date”) and ending on the date that is **[number of years]** therefrom or, upon exercise of the Renewal Option, the end date of the Renewal Term. Tenant shall commence occupation upon completion of the Initial Improvements. The Occupancy Date shall be no later than **[insert first day you will use space]**.

**Explanation:** This section describes the length of your lease. Make sure the lease date is clear to you and that the dates reflect what you discussed with the landlord. This lease contemplates three important dates: (1) the effective date; (2) the commencement date (see Section 4.3 below); and (3) the occupancy date. The “Effective Date” is the date you sign the lease. This lease gives you time for Initial Improvements before you start occupying the space. The “Commencement Date” is the date you begin Initial Improvements. The “Occupancy Date” is the date you move in to the space.

This lease also has a Renewal Option, which will need to be exercised within a certain time frame (See Section 7.2 below). A renewal option can be a great option for new businesses because it offers flexibility as you are getting your business off the ground.

#### **Suggested Provisions:**

Add a *renewal option* to your lease term (See Section 7 below).

If the Commencement Date is sometime in the future, consider adding the following: *Landlord will make all commercially reasonable efforts to deliver the Premises to Tenant in the condition required by this lease. Notwithstanding any provision to the contrary in this Lease, in the event*



*Landlord has failed to deliver the Premises to Tenant in the condition required by this Lease (as reasonably determined by Tenant) on or prior to [insert date], Tenant shall have the option to terminate this Lease by delivery to Landlord of written notice ("Termination Notice"), which termination shall be effective thirty (30) days following Tenant's delivery of the Termination Notice to Landlord, unless within such thirty (30) day period the Premises are delivered to Tenant in the condition required by this Lease (as reasonably determined by Tenant). In the event that Tenant shall elect to terminate this Lease, Tenant shall deliver to Landlord the Termination Notice and Landlord shall pay to Tenant all of Tenant's actual costs incurred in connection with entering into this Lease and designing and constructing Tenant's improvements, if any. Landlord shall make such payment within thirty (30) days after receiving Tenant's evidence of such costs incurred by Tenant.*

*Or you can add: Notwithstanding any provisions to the contrary in this Lease, in the event Landlord has failed to deliver the Premises to Tenant in the condition required by this Lease by [insert date], the Base Rent for the immediately proceeding month (or months, as applicable) shall be reduced proportionately for each day of such delay.*

#### **4. RENT**

**4.1 Base Rent.** During the Lease Term, Tenant shall pay to Landlord fixed rent at the rate of \$[yearly rent] per year, payable in advance in monthly installments of \$[monthly rent], subject to proration in the case of any partial calendar month ("Base Rent"). Base Rent shall be due and payable on the first (1<sup>st</sup>) calendar day of each month. All rent shall be payable without offset or deduction.

**4.2 Payment.** All rent payments shall be made to Landlord when due to such address as set forth in Section 27 of this Lease, or at such other place as Landlord may from time to time designate upon not less than ten (10) days' prior written notice to Tenant.

**4.3 Rent During Initial Improvements.** Beginning on the date construction of the Initial Improvements commences (the "Commencement Date") and ending on the Occupancy Date, Tenant shall pay Landlord fixed rent at the rate of \$[total rent during Initial Improvement period], payable in advance in monthly installments of \$[monthly rent during Initial Improvements period], subject to proration in the case of any partial calendar month ("Initial Rent"). Initial Rent shall be due and payable by the first (1<sup>st</sup>) calendar day of each month. All rent shall be payable without offset or deduction."

**Explanation:** This section describes your rent obligations. It is important to make sure the rent is what was discussed with your landlord, and that it is clear when you are expected to pay rent and how you should pay. This way, the landlord cannot accuse you of failing your responsibilities just because the language is vague.

Note that if your landlord fails to perform any of its obligations under the lease (for example, to repair the property), the last sentence of Section 4.1 will *not* let you refuse to pay rent or deduct for the amount the landlord owes you from your payment. This is typical in commercial leases.

(However, this lease has some additional sections in tenant’s favor that provide rent abatement in some cases.)

Make sure it is clear when your rent is due. This lease says that rent is payable in advance on the 1<sup>st</sup> day of each month.

Section 4.3 describes the amount of rent paid during the Initial Improvements (See Section 13.2 below). Because your business will not make money during construction, you may try to negotiate a lower rent during this time.

## 5. SECURITY DEPOSIT

Upon the Effective Date of this Lease, Tenant shall pay to Landlord the amount of \$[**security deposit**], which shall be held as a security for Tenant’s performance as herein provided and refunded to Tenant at the end of this Lease, without interest, subject to Tenant’s satisfactory compliance with the conditions of this Lease.

**Explanation:** This section describes your security deposit. The security deposit is due when you sign the lease, and will be refunded as long as you comply with the lease. You should make sure that the security deposit will be refunded within a reasonable amount of time after the end of your lease term.

If the security deposit is very large, you may be able to negotiate for a “burndown” provision. This means that a portion of the security deposit will be returned before the end of your lease term.

### **Suggested Provisions:**

Add a timeframe for the landlord to return the security deposit, for example: *Landlord will refund the security deposit to Tenant within 30 days of the termination of this Lease.*

Add a burndown provision: *Notwithstanding anything to the contrary contained in this Lease, and provided that this Lease is in full force and effect and Tenant shall not then be in monetary or material nonmonetary default of this Lease (beyond the expiration of any applicable notice and cure period), Tenant may provide to Landlord (and Landlord shall promptly thereafter execute and deliver to Tenant, if reasonably requested by Tenant) such instruments and authorizations, as may be reasonably required by Landlord to reduce the security deposit thereof by \$[amount reduction] to \$[new security deposit] as of the first (1st) calendar day subsequent to the [number of years] anniversary of the Occupancy Date.*

## 6. RENT ADJUSTMENT

**6.1 Tax Escalation.** If in any tax year commencing with the fiscal year ending after the Occupancy Date, the real estate taxes on the Project are in excess of the amount of the real estate taxes

thereon for the fiscal year ending immediately prior to the date of this Lease (hereinafter called the “Base Year”), Tenant will pay to Landlord as additional rent hereunder, when and as designated by notice in writing by Landlord [% amount] percent of such excess that may occur in each year of the Lease Term or any extension or renewal thereof and proportionately for any part of a fiscal year. ***Tenant will pay Landlord such amount no later than thirty (30) days after receiving written notice thereof.*** If Landlord obtains an abatement of any such excess real estate tax, a proportionate share of such abatement, less the reasonable fees and costs incurred in obtaining the same, if any, shall be refunded to Tenant.

**6.2 Operating Expense Escalation.** Tenant shall pay to Landlord as additional rent hereunder when and as designated by notice in writing by Landlord, [% amount] percent of any increase in operating expenses over those incurred during the calendar year ending immediately prior to the date of this Lease. ***Tenant will pay Landlord such amount no later than thirty (30) days after receiving written notice thereof.*** “Operating Expenses” are defined, for purposes of this Lease, as all costs and expenses incurred by Landlord during any calendar year in connection with the operation and maintenance of the Project, including, without limitation, insurance premiums, license fees, janitorial service, landscaping and snow removal, employee compensation and fringe benefits, equipment and materials, utility costs, repairs, maintenance and any capital expenditure (reasonably amortized with interest) incurred in order to reduce other operating expenses or comply with any governmental requirement. This increase shall be prorated should this Lease be in effect with respect to only a portion of any calendar year.

**6.3 Consumer Price Escalation.**

- (1) Tenant agrees that, in the event the “Consumer Price Index for Urban Wage Earners and Clerical Workers, U.S. City Average, All Items (1982-84=100)” (hereinafter referred to as the “Price Index”) published by the Bureau of Labor Statistics of the U.S. Department of Labor, or any comparable successor or substitute index designated by Landlord appropriately adjusted, reflects an increase in the cost of living over and above the cost of living as reflected by the Price Index for the month ending immediately prior to the Effective Date of this Lease (hereinafter called the “Base Price Index”), the Base Rent shall be adjusted in accordance with sub-paragraph (2) of this Section.
- (2) Commencing as of the first anniversary of the Effective Date of this Lease, there shall be an adjustment (hereinafter referred to as “Adjustment”) in the Base Rent on an annual basis calculated by multiplying the Base Rent set forth in Section 4 by a fraction, the numerator of which shall be the Price Index for the month of [month] and the denominator of which (for each such fraction) shall be the Base Price Index; provided, however, that no Adjustment shall reduce the Base Rent as previously payable in accordance with this Section or Section 4.
- (3) In the event the Price Index ceases to use the 1982-84 average of 100 as the basis of calculation, or if a substantial change is made in the terms or number of items contained in the Price Index, then the Price Index shall be adjusted to the figure that would have been arrived at had the manner of computing the Price Index in effect at the date of this Lease not been changed.

**Explanation:** Your lease may contain all, some or none of these provisions. Your rent may

increase due to real estate taxes, operating expenses, or the consumer price index. You should consider all these potential costs when negotiating your rent.

First, Section 6.1 says that your rent may increase if the landlord faces higher real estate taxes than in the prior year. For Section 6.1, make sure that you are only responsible for a percentage of increased taxes that corresponds to the square footage of your leased premises. For example, if you use one story of a three-story building, you should be responsible for no more than 1/3 of the tax increase. Also make sure that the selected base year is not immediately before an event that is likely to increase the value of the building such as a sale, financing, or significant capital improvements on the project.

Notice that if real estate taxes decrease, your landlord must also refund a portion of your rent.

Section 6.2 says that you will owe a percentage of the increase in landlord's operating costs.

Section 6.3 says that you will pay increased rent based on an increase in the Consumer Price Index.

### **Suggested Provisions:**

Whenever possible, clarify the time frame in which you are expected to pay by inserting: "***Tenant will pay Landlord such amount no later than thirty (30) days after receiving written notice thereof.***" This way, you will not be required to pay immediately and will have time to gather evidence if necessary (See Sections 6.1 and 6.2 above).

