

# Top 100 Lease Issues for Office Tenants

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1. **Lease (accurate & complete)** - This is one change to which the Landlord shouldn't object, since you are simply making the lease document consistent with the deal. It is surprising how often the lease document doesn't contain the agreed-to terms or it describes them inaccurately. We have actually received three (3) execution originals from a Landlord for the same lease and each original was different, instead of identical documents! Since it is the easiest change to get, and in many cases involves important terms (such as accurately stating the names of the parties, the percentage share, the rent, the renewal term you negotiated, and the base year you negotiated), it is #1 on the list.
2. **Sublease/Assignment (consent not unreasonably withheld)** - Standard leases prohibit sublease/assignment without the Landlord's prior written consent. Most Landlords don't object to adding that “Landlord's consent shall not be unreasonably withheld, unduly delayed, or conditioned”. Retaining the flexibility to sublease is critical in meeting changing business needs as evidenced by the thriving sublease market.
3. **Default (notice/cure of default)** - Standard leases generally provide for notice and cure if the Tenant is in non-monetary default but not for rent defaults. So, a Tenant could be in default if it is one day late in paying the rent. Since the consequence of default is so severe, and the Landlord can be made whole through interest for late rent, the Tenant must get relief from such a draconian remedy. At the very least the Tenant should obtain reasonable written