To require the landlord to give you evidence of any taxes or expenses, you may add to Sections 6.1 and 6.2: *Tenant's obligation hereunder to pay Landlord any such increased [taxes][operating expenses] shall be contingent on Landlord providing Tenant, concurrently with its delivery to Tenant of notice of the increased [taxes][operating expenses], evidence reasonably satisfactory to Tenant of the increased [taxes][operating expenses].*

You may also add to Section 6.1: *Tenant may in its sole discretion challenge the assessed value of the Project with the assessor or applicable authority, and Landlord will take such commercially reasonable action to cooperate with Tenant in any such challenge.*

## **7. RENEWAL OF LEASE TERM**

**7.1 Option to Extend.** Tenant shall have the right and option to renew this Lease ("Renewal Option") for **[one (1)]** additional term of **[number of years]** years (the "Renewal Term") provided that:

- (a) Tenant is not in default beyond any applicable notice and cure period provided for herein at the time Tenant notifies Landlord of Tenant's intention to exercise the Renewal Option;
- (b) Upon the expiration of the then current Lease Term, Tenant has no outstanding default beyond the applicable notice and cure period provided for herein;
- (c) No event has occurred that upon notice or the passage of time would ***reasonably*** constitute a

default; and

(d) Tenant is occupying the Premises.

**7.2 Exercise of Renewal Option.** If Tenant intends to exercise the Renewal Option, Tenant shall notify Landlord of such intent in writing at least three (3) months prior to the last day of the then current Lease Term. If Tenant exercises the Renewal Option, Landlord's and Tenant's respective rights, duties and obligations shall be governed by the terms of this Lease except as otherwise provided herein.

**7.3 Renewal Term Base Rent.** If Tenant exercises the Renewal Option, then during the Renewal Term Tenant shall pay to Landlord fixed rent at the rate of \$[**yearly renewal term rent**] per year, payable in advance in monthly installments of \$[**monthly renewal term rent**], subject to proration in the case of any partial calendar month (the "Renewal Term Base Rent"). All rent shall be payable without offset or deduction.

**Explanation:** You may customize a renewal term to fit the needs of your business. For example, you might have two renewal options of one year each. Alternatively, you might agree to one renewal term of five years. Section 7.1 describes the conditions you must meet in order to exercise the renewal option. Section 7.2 requires that you give landlord notice of your intent to renew the lease at least 3 months prior to expiration of your current lease term. Section 7.3 changes the rent for the renewal term. Deciding the rent in advance is an opportunity for you to fix the price *now* and adjust your business plan in advance.

## 8. COMMON AREAS

**8.1 Common Areas Defined.** The term "Common Areas" is defined as all areas and facilities outside of the Premises and within the exterior boundary line of the Project that are designated by Landlord from time to time for the general non-exclusive use of Landlord, Tenant, and the other tenants of the Building and their respective employees, suppliers, customers, contractors and invitees, including, but not limited to, common entrances, lobbies, corridors, stairwells, parking areas including the driveway, the yard, the basement, roadways and sidewalks.

**8.2 Management and Control.** All Common Areas shall be subject to the exclusive control and management of Landlord or such other persons or nominees as Landlord may designate to exercise such management or control in whole or in part. Landlord and Landlord's nominees and assignees shall have the right to establish, modify, amend and enforce **reasonable** rules and regulations with respect to the Common Areas, provided that all such rules and regulations shall apply equally and without discrimination to all persons entitled to use of said Common Areas. Tenant shall abide by such rules and regulations, shall cause its employees, agents, and contractors to so abide, and to use its **commercially reasonable** efforts to cause its customers, invitees and licensees to so abide. Landlord shall have the right to **reasonably** increase or reduce the Common Areas, to **reasonably** rearrange the improvements in the Common Areas, and to make such **reasonable** changes therein and thereto from time to time which, in Landlord's opinion are

deemed to be desirable and for the best interests of all parties using said Common Areas, provided that access to the Premises is not adversely affected.

**8.3 Tenant Use of Driveway.** Tenant shall be allowed non-exclusive use of the driveway, including without limitation [i.e. the right to park its food truck on the driveway].

**Explanation:** This section defines the common areas to which your landlord will have unlimited access, such as hallways, lobbies, parking areas, and the stairwells. Think about which of the areas listed are crucial to your business. If the landlord had access to that space at all times, would it interfere with your business? If so, try to limit the landlord's control over those areas. Do not delete a common area from this section because that will remove your ability to access and use the space under Section 2.1.

**Suggested Provisions:**

Whenever the landlord has the discretion to do things, add the word *reasonably*.

Whenever you have the obligation to do things, add the word *commercially reasonable* so you are not required to do something if it requires that you spend a large amount of money.

Add to the end of Section 8.2: *and provided that no such alterations or modifications shall be permitted which unreasonably interferes with Tenant's use and enjoyment of the Premises or restricts Tenant's access to or use of the Premises.*

Add to Section 8.2: *Landlord shall at all times maintain and operate the Common Areas in good repair and condition and in a manner consistent with comparable buildings in the vicinity of the Project.*

## 9. UTILITIES

**9.1 Payment.** Tenant shall pay, as they become due, all bills for electricity, water, gas, telephone service, Internet service, sewer, refuse and trash collection, and other utilities and services furnished to the Premises and *presently separately metered*, together with any taxes, penalties, surcharges or the like pertaining thereto. Tenant shall contract directly with the applicable utility provider for such services.

**9.2 Interruptions.** Tenant agrees that Landlord shall not be liable to Tenant for Landlord's failure to furnish gas, electricity, telephone service, Internet service, water, or other utility that Tenant is responsible for pursuant to Section 9.1 above.

**Explanation:** This section describes who will pay for utilities charges that result from the use of the premises, and how this payment will be made. Under Section 9.1 of this lease, the tenant is responsible for paying the cost of all utilities separately metered to it directly to the companies providing those utility services. Another common arrangement is having the tenant pay the

landlord a proportion of the cost for supplying a certain utility to the entire building. This is most common for electricity, and is sometimes calculated using a separate sub-meter for the leased premises. Alternatively, the cost of utilities can be included in the cost of rent, or paid to the landlord through a separately negotiated monthly charge.

Section 9.2 provides that the landlord does not need to pay the tenant for any interruptions in utility services, which is a common arrangement where the tenant pays for utilities directly to the service providers. Because an extended interruption in the supply of utilities could prevent your business from operating, however, you should consider adding a provision to offset your monetary losses for utility service interruptions. The alternative Section 9.2 below reduces your rent for utility service outages so that you do not have to pay while you are unable to do business.

### **Suggested Provisions:**

Make sure that the utilities you are responsible to pay for are *presently separately metered*. If your lease requires you to pay for a "reasonable proportion" or a "reasonable allocation" of utilities as determined by the landlord, discuss with your landlord how he or she makes this determination and ask what previous tenants have paid for utilities. You should also ask for evidence of these charges such as utility bills or records of past payments. This will minimize the risk that you end up paying for more than your fair share of utilities.

To minimize your risk for utility stoppage, consider replacing Section 9.2 entirely with:

**9.2 Rent Abatement.** *Notwithstanding the foregoing, if Tenant is unable to use all or a portion of the Premises for a period of three (3) consecutive business days or ten (10) business days in any twelve (12) month period (the "Eligibility Period") as a result of failure in any service or system of the Building, the Base Rent shall be reduced and abated after the expiration of the Eligibility Period for such time as the Premises or such portion thereof remains untenable in the proportion that the rentable area of the portion of the Premises rendered untenable bears to the total rentable area of the Premises; provided, however, there shall be no abatement of rent: (a) if Landlord provides to Tenant other space in the Building which is reasonably suited for the temporary operation of Tenant's business and reasonably acceptable to and actually used by Tenant, or (b) if the damage or failure of Building systems is caused by the gross negligence or willful acts or omissions of Tenant.*

## **10. USE OF PREMISES**

**10.1 Permitted Use.** Tenant shall occupy and use the Premises *substantially for* the purposes of [insert purposes of use].

**10.2 Prohibited Use.** Tenant shall not do or permit anything to be done in or about the Premises which will in any way obstruct or interfere with the rights of other tenants or occupants, injure or annoy them, or disturb the quiet enjoyment of other tenants or occupants. Tenant shall not use or suffer or permit

any person or persons to use the Premises or any part thereof for any use or purpose in violation of the laws of the United States of America or the Commonwealth of Massachusetts.

**10.3 Nuisance.** Tenant covenants and agrees that the Premises and every part thereof shall be kept by Tenant in a clean and orderly condition, free of any objectionable noise, offensive odors or other offensive impacts which could be a nuisance to other tenants of the Building, to surrounding property owners, or to invitees or licensees of the Project. If the use permitted under this Lease is **reasonably** determined by Landlord to be a use that may generate excessive noise, offensive odors or other offensive impacts which could be a nuisance to other tenants in the Building, to surrounding property owners, or to business invitees or licensees of the Building, Landlord shall notify Tenant thereof and Tenant shall be responsible for installing, providing for and maintaining, at Tenant's sole cost and expense, measures to mitigate the nuisance or potential nuisance. The type and adequacy of such mitigating measures shall be approved by Landlord in Landlord's discretion, **not to be unreasonably withheld, conditioned or delayed.**

**10.4 Compliance with Laws.** Tenant shall, at its sole cost and expense, promptly comply with all laws, statutes, ordinances, declarations, restrictions, covenants, conditions and governmental rules, regulations or requirements now in force or which may hereafter be in force and with the requirements of any board of fire underwriters or other similar body now or hereafter constituted relating to or affecting the condition, use or occupancy of the Premises and Tenant's improvements in the Premises, excluding structural changes not relating to or affecting the condition, use or occupancy of the Premises, or not related or afforded by Tenant's improvements or acts. Without limiting the generality of the foregoing, Tenant shall be responsible for compliance with requirements imposed by the Americans with Disabilities Act relative to the layout of the Premises and any work performed by Tenant therein.

**Explanation:** This section describes how you will be able to use the leased premises.

Section 10.1 describes what you will be allowed to do in the space. Make sure that Section 10.1 accurately describes, in general terms, what you will be doing in the space. Try to avoid making this description too specific to avoid having to amend the lease if your business changes. For example, if you are leasing space for a clothing store, say "retail sales and related services" so that you can potentially also sell home goods later on if your business needs change. In this lease, we have also required that the premises are **substantially** used for the purpose you define. This gives you some flexibility to operate other unrelated businesses so long as the space is used substantially for your primary business.

Section 10.2 describes any activities you will be specifically prohibited from doing. Make sure no activities are listed here that are essential to the operation of your business.

Section 10.3 requires that you do not use the premises in a way that is a nuisance, meaning your use cannot disrupt the use by others of the Building and other properties. This kind of provision may not appear in your lease, or may appear in a different section. If a nuisance provision does appear in your lease, pay close attention to what the provision says will happen if the landlord thinks that you are using the premises in a disruptive way. In this lease, the landlord must first notify you before you are responsible for stopping the nuisance in a way that is acceptable to the



landlord.

Section 10.4 requires you to comply with all laws and regulations applicable to the lease in using, occupying, modifying, or improving the premises. Note that this includes compliance with the Americans with Disabilities Act (ADA), which requires the premises and any alterations you make to it to be accessible to those with disabilities. Therefore, before making any improvements, alterations, or additions make sure that the premises will include the spacing, fixtures, and signage required under the ADA after these modifications are complete. Resources on ADA compliance are available from the New England ADA Center, here: <https://www.adachecklist.org/checklist.html>. This sample lease clarifies that your responsibility to ensure compliance with the ADA is limited to the premises. If your lease does not include such a limitation, consider adding one so that you are not obligated to pay for the costs of bringing the common areas of the building in compliance with the ADA.

### **Suggested provisions:**

Whenever the landlord has the discretion to do things, add the word "*reasonably*."

In Section 10.3, the final phrase, "*not to be unreasonably withheld, conditioned or delayed*," limits the landlord's ability to unreasonably refuse to approve the measures you have taken. Look for, or consider adding, this phrase if your lease also requires the landlord to approve of the steps you have taken to stop the disruptive action.

If your business involves activity that others could see as disruptive (such as serving alcohol, making pungent food or other goods, or performing very loud activities), consider adding to Section 10.3 a sentence that clarifies that such use will not be deemed a nuisance. Here is an example: "*Provided, however, that the sale of alcoholic beverages in connection with the permitted use described in Section 10.1 shall not be deemed a nuisance in and of itself.*"

An exclusive use provision, such as the proposed Section 10.5 below, can be critically important for restaurants and service providers. An exclusive use provision prohibits the landlord from leasing another space in the building to a business that is similar to yours and would compete with your business for customers. Landlords are often resistant to these provisions because the provisions limit the landlord's freedom to lease other units. However, some landlords are receptive to exclusive use provisions because it is in the landlord's best interest for all of its tenants to be successful and reducing competition between tenants can help foster this success. Pay close attention to what the exclusive use provision says you will be entitled to – your remedies – if the landlord violates the provision. In the provision below, you are entitled to lower rent or the option to terminate your lease if the landlord violates the provision. If another tenant violates the provision by starting to engage in business that overlaps with yours, the landlord is required to take action to stop it.

**10.5 Exclusive Use.** *To the extent Landlord is not prohibited by any existing or future applicable laws, and provided that Tenant is not in default, Landlord covenants not to enter into a lease agreement for space located at the Project with a Competitor (as hereinafter defined) for a term scheduled to commence during the Lease Term or consent to the use by any Competitor of*

any portion of the Project.

- (a) **Competitor.** For purposes of this Section, a “Competitor” shall mean any entity whose primary purpose is [insert purpose from Section 10.1]. However, in no event will any of the following be deemed a Competitor: (1) a tenant open for business in the Project on the Occupancy Date or any assignee or sublessee of any such tenant or any renewal or extension of the lease or other occupancy agreement (collectively, an “Occupancy Agreement”) of such tenant, or (2) a tenant of the Project whose Occupancy Agreement is dated prior to the Occupancy Date or any assignee or sublessee of any such tenant or any renewal or extension of the Occupancy Agreement of such tenant, or (3) a business operated by, or affiliated with, Tenant, or (4) any tenant who has been permitted to operate as a result of an action or order by a court of competent jurisdiction.
- (b) **Breach by Landlord, Remedies.** In the event of a breach of Landlord's agreement set forth above, Tenant may, at its election and its sole and absolute discretion, (i) terminate this Lease upon prior written notice to Landlord, which notice shall be given by Tenant not less than ninety (90) days prior to the effective date thereof; provided that such termination shall be rendered ineffective if during such ninety (90) day period Landlord causes the cessation of the activities causing the breach, in which case the Base Rent shall be reduced to \$[amount for reduced rent] for the duration of the activities causing the breach, or (ii) permanently reduce the Base Rent for the remainder of the Lease Term to \$[amount for reduced rent]. Tenant's right to terminate as provided for in this paragraph shall be conditioned upon Tenant giving Landlord notice thereof within six (6) months of the date of Landlord's breach. Failure of Tenant to give such notice within the above time period shall be a waiver of Tenant's right to terminate and shall be deemed an election of clause (ii) above.
- (c) **Breach by Other Occupant, Remedy.** If another tenant or occupant in the Project violates a provision of its lease or license agreement regarding its premises, which either does not permit or specifically prohibits such occupant from using their premises in violation of Tenant's exclusive use as set forth above, Landlord, after receipt of notice from Tenant advising of such violation, shall commence an action (or arbitration, if required by such lease or license agreement) against such other tenant or occupant, and thereafter shall use reasonable efforts to enforce its rights under such lease or license agreement and obtain a temporary restraining order, preliminary injunction, order of eviction, other court order, or order resulting from an arbitration proceeding enjoining the lease violation.
- (d) **Prevailing Party, Attorney's Fees.** If Tenant institutes a lawsuit against Landlord for violation of, or to enforce any covenant or condition of, this Section 10.5 and Tenant prevails in such lawsuit, Tenant shall be entitled to all of its costs and expenses incurred in connection with such lawsuit, including, without limitation, attorneys' fees. The “prevailing party” in such action will be determined by the court before whom the action

*was brought.*

## 11. INSURANCE

**11.1 Fire Insurance.** Tenant shall not permit any use of the Premises which will make voidable any insurance on the Building or the Project, or on the contents of said property or which shall be contrary to any law or regulation from time to time established by the New England Fire Insurance Rating Association, or any similar body succeeding to its powers. Tenant shall on demand reimburse Landlord, and all other tenants, all extra insurance premiums caused *solely* by Tenant's use of the Premises.

**11.2 Tenant's Insurance Obligations.** [After the Effective Date and prior to the Occupancy Date, Tenant's insurance coverage shall be governed by Exhibit A-1 attached hereto.] At all times from and after the Occupancy Date, Tenant shall procure and maintain, at its sole cost and expense, the following policies of insurance:

- (a) **Liability.** Commercial general liability insurance with broad form contractual liability coverage and with coverage limits of not less than \$[X] combined single limit, per occurrence, and \$[X] general aggregate. Such policy shall protect Tenant and Landlord (as an additional insured) against claims for bodily injury and property damage based upon, involving or arising out of the ownership, use, occupancy or maintenance of the Premises and all areas appurtenant thereto.
- (b) **Workers' Compensation.** Workers' compensation insurance in the amount required by Massachusetts for the benefit of Tenant's employees.
- (c) **Tenant's Personal Property and Improvements.** Property insurance covering any peril generally included in the classification "special form coverage" covering all improvements made by Tenant and personal property owned or leased by Tenant or for which Tenant is legally liable and located on the Premises in an amount not less than the full replacement cost and with a commercially reasonable deductible not to exceed \$[**maximum deductible amount**]. Such coverage shall include insurance against loss of business income, vandalism, malicious mischief, and sprinkler leakage or other sprinkler damage, boiler and pressure vessel insurance, and any policy proceeds shall be used for the repair or replacement of the property damaged or destroyed, unless this Lease is terminated under the provisions hereof.

**11.3 Tenant Policy Requirements.** All policies of insurance provided for herein (with the exception of workers' compensation insurance) shall name Landlord as "additional insureds." All commercial general liability insurance, property damage or other casualty policies shall be written as primary policies, not contributory with or secondary to coverage that Landlord may carry.

**11.4 Tenant Proof of Insurance; Notice.** Tenant shall provide proof of such insurance at or prior to the Occupancy Date, and thereafter within thirty (30) days prior to the expiration of any such policies. All such proof of insurance shall provide that such policies shall not be cancelled without at least ten (10) days prior written notice to each additional insured named therein. Tenant shall provide notice to

Landlord within three (3) days upon receipt of any notice received by Tenant from its insurance carrier advising of non-renewal or cancelation of the policies required under this Lease.

**11.5 Landlord's Insurance Obligations.** At all times from and after the Occupancy Date, Landlord shall maintain in effect insurance providing protection for the following liabilities and/or risks:

- (a) Commercial general liability insurance for bodily injury and property damage arising from Landlord's ownership and operation of the Project with coverage limits at least equal to those Tenant is required to maintain as provided herein; and
- (b) Any peril included in the classification "special form coverage" in Massachusetts, including earthquake coverage and/or other coverage Landlord deems reasonably necessary, covering the Project, exclusive of any item that Tenant is required to insure or any item, building or improvement that another party is required to (and does) insure, in an amount that is the greater of [X] percent of its full replacement cost, or such greater amount as any mortgagee may require Landlord to maintain.

**11.6 Landlord's Policy.** Tenant will not be named as an additional insured in any insurance policies carried by Landlord and shall have no right to any proceeds therefrom.

**11.7 Waiver of Subrogation.**

- (a) Landlord waives any and all rights of recovery against Tenant for or arising out of damage to, or destruction of, the Premises to the extent that Landlord's insurance policies then in force insures against such damage or destruction and permit such waiver. Such waiver is only to the extent of the insurance proceeds actually received by Landlord for such damage or destruction. Landlord's waiver shall not relieve Tenant from liability under Section 23 except to the extent Landlord's insurance company actually satisfies Tenant's obligations under Section 23.
- (b) Tenant waives any and all rights of recovery against Landlord for liability or damage to the extent Tenant's insurance policies then in force, or the insurance policies Landlord is required to obtain and maintain under this Section 11 regardless of whether insurance Tenant is required to obtain is then in force and effect, insures against such damage or liability and permit such waiver. Such waiver is only to the extent of the insurance proceeds actually received by Tenant for such liability or damage.

**11.8 Coverage.** Landlord makes no representation that the limits or forms of coverage specified above or approved by Landlord are adequate to insure Tenant's property or Tenant's obligations under this Lease, and the limits of any insurance carried by Tenant shall not limit Tenant's obligations or liability under any provision of this Lease.

**Explanation:** Section 11 describes the insurance policies that you and the landlord will be required to purchase and maintain for the duration of the lease.

Section 11.1 prohibits you from engaging in any activities that could void the landlord's fire

insurance (or other policy) on the building. The provision also requires you to pay for any increases in the cost of the landlord's insurance that are caused by your occupancy.

Section 11.2 defines what insurance policies you will be required to purchase. The first sentence in brackets should only be included when you will be doing the "Initial Improvements" described in Section 2.3 above.

The three kinds of policies required by this lease will be required by most commercial leases. Liability insurance, required by Section 11.2(a), offers protection from lawsuits that arise out of your occupancy of the premises. Note that this provision, as well as Section 11.3, requires you to list your landlord on the policy as an additional insured so that he or she is also protected by the policy. You can do this by asking the insurance company to add your landlord's name to the policy as an additional insured. Workers' compensation, required by Section 11.2(b), provides your injured employees with medical costs and wage replacement and protects you from lawsuits brought by your employees. With limited exceptions, every business in Massachusetts with one or more employees is required to carry workers' compensation insurance. Section 11.2(c) requires you to have an insurance policy that protects you against damage to your personal property, including any improvements you make to the premises.

Section 11.3 describes certain requirements for the insurance policies you obtain. As mentioned above, this provision requires you to name your landlord as an additional insured. This section also requires that your coverage be primary, i.e. your insurance will be used before any of the landlord's. Your lease may also require that your insurance policy be from an insurance company that has received a particular rating set by A.M. Best or Standard & Poor's. You should double-check that your insurer meets the ratings requirements in your lease by looking up the insurer's rating at the A.M. Best website, here: <http://www.ambest.com/home/ratings.aspx>.

Section 11.4 requires you to provide proof of insurance to your landlord and notify the landlord of any cancellations of coverage.

Section 11.5 describes the insurance policies the landlord will be required to purchase, including under Section 11.5(a), general commercial liability insurance, which protects the landlord from lawsuits arising out of his or her ownership of the building, and under Section 11.5(b), special form coverage the landlord thinks is reasonably necessary, which protects against events like natural disasters. Notice that under Section 11.6 you will not be named as an additional insured and will therefore not be entitled to any money from landlord's insurance policies.

In Section 11.7, you and your landlord agree not to bring lawsuits against one another for damage that is covered and actually paid for by an insurance policy. Section 11.7(a) clarifies that this lease does not apply to any indemnification obligations you separately have under Section 23.

Section 11.8 clarifies that the limits specified in Section 11.2 do not necessarily reflect what is adequate insurance for you and the premises, nor limits the amount you may be obligated to pay under this lease. When you purchase an insurance policy, therefore, you should make sure it meets the requirements set out in this section, and consider whether additional coverage may

be necessary based on the risk associated with your business.

## 12. MAINTENANCE AND REPAIRS

### 12.1 Tenant's Obligations.

- (a) Tenant shall maintain the Premises in good condition, ***reasonable wear and tear and damage by fire and other casualty excepted***, and whenever necessary, to replace plate glass and other glass therein, acknowledging that the Premises are now in good order and the glass whole, ***provided that such obligations shall not extend to any of the mechanical, electrical, plumbing and life safety systems serving the Premises or the Building, which shall be the obligation of Landlord to maintain***. Tenant shall not permit the Premises to be overloaded, damaged, stripped, or defaced, nor suffer any waste.
- (b) If Tenant fails to keep the Premises in good condition and repair, ***reasonable wear and tear and damage by fire and other casualty excepted***, Landlord may, ***upon reasonable prior written notice to Tenant***, make any necessary repairs. If Landlord makes such repairs, Landlord may bill Tenant for the cost of such repairs and such amount shall be payable by Tenant within ten (10) days after demand by Landlord.

### 12.2 Landlord's Obligations.

- (a) Landlord shall maintain the Building of which the Premises are a part and the Project in the same condition as it is at the commencement of the Lease Term or as it may be put in during the Lease Term, reasonable wear and tear, damage by fire and other casualty only excepted, unless such maintenance is required because of Tenant or those for whose conduct Tenant is legally responsible. The removal of snow and ice from the roof of the building and the sidewalks bordering upon the Premises shall be Landlord's responsibility.
- (b) Tenant shall give Landlord notice of any repair required to be performed by Landlord pursuant to this Section 12.2 within ten (10) days after the later of the date (i) the need for such repair arises, and (ii) Tenant becomes aware of such required repair. Landlord shall have a reasonable time in which to complete the repair after receipt of such notice. ***Provided, however, that in the event of an emergency, or if Landlord fails to respond to Tenant's repair request within a reasonable period of time, Tenant may make repairs necessary to resolve the emergency or otherwise without prior notice to Landlord, and shall notify Landlord immediately, but in any event no later than three (3) days of making such repairs. Any costs incurred by Tenant for such repairs shall be applied dollar-for-dollar against the Base Rent due immediately following the date such costs were incurred.***

**Explanation:** Section 12 defines who will be responsible for various aspects of the maintenance and repair of the building and premises.

Section 12.1(a) defines what you are responsible for in terms of maintenance and repair. In this lease, we have included a provision that makes the landlord responsible for repairs to the utility systems serving the building. If a similar provision does not appear in your lease, consider adding

one.

Section 12.1(b) permits the landlord to make necessary repairs if you do not maintain the premises in good condition. If this or a similar provision in your lease does not include a requirement that the landlord notify you before making repairs, consider adding one so that you have the opportunity to make the necessary repairs yourself and the landlord does not unexpectedly alter the premises.

Section 12.2(a) describes the landlord's maintenance and repair obligations, which are limited to the entire building. Note that the landlord's obligations under this provision include removal of snow and ice from the roof of the building and the sidewalks around the premises. Because an individual who is injured outside the premises as a result of a failure to remove snow and ice could sue for that failure, make sure that your lease specifies who is responsible for this removal.

Section 12.2(b) describes how you will need to work with your landlord to complete repairs for which his or her attention is required. Because needed repairs to the building could impede your ability to do business, make sure that you can make repairs on your own if the landlord fails to do so within a reasonable time, and that you may deduct the costs you incur from the Base Rent.

#### **Suggested Provisions:**

Consider adding the following subsection (c) to Section 12.1 to limit your responsibility to repair any defects in the construction of the building or improvements the landlord made prior to your occupancy:

- (c) *Notwithstanding the foregoing, Tenant shall not be responsible for the repair of any latent defect in the original construction of the Building or installation of any Landlord installed improvements regardless of time of discovery, and Landlord shall repair the same within a reasonable time, but in no event later than thirty (30) days after discovery of the defect.*

### **13. IMPROVEMENTS, ALTERATIONS AND ADDITIONS**

**13.1 Landlord's Consent.** Tenant shall not make alterations or additions to the Premises without Landlord's written consent, *which consent shall not be unreasonably withheld, conditioned or delayed*. All such allowed additions and alterations shall be at Tenant's expense and shall be in quality at least equal to the present construction.

#### **13.2 Initial Improvements.**

- (a) Tenant, at its sole expense, shall perform and complete its work (the "Tenant's Work") with respect to Initial Improvements in accordance with and as described in Exhibit A-1 hereof and other relevant provisions of this Lease.
- (b) As soon as reasonably possible hereafter, Tenant shall submit plans to Landlord for Tenant's Work (the "Tenant's Plans"). Within five (5) days after receipt of Tenant's Plans, Landlord shall notify Tenant in writing of any failures or deficiencies of Tenant's Plans necessary to

meet Landlord's approval, ***which approval shall not be unreasonably withheld, delayed or conditioned***. Tenant shall within five (5) days after receipt of any such written notice cause Tenant's Plans to be revised to the extent necessary to obtain Landlord's approval. When Landlord has approved the original or revised Tenant's Plans, as applicable, Landlord shall sign and return (which signature and return may be transmitted electronically) the approved Tenant's Plans to Tenant and the same shall become a part hereof by reference as Exhibit A-2. Approval of plans and specifications by Landlord shall not constitute an assumption of any responsibility by Landlord for their accuracy or sufficiency or conformity with applicable laws, and Tenant shall be solely responsible for such plans and specifications.

- (c) Tenant shall not commence any of Tenant's Work until Landlord has approved Exhibit A-2, unless Landlord consents in writing.
- (d) Tenant shall commence Tenant's Work on the date specified in Exhibit A-2 and diligently proceed with construction so as to complete the work contemplated thereby, install all trade fixtures and equipment, and open for business in the Premises no later than the required completion date specified in Exhibit A-2.
- (e) Tenant shall obtain adequate and appropriate insurance for the Initial Improvements and shall name Landlord as an additional insured.
- (f) Within ten (10) days after the Occupancy Date, Tenant shall deliver to Landlord the following:
  - i. Tenant's affidavit stating that the work to be performed by Tenant pursuant to the terms of this Lease has been completed in compliance with Tenant's Plans as approved by Landlord, and that no security interest under the Uniform Commercial Code or chattel mortgages are outstanding, it being intended that any such affidavit may be relied upon by Landlord and that any deliberate misstatement by Tenant shall constitute an event of default hereunder;
  - ii. An affidavit of any general contractor performing Tenant's Work stating that all subcontractors, laborers and material men who have performed work on or furnished materials to the Premises (whose names and addresses shall be recited in the affidavit) have been paid in full and that all liens therefor that have or might be filed have been discharged of record or waived; and
  - iii. All certificates and approvals with respect to work performed by Tenant or on Tenant's behalf that may be required by governmental authorities as a condition for the issuance of an occupancy certificate for the Premises together with a copy of any occupancy certificate issued by the applicable government authority for the premises.

**13.3 Signs.** Tenant shall obtain written consent of Landlord before erecting any sign on the Premises, which consent by Landlord shall not be unreasonably withheld, conditioned or delayed. Any permitted sign shall be erected and maintained by Tenant at Tenant's sole expense.

**13.4 Liens.** Tenant shall not permit any mechanics' liens, or similar liens, to remain upon the Premises for labor and material furnished to Tenant or claimed to have been furnished to Tenant in



connection with work of any character performed or claimed to have been performed at the direction of Tenant and shall cause any such lien to be released of record forthwith without cost to Landlord.

**13.5 Notice.** Subject to waiver by Landlord, Tenant shall give Landlord ten (10) days written notice prior to the commencement of any alterations in the Premises by Tenant, and Landlord shall have the right to post notices of non-responsibility in or on the Premises or Project relating thereto.

**13.6 Upon Surrender.** Any alterations, additions or improvements made by Tenant, including without limitation the Initial Improvements, shall become the property of the Landlord at the termination of occupancy as provided herein with the exception of trade fixtures, furnishings and equipment, which shall be the property of Tenant. Tenant shall repair any damage to the Premises occasioned by installation or removal of Tenant's trade fixtures, furnishings and equipment.

**Explanation:** This section establishes requirements and procedures for making improvements, alterations, and additions to the premises.

Section 13.1 requires you to seek the landlord's consent before making alterations or additions to the premises, which is a common provision in most leases. If your lease does not include a clause clarifying that the ***landlord's consent cannot be unreasonably withheld, conditioned, or delayed***, consider adding one so that your landlord cannot arbitrarily deny your request to make an alteration or addition.

Section 13.2 makes arrangements for initial improvements you may need to make before moving into the space. This is more common for restaurants, which may need to install heavy equipment or construct built-in seating or other features before opening. Note that Sections 2.3 and 4.3 also contain provisions relating to initial improvements.

Section 13.3 permits you to put up signs with the written consent of the landlord. Again, if your lease does not include a clause clarifying that the ***landlord's consent cannot be unreasonably withheld, conditioned, or delayed***, consider adding one so that your landlord cannot arbitrarily deny your requests to put up signs.

Section 13.4 prohibits you from allowing a contractor or other third-party to place a lien on the premises. To avoid violating this provision, be sure to pay all outstanding charges for services when they are due so that the contractor or other third-party will not attempt to put a lien on the property.

Section 13.5 requires you to notify your landlord of any alterations, additions, or improvements 10 days prior to starting work.

Section 13.6 specifies that at the end of your lease, any alterations, additions, or improvements you make will become your landlord's property, except for any trade fixtures, furnishings and

equipment you install, which will remain your property.

#### **Suggested Provisions:**

If you anticipate needing to paint or make minor cosmetic alterations to the premises on a routine basis, consider adding the following provision to Section 13.1 so that you will not need to get the landlord's written consent every time you need to make such a revision: *Notwithstanding anything herein to the contrary, Tenant shall be permitted to make nonstructural alterations to the Premises following ten (10) days' written notice to Landlord, but without Landlord's prior consent, to the extent that such alterations do not adversely affect the systems and equipment of the Building, exterior appearance of the Building, or structural aspects of the Building.*

## **14. ASSIGNMENT, SUBLEASING, AND TRANSFERRING**

**14.1 Tenant.** Tenant shall not assign, sublet or otherwise transfer the whole or any part of the Premises without Landlord's prior written consent, ***which shall not be unreasonably withheld, conditioned or delayed.*** Notwithstanding such consent and subject to waiver by Landlord, ***unless expressly consented to by Landlord,*** Tenant shall remain liable to Landlord for the payment of all rent and for the full performance of the covenants and conditions of this Lease.

**14.2 Landlord.** Landlord shall have the right to transfer all or any portion of its interest in the Project and to assign this Lease to the transferee. In the event of such a transfer, Tenant agrees that Landlord shall automatically be released from all duties, obligations and liabilities under this Lease, and Tenant hereby agrees to look solely to Landlord's transferee for the performance of Landlord's obligations under this Lease from and after the date of transfer.

**Explanation:** Pay close attention to this provision. Being able to assign (i.e. sell) your lease to someone else is a great back-up option if you want to stop paying rent.

Typically, the landlord will retain control over assignments and subleases and often will not allow you to be released from paying rent unless a new lease is signed with the assignee or subtenant.

Section 14.1 describes your rights to sublet the space and assign the lease. You can only assign or sublet the premises with the landlord's consent. You want to make sure to add that ***the landlord cannot unreasonably withhold consent.*** You may want to carve out some exceptions to requiring the landlord's consent over your assignment or sublet. For example, if the business is purchased by a new company, this should not be considered a transfer.

Landlord's rights to transfer the property are described in Section 14.2. In this lease, the landlord may sell the building and its rights and obligations under the lease to a third-party without

limitation.

### **Suggested Provisions:**

For tenants that are legal entities (e.g. corporations and LLCs), add as Section 14.1(a): *For the avoidance of doubt, a change of control of Tenant will not be deemed an assignment or transfer hereunder.*

You may want to arrange flexibility in how you use the space by allowing some forms of sublet. Perhaps you want to assign or sublet 10% of the square-footage to a friend without having to get the landlord's consent. In addition to signing an agreement with that friend, consider adding to your lease as Section 14.1(b):

- (b) *Notwithstanding the provisions of this Section 14.1, Tenant shall have the right, upon ten (10) days' prior written notice to Landlord, to permit affiliates, associated professionals, clients or customers of Tenant (collectively, the "Other Associates") to occupy up to [ten percent (10%)] of the rentable square feet in the Premises, provided that (a) Tenant does not separately demise (or otherwise further sublet or assign) its rights to such space, and Tenant and any Other Associates use one (1) common entry way to the Premises; (b) the Other Associates operate in the Premises only for the uses permitted by this Lease and in accordance with all of the terms and conditions of this Lease; and (c) the Other Associates are suitable for the Building considering the business of the Tenant. In no event shall any use of the Premises by Other Associates release or relieve Tenant from any of its obligations under this Lease.*

You should include a requirement that the landlord give you notice of any sale made under Section 14.2. Consider adding to Section 14.2: *Landlord will provide Tenant notice of any such transfer no later than 10 days after the transfer.*

You may also want to build in a "Right of First Refusal." This would require that the landlord offer you the chance to buy the property if it finds a potential buyer. While you yourself may not be able to afford the purchase price, you could assign the purchase right to a community organization or non-profit organization who could then lease you the property at more favorable terms. This is an ideal opportunity to create more community-owned property.

Suggested Right of First Refusal:

**14.3 Right of First Refusal.** *Landlord hereby agrees that if, from time to time during the Lease Term, Landlord receives a bona fide offer in writing from a third-party to consummate a sale of the Project, Building or Premises, Landlord shall promptly notify Tenant thereof in writing (an "Offer Notice"), which notice shall contain the following information: (a) the purchase price with respect to such sale (the "Sales Price"); (b) the desired closing date for such sale, which shall not be less than 120 days after the date Tenant receives the Offer Notice; and (c) all the other terms and conditions that are material to such sale, and shall be accompanied by a true, correct and complete copy of the sale offer, including all schedules, exhibits and annexes (if any) thereto. Each Offer Notice shall constitute an offer (the "ROFR Offer") by Landlord to Tenant to purchase the Project, Building or Premises, as applicable, on the terms and conditions set forth in the Offer Notice including the Sales Price set forth therein. If Tenant desires that it or its designee (which*

*designee may be, without limitation, an unaffiliated non-profit organization or community organization) accept the ROFR Offer, Tenant shall give Landlord notice to that effect within sixty (60) days (the "Offer Period") after Tenant's receipt of such Offer Notice. If Tenant fails to accept the ROFR Offer within such sixty (60) day period (or affirmatively rejects such offer), then Landlord shall be free to effectuate the sale contemplated in the Offer Notice within 120 days of the Offer Period; provided that, if such sale is not consummated within such 120 day period in accordance with the terms and conditions set forth in the Offer Notice, then Tenant's right of first refusal hereunder shall remain in full force and effect. Landlord hereby agrees that monetary damages would not be a sufficient remedy for any breach by it of this Section, and Tenant shall be entitled to equitable relief, including injunction and specific performance, as a remedy for any such breach.*

## 15. SUBORDINATION

This Lease shall be subject and subordinate to any and all mortgages, deeds of trust and other instruments in the nature of a mortgage, now or at any time hereafter, a lien or liens on the property of which the Premises are a part and Tenant shall, when requested, promptly execute and deliver such written instruments as shall be necessary to show the subordination of this Lease to said mortgages, deeds of trust or other such instruments in the nature of a mortgage.

**Explanation:** This provision means that if the landlord defaults on a loan and the property is foreclosed by a bank, the lease may be terminated by the bank if the bank chooses. To avoid this scenario, you should negotiate a "non-disturbance provision."

You may seek a SNDA (Subordination, Non--Disturbance and Attornment) Agreement from the bank, financial institution, or other lien holder. In addition, the bank may want you to complete a Tenant Estoppel. Be sure to note in this document any security deposit you have paid that is due after the expiration of the lease and any of the landlord's other obligations, especially monetary ones.

### **Suggested Provisions:**

Add the following non-disturbance provision: *Notwithstanding the foregoing, no such subordination shall be effective unless and until Landlord obtains from its mortgage lender or other lien holder a reasonably acceptable non-disturbance agreement in recordable form, providing that Tenant will not be disturbed by such mortgage lender or lien holder so long as Tenant is in compliance with the terms of this Lease.*

## 16. LANDLORD'S ACCESS

**16.1 Access.** Landlord or agents of Landlord may, at reasonable times and ***upon twenty-four (24) hours' advance notice***, enter to view the Premises and may remove placards and signs not approved and affixed as herein provided, and make repairs and alterations as Landlord should elect to do and may

show the Premises to others, and at any time within three (3) months before the expiration of the Lease Term, may affix to any suitable part of the Premises a notice for letting or selling the Premises or the Project and keep the same so affixed without hindrance or molestation.

**16.2 Keys.** Landlord shall have the right to retain keys to the locks on the entry doors to the Premises and all interior doors at the Premises. At Landlord's option, Landlord may require Tenant to obtain all keys to door locks at the Premises from Landlord's locksmith and only use Landlord's locksmith to change locks at the Premises. Tenant shall pay locksmith's standard charge for all keys and other services obtained.

**Explanation:** Section 16 describes how your landlord will be able to access the premises. Section 16.1 describes when and for what purposes your landlord can enter the premises. Section 16.2 permits the landlord to keep keys to the premises.

**Suggested Provisions:**

Look for a requirement that the landlord notify you before entering the premises (e.g. "*upon twenty-four (24) hours' advance notice*"), and consider adding one if there is no similar restriction in your lease.

You should also consider adding a sentence to Section 16.1 that clarifies that the landlord should cause as little disturbance to your business as possible. For example: *Any entry by Landlord shall be accomplished as expeditiously as reasonably possible and in a manner so as to cause as little interference to Tenant as reasonably possible.*

## 17. BROKERAGE

**17.1 Brokers, Warranty.** The Broker(s) named herein [**list brokers' names**] warrant(s) that he (they) is (are) duly licensed as such by the Commonwealth of Massachusetts, and join(s) in this agreement and become(s) a party hereto, insofar as any provisions of this agreement expressly apply to him (them), and to any amendments or modifications of such provisions to which he (they) agree(s) in writing.

**17.2 Payment for Services.** Landlord agrees to pay the above-named Broker(s) on the Occupancy Date a fee for professional services of [insert brokerage fee] or pursuant to Broker's attached commission schedule.

**17.3 Tenant's Warranty.** Tenant warrants and represents that it has dealt with no other broker entitled to claim a commission in connection with this transaction and shall indemnify Landlord from and

against any such claim, including without limitation reasonable attorneys' fees incurred by the Landlord in connection therewith.

**Explanation:** This section provides for payment to any brokers involved in the lease.

Section 17.1 describes the brokers who have provided services during the course of the transaction.

Section 17.2 provides that the landlord will pay the brokers. It is also common for a commercial lease to require that the landlord pay brokers' fees according to a separate written agreement.

Section 17.3 requires you to promise that you did not deal with any other brokers in your lease transaction with the landlord and that you will pay for any legal costs the landlord might have in defending against people claiming to have provided you with brokerage services.

## 18. FIRE, CASUALTY, AND EMINENT DOMAIN

**18.1 Effect of Damage or Destruction.** Should a substantial portion of the Premises, the Building or the Project be substantially damaged (as defined in Section 18.2) by fire or other casualty, or be taken by eminent domain, Landlord may elect to terminate this Lease under the terms specified in this Section 18. When such fire, casualty, or taking renders the Premises substantially unsuitable for their intended use, *a just and proportionate abatement of rent shall be made*, and *Tenant may elect to terminate this Lease if*: (i) Landlord fails to give written notice within thirty (30) days of intention to restore Premises; or (ii) Landlord fails to restore the Premises to a condition substantially suitable for their intended use within ninety (90) days of said fire, casualty or taking. Landlord reserves, and Tenant grants to Landlord, all rights which Tenant may have for damages or injury to the Premises for any taking by eminent domain, except for damage to Tenant's trade fixtures, property, and equipment.

**18.2 Definition of Substantially Damaged.** The Premises, Building or Project shall be deemed "substantially damaged" under any of the following circumstances:

- (a) The uninsured cost of repairing the damage exceeds \$[amount]; or
- (b) If insurance proceeds are available to Landlord which are sufficient to pay the entire cost of repairing all damage to the Premises, Building or the Project and the cost of repairing the damage exceeds \$[amount]; or
- (c) The Premises, Building or Project cannot be rebuilt or repaired to substantially the same condition it was in prior to the damage due to laws, regulators or ordinances in effect at the time

the repairs will be made.

**18.3 Tenant's Acts.** If such damage or destruction occurs as a result of the negligent or intentional acts of Tenant or Tenant's employees, agents, contractors or invitees:

- (a) Tenant's termination right described in Section 18.1 shall not apply; and
- (b) If the insurance proceeds actually received by Landlord are insufficient to pay for the repairs of the damage, Tenant shall pay at Tenant's sole cost and expense the difference between the cost of repairing the damage and the insurance proceeds received by Landlord.

**18.4 Tenant's Property.** Tenant shall repair or replace Tenant's property at Tenant's sole cost and expense. Tenant acknowledges that it is Tenant's sole responsibility to obtain adequate insurance coverage to compensate Tenant for damage to Tenant's property.

**Explanation:** Section 18 describes your legal rights and obligations in the case of a fire, governmental taking, or other event that causes the premises to be substantially damaged.

Section 18.1 describes what actions you and your landlord can take in the event of substantial damage to the premises. This lease would permit you to **terminate the lease** in certain scenarios. Read your lease closely to make sure it also allows you to terminate the lease if the premises are damaged and the landlord is unable to make necessary repairs. If such a provision is included, be sure to study and understand the conditions in which you will be able to terminate the lease. In addition, this lease also **reduces your rent** if the premises become unusable.

Section 18.2 defines what "substantially damaged" means, which is what determines when Section 18.1 is triggered. Your lease may define this term according to a certain percentage of the premises being damaged. If the term is not defined in your lease, consider adding a definition like this one.

Section 18.3 prevents you from terminating the lease and requires you to compensate the landlord for any costs that exceed the insurance payout for the damage, *but only if you are at fault for the damage*.

Section 18.4 clarifies that you will be responsible for repairing or replacing any of your own property that is damaged.

**Suggested Provisions:**

If your lease does not reduce your rent when there is a fire or other casualty, consider adding the following as Section 18.5:

**18.5 Rent Abatement Due to Casualty.** *If Tenant is unable to use any portion of the Premises or Common Areas as a result of the casualty damage and the damage does not result from the gross negligence or willful misconduct of Tenant, then during the period all or a portion of the Premises or Common Areas are rendered unusable by such damage and subsequent repair, the Base Rent shall be proportionately reduced based upon the extent to which the damage and*

*subsequent repair prevents Tenant from conducting, and Tenant does not actually conduct, its business at the Premises.*

## **19. DEFAULT**

**19.1 Default by Tenant.** Landlord and Tenant hereby agree that the occurrence of any one or more of the following events is a default by Tenant under this Lease and such default shall give Landlord the rights described in Section 19.2:

- (a) Tenant defaults in the payment of any installment of Base Rent or other sum herein specified and such default shall continue for ten (10) days after written notice thereof; or
- (b) Tenant abandons the Premises in which event Landlord shall not be obligated to provide any notice of default to Tenant; or
- (c) Tenant defaults in the observance or performance of any other of Tenant's covenants, agreements, or obligations hereunder and such default shall not be corrected within thirty (30) days after written notice thereof; or
- (d) Tenant is declared bankrupt or insolvent according to law, or, if any assignment shall be made of Tenant's property for the benefit of creditors.

**19.2 Landlord's Remedies.** In the event of default by Tenant as defined in Section 19.1, Landlord shall have the right thereafter, while such default continues, to re-enter and take complete possession of the Premises, to terminate this Lease, and remove Tenant's effects, without prejudice to any remedies which might be otherwise used for arrears of rent or other default. Tenant shall indemnify Landlord against all loss of rent and other payments which Landlord may incur by reason of such termination during the residue of the term. If Landlord makes any expenditures or incurs any obligations in connection therewith, including, but not limited to, reasonable attorney's fees in instituting, prosecuting or defending any action or proceeding, such sums paid or obligations insured, with interest at the rate of [X] percent per annum and costs, shall be paid to Landlord by Tenant as additional rent.

**19.3 Default by Landlord.** If Landlord fails to perform or observe any of the terms, covenants or conditions contained in this Lease on its part to be performed or observed within thirty (30) days after receipt of written notice specifically describing such default from Tenant or, when more than thirty (30) days shall be required because of the nature of the default, if Landlord shall fail to proceed diligently to cure such default after receipt of written notice thereof from Tenant, said failure shall constitute a default by Landlord under this Lease.

**19.4 Tenant's Remedies.** In the event of a default by Landlord as defined in Section 19.3, Tenant shall have the right thereafter, while such default continues, at its sole and absolute option, to (a)



reduce the Base Rent by a just and proportionate amount until the date Landlord cures such default, and/or (b) terminate the Lease.

**19.5 Late Charges.** If a sum payable hereunder other than Base Rent remains outstanding for a period of ten (10) days, Tenant shall pay to Landlord a late charge equal to one and one-half percent (1.5%) of the amount due for each month or portion thereof during which the arrearage continues.

**19.6 Landlord's Right to Cure Default; Payments by Tenant.** All covenants and agreements to be kept or performed by Tenant under this Lease shall be performed by Tenant at Tenant's sole cost and expense and without any reduction of rent. If Tenant shall fail to perform any of its obligations under this Lease, within a reasonable time after such performance is required by the terms of this Lease, Landlord may, but shall not be obligated to, after three (3) days prior written notice to Tenant, make any such payment or perform any such act on Tenant's behalf without waiving its rights based upon any default of Tenant and without releasing Tenant from any obligations hereunder. Tenant shall pay to Landlord, within ten (10) days after delivery by Landlord to Tenant of statements or bills therefore, an amount equal to the expenditures reasonably made by Landlord in connection with the remedying by Landlord of Tenant's defaults pursuant to the provisions of this Section 19.6.

**Explanation:** If you fail to meet the lease obligations, there could be a default. This lease contains guidelines for a tenant's default and a landlord's default. Most standard commercial leases will only discuss the tenant's default, and *you should consider* whether landlord has any obligations under the lease and what options you have if the landlord fails to perform its obligations (see Sections 19.3 and 19.4).

Section 19.1 lists four reasons why you may default: (1) you fail to pay rent for 10 days after receiving notice of missing rent; (2) you abandon the property; (3) you fail to observe any obligations of the lease and do not correct it within thirty days of receiving notice; or (4) you are declared bankrupt.

If you default, the landlord has the rights listed in Section 19.2. The landlord may retake complete possession of the space and remove your property. You will pay the landlord for any rent he has lost. You will pay the landlord for any expenses the landlord incurs because of your default, including attorneys' fees, with interest. This could be a large sum of money.

Section 19.6 contains late charges. If you are late on rent by 10 days or more, you will owe the rent amount, plus 1.5% of your rent amount due that month.

Section 19.7 permits the landlord to perform any of tenant's obligations under the lease (e.g. repairing the space) if tenant fails to do so within a reasonable time. The landlord must give tenant 3 days advance notice, and tenant must reimburse the landlord within 10 days for landlord's costs.

In this lease, the tenant has the right to reduce rent or terminate the lease if the landlord defaults in its obligations for more than 30 days. This is described in Sections 19.3 and 19.4. Such provisions give the tenant more rights, so typically will not be included in the draft you receive

from the landlord.

**Suggested Provisions:**

Make sure there is also a section about what occurs if the landlord defaults, such as Section 19.3 above.

Make sure that you will only reimburse the landlord for *reasonable* expenses.

Consider adding a clause that gives the landlord a duty to mitigate/reduce damages. For example, add to Section 19.2: *Landlord shall use its best efforts to mitigate damages.*

## 20. TERMINATION

**Tenant Termination Right.** Notwithstanding anything to the contrary contained herein, Tenant shall have a right to terminate this Lease upon no less than six (6) months' written notice to Landlord and payment of **[two (2)]** additional months' Base Rent to Landlord on the specified termination date, such payment representing an early termination fee.

**Explanation:** This provision gives you the right to terminate the lease with 6 months' notice and a fee. Such a provision can be a great option if you are worried about your ability to maintain your business during a long-term lease.

**Suggested Provisions:**

You may instead add a termination right in the event you are unable to reach a certain amount of sales. For example:

*Provided that Tenant is not in default of the Lease beyond any applicable notice and cure period, and provided that Tenant has continuously and uninterruptedly operated the Premises for business during the Measuring Period (as hereinafter defined), then if Tenant fails to achieve \$[minimum sales amount] ("Sales Limit") in gross sales during the period from the [sixth (6th)] full calendar month of the Lease Term through the [twelfth (12th)] full calendar month during the Lease Term (the "Measuring Period"), Tenant shall have the right to terminate the Lease upon one hundred eighty (180) days written notice to Landlord, provided that any such notice shall be provided within sixty (60) days after the last day of the Measuring Period. Tenant shall continue to operate its business in the Premises through the termination date and Tenant shall surrender the Premises to Landlord in the condition required by the terms of the Lease as of the termination date.*

## 21. SURRENDER

**21.1 Tenant's Obligations.** Tenant shall at the expiration or other termination of this Lease remove all of Tenant's goods and effects from the Premises (including, without hereby limiting the generality of the foregoing, all signs and lettering affixed or painted by Tenant, either inside or outside the Premises). Tenant shall deliver to Landlord the Premises and all keys, locks thereto, and other fixtures

connected therewith (with the exception of Tenant's trade fixtures, furnishings and equipment) and all alterations and additions made to or upon the Premises, in good condition, damage by ordinary wear and tear, fire or other casualty only excepted. Tenant shall repair any damage to the Premises occasioned by installation or removal of Tenant's trade fixtures, furnishings and equipment.

**21.2 Tenant's Failure to Remove Property.** In the event of Tenant's failure to remove any of Tenant's property from the Premises, Landlord is hereby authorized, without liability to Tenant for loss or damage thereto, and at the sole risk of Tenant, to remove and store any of the property at Tenant's sole risk and expense, and such right shall be in addition to any other rights and remedies available to Landlord under this Lease or applicable law.

**Explanation:** When the lease ends, you must surrender the space and remove all belongings from the premises. If you do not remove your belongings from the premises, the landlord may remove and store your belongings at your expense.

## 22. HOLDING OVER

**22.1 With Landlord's Consent.** If Tenant remains in possession of the Premises or any part thereof after the expiration or earlier termination of the term hereof with Landlord's consent, such occupancy shall be a tenancy from month to month upon all the terms and conditions of this Lease pertaining to the obligations of Tenant, and in such case rent shall be payable at a monthly rate equal to [one hundred fifty] percent ([150]%) of the Base Rent and additional rent payable under this Lease during the last full month prior to the date of the expiration or termination of this Lease.

**22.2 Without Landlord's Consent.** If Tenant remains in possession of the Premises or any part thereof after the expiration of the term hereof without Landlord's consent, Tenant shall, at Landlord's option, be treated as a tenant at sufferance or a trespasser. Nothing contained herein shall be construed to constitute Landlord's consent to Tenant holding over at the expiration or earlier termination of the Lease term or to give Tenant the right to hold over after the expiration or earlier termination of the Lease Term. Tenant hereby agrees to indemnify, hold harmless and defend Landlord from any cost, loss, claim or liability (including reasonable attorneys' fees) Landlord may incur as a result of Tenant's failure to surrender possession of the Premises to Landlord upon the termination of this Lease.

**Explanation:** Your lease may expire and you may want to keep occupying the space without a new lease. If you do this with your landlord's consent, then you have a month-to-month lease. Beware that in this lease, the consequences will be an increased rent equal to 150% of your existing rent.

If you stay in the premises without your landlord's consent, you are a trespasser and your

landlord may evict you. You will be responsible for the costs of the eviction.

**Suggested Provisions:**

In Section 22.1, delete the phrase “pertaining to the obligations of Tenant”, which means that only the tenants’ (and not the landlord’s) obligations carry over into the month-to-month lease.

You may also try to change the rent charged in Section 22.1 to a lower percentage, or, preferably, try to enter into a new lease with the landlord.

### 23. INDEMNIFICATION

Tenant shall save Landlord harmless from all loss and damage occasioned by anything occurring on the Premises unless caused by the negligence or willful misconduct of Landlord, ***Landlord’s agents, employees, or guests***, and from all loss damage wherever occurring occasioned by any omission, fault, neglect, or other misconduct of Tenant.

**Explanation:** This section describes how you will reimburse the landlord if there is any lawsuit related to the property. For example, if a passerby slips and falls on ice outside the property, you might be liable. You should make sure there is an exception for damages due to the landlord’s negligence or willful misconduct.

**Suggested Provisions:**

Consider adding the following paragraph to ensure that you could be indemnified by the landlord if you have any loss from landlord’s negligent acts or willful misconduct:

*Landlord shall indemnify, defend, protect, and hold harmless Tenant from and against all claims for damage to property outside the Premises to the extent that such claims are covered by Landlord’s insurance (or would have been covered had Landlord carried the insurance required under this Lease), even if the claims result from the negligent acts, omissions, or willful misconduct of Tenant. In addition, Landlord shall indemnify, defend, and hold harmless Tenant from and against all claims resulting from the negligent acts, omissions, or willful misconduct of Landlord in connection with Landlord’s activities in, on, or about the Building, except to the extent that such claim is for damage to the tenant improvements and Tenant’s personal property, fixtures, furniture, and equipment in the Premises and is covered by insurance that Tenant is required to obtain under this Lease (or would have been covered had Tenant carried the insurance required under this Lease).*

### 24. HAZARDOUS MATERIALS

**24.1 Definition and Consent.** The term “Hazardous Substance” as used in this Lease shall mean any product, substance, chemical, material or waste whose presence, nature, quantity and/or intensity of existence, use, manufacture, disposal, transportation, spill, release or affect, either by itself or in combination with other materials expected to be on the Premises, is: (a) potentially injurious to the public

health, safety or welfare, the environment or the Premises, (b) regulated or monitored by any governmental entity, (c) a basis for liability of Landlord to any governmental entity or third party under any federal, state or local statute or common law theory or (d) defined as a hazardous material or substance by any federal, state or local law or regulation. ***Except for small quantities or ordinary office supplies such as copier toner, liquid paper, glue, ink and common household cleaning materials***, Tenant shall not cause or permit any Hazardous Substance to be brought, kept, or used in or about the Premises or the Project by Tenant, its agents, employees, contractors or invitees.

**24.2 Duty to Inform Landlord.** If Tenant knows, or has reasonable cause to believe, that a Hazardous Substance, or a condition involving or resulting from same, has come to be located in, on or under or about the Premises or the Project, Tenant shall immediately give written notice of such fact to Landlord. Tenant shall also immediately give Landlord (without demand by Landlord) a copy of any statement, report, notice, registration, application, permit, license, given to or received from, any governmental authority or private party, or persons entering or occupying the Premises, concerning the presence, spill, release, discharge of or exposure to, any Hazardous Substance or contamination in, on or about the Premises or the Project.

**24.3 Inspection; Compliance.** Landlord and Landlord's employees, agent, contractors and lenders shall have the right to enter the Premises at any time in the case of an emergency, and otherwise at reasonable times ***and upon reasonable notice***, for the purpose of inspecting the condition of the Premises and for verifying compliance by Tenant with this Section 24. Landlord shall have the right to employ experts and/or consultants in connection with its examination of the Premises and with respect to the installation, operation, use, monitoring, maintenance, or removal of any Hazardous Substance on or from the Premises. The costs and expenses of any such inspections shall be paid by the party requesting same, unless a contamination, caused or materially contributed to by Tenant, is found to exist or be imminent, or unless the inspection is requested or ordered by governmental authority as the result of any such existing or imminent violation or contamination. In any such case, Tenant shall upon request reimburse Landlord for the cost and expenses of such inspection.

**Explanation:** Section 24 prohibits you from keeping hazardous substances at the premises, requires you to notify your landlord if any hazardous substances that appear on the premises, and gives the landlord certain rights to monitor and remove hazardous substances. This provision is a common feature of almost all commercial leases because the landlord is legally responsible for any hazardous materials present at his or her property.

Section 24.1 defines the term "Hazardous Substances." This lease, like most others, bases the definition of hazardous materials on governmental regulation. Longer, more complex leases may define the specific substances subject to this section or the particular environmental laws with applicable definitions. Landlords may be reluctant to negotiate this section due to the liability they bear for hazardous substances, but if possible, ***make sure to add a provision*** clarifying that this section does not apply to ordinary use of everyday items that may be covered

by the definition of Hazardous Substance in this section.

Section 24.2 requires you to notify the landlord in writing when you find out there is a hazardous substance present on the premises.

Section 24.3 permits the landlord to enter the premises to ensure there are no hazardous wastes on the property and hire any professionals needed to inspect the premises and ensure compliance. If you caused or contributed in a meaningful way to the presence of the substance, you will be required to pay for these inspections. Make sure that your lease includes a provision requiring the landlord to give you reasonable notice before entering the premises to look for hazardous substances.

### **Suggested Provisions:**

Because you may be liable for the costs of inspections, you may want to consider asking the landlord to promise, through a provision like Section 24.4 below, that there are no hazardous substances present in the building already.

**24.4 No Existing Hazardous Substances.** *Landlord represents and warrants that to the best of Landlord's actual knowledge (a) there are no Hazardous Substances in the Building, and (b) the Building is in compliance with all local, state, and federal environmental laws and regulations.*

You could also add a provision, such as Section 24.5 below, that requires you and your landlord to agree to pay for any damage resulting from your own or the landlords' own handling of hazardous materials.

**24.5 Indemnifications.** *Each of Tenant and Landlord agrees to indemnify, defend, protect and hold harmless the other party hereto from and against any liability, obligation, damage or costs, including without limitation, reasonable attorneys' fees and costs, to the extent resulting from any use, presence, removal or disposal of any Hazardous Substances or breach of any provision of this section, to the extent such liability, obligation, damage or costs was a result of actions caused or permitted by the indemnifying party.*

## **25. FORCE MAJEURE**

In the event that Landlord is prevented or delayed from making any repairs or performing any other covenant hereunder by reason of any cause reasonably beyond the control of Landlord, Landlord shall not be liable to Tenant therefor nor, except as expressly otherwise provided in case of casualty or taking, shall Tenant be entitled to any abatement or reduction of rent by reason thereof, nor shall the same give rise to a claim by Tenant that such failure constitutes actual or constructive eviction from the Premises or any part thereof.

**Explanation:** This provision refers to events outside of the landlord's control, such as natural disasters or other uncontrollable events. It means that you will not be entitled to pay less rent if

something uncontrollable happens that makes landlord unable to perform his or her duties.

## 26. LIABILITY OF OWNER

No owner of the Project or Building of which the Premises are a part shall be liable hereunder except for breaches of Landlord's obligations occurring during the period of such ownership or claims arising out of the negligence or willful misconduct of Landlord, its partners, employees and agents. The parties hereto agree that the obligations of Landlord in this Lease shall be binding only upon Landlord's interest in said Project or Building, but not upon other assets of Landlord, and no individual partner, agent, trustee, stockholder, officer, director, employee or beneficiary of Landlord shall be personally liable for performance of Landlord's obligations hereunder.

**Explanation:** This standard provision means that the landlord is never liable except for its own actions, such as breach of contract, negligence, or willful misconduct. The landlord is only liable to the extent of its interest in the property; therefore, the landlord cannot be expected to pay for damages in excess of the value of the property.

## 27. NOTICE

All notices, requests, claims, approvals, demands, instructions and other communications hereunder shall be in writing and shall be deemed to have been given if it is hand delivered, sent by recognized overnight courier service, sent by registered or certified mail, return receipt requested, postage prepared, and addressed to the intended recipient as set forth below or sent by facsimile or e-mail of a PDF document:

If to Landlord:

If to Tenant:

**Explanation:** The address you write here will be the address where the landlord is legally required to contact you. Notice will be deemed to have been given once the letter is dropped in

the mail.

**Suggested Provisions:**

Add your e-mail address and ask that landlord provide you e-mail and mail notice.

**28. MISCELLANEOUS**

**28.1 Quiet Enjoyment.** Landlord agrees that so long as Tenant is not in default of any of its obligations hereunder, Tenant may quietly have, hold, and enjoy the Premises from and after Landlord's delivery of the Premises to Tenant and until the end of the Lease Term, subject, however, to those matters to which this Lease is or shall become subordinate as expressly provided herein.

**28.2 Severability.** The invalidity of any provision of this Lease as determined by a court of competent jurisdiction shall in no way affect the validity of any other provision thereof.

**28.3 Amendment.** This Lease may be modified in writing only, signed by the parties in interest at the time of the modification.

**28.4 Captions and Headings.** The captions and headings contained in this Lease are for convenience only and shall not be deemed to limit or alter the meaning of this Lease. As used in this Lease the words tenant and landlord include the plural as well as the singular. Words used in the neuter gender include the masculine and feminine gender.

**28.5 Counterparts.** This Lease may be executed in any number of counterparts, each of which shall constitute an original, but all of which, when taken together shall constitute one and the same instrument. In addition, properly executed, authorized signatures may be transmitted electronically and upon receipt shall constitute an original signature.

**28.6 Incorporation and Integration.** The Exhibits identified in and attached to this Lease are incorporated herein by reference. This Lease and the Exhibits delivered hereunder represent the entire agreement between Landlord and Tenant and supersedes all other understandings and agreements, whether written or oral, with respect to the transaction contemplated herein. If there is an inconsistency between the statements in the body of this Lease and the documents delivered hereunder, including any Exhibits (other than an exception expressly set forth as such in the Exhibit), the statements in the body of this Lease shall control.

**28.7 Waiver.** No waiver by Tenant or Landlord of any provision hereof shall be deemed a waiver of any other provision hereof or of any subsequent breach by Landlord or Tenant of the same or any other provision. The acceptance of rent hereunder by Landlord shall not be a waiver of any preceding breach by Tenant of any provision hereof, failure of Tenant to pay rent so excepted. No acceptance by Landlord of partial payment of any sum due from Tenant shall be deemed a waiver by Landlord of its right to receive



the full amount due, not shall any endorsement or statement of any check or accompanying letter from Tenant be deemed an accord and satisfaction.

**28.8 Choice of Law.** This Lease shall be governed by the laws of the Commonwealth of Massachusetts and any litigation between Landlord and Tenant concerning this Lease shall be initiated in the county in which the Project is located.

**Explanation:** These provisions are called “boilerplate” provisions, and they are common to many leases. It is possible that some of them will not be in your lease.

Section 28.1 describes your right to enjoy the premises without the landlord intruding on your business and use of the property (except for the rights landlord has in the lease).

If a court finds that a provision in this lease is invalid, Section 28.2 provides that the rest of the lease will still be valid.

Section 28.3 requires that the lease may only be modified in writing. Therefore, if your landlord promises you anything different from the lease, you should get it in writing. Otherwise a court may not recognize your agreement.

Section 28.4 means that a court will not consider the titles of each section, but only the words contained in the actual provision. Make sure not to be misled by the names of each section.

Section 28.5 means that if you and the landlord sign on different pages of the lease, the lease is still effective.

In this lease, there are exhibits attached. Section 28.6 says that if there is a conflict between the body of the lease and the exhibits, then a court should follow the body of the lease.

In contract law, sometimes one party’s actions can constitute a waiver of any claims against the other. Section 28.7 clarifies that there will be no waivers unless landlord specifically waived your default. Thus, just because you have paid your rent and the landlord accepts your check does not mean there are no lingering issues that could be brought out in a future dispute.

Section 28.8 describes the law governing the lease. In this lease, Massachusetts law will apply.

**Suggested Provisions:**

Throughout this lease, we have suggested inserting the phrase “*not to be unreasonably withheld, conditioned or delayed*” wherever landlord is obligated to give their consent. As an alternative, you can insert the following in this Section 28:

**28.9 Landlord Consent.** *Whenever any provision in this Lease requires Landlord’s consent or approval, such provision shall be construed to mean Landlord’s consent or approval, not to be unreasonably withheld, conditioned or delayed.*

In witness whereof the following parties have executed this Lease as of the date and year first above written intending to be legally bound by this Lease, including the Exhibits attached hereto which are incorporated herein, to the extent provided herein.

LANDLORD:

TENANT:

**[Landlord's Name]**

**[Tenant's Name]**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

**Exhibit A-1**

**Tenant's Work**

Commencement Date: [Month] [Date], [Year]

**[LIST OF TENANT'S WORK TO BE PERFORMED]**

Insurance Requirements:

**[INSURANCE REQUIREMENTS DURING DEMOLITION AND INITIAL IMPROVEMENT STAGE. INSURANCE MUST BE OBTAINED PRIOR TO COMMENCEMENT DATE AND IN EFFECT BETWEEN COMMENCEMENT DATE AND OCCUPANCY DATE]**

**Exhibit A-2: Approved Tenant's Plans**

Work to commence on: **[Month] [Date], [Year]**

Work to be completed by: **[Month] [Date], [Year]**

Landlord hereby approves the Tenant's Plans pursuant to the following conditions:

**[LANDLORD'S APPROVAL OF TENANT'S PLANS.]**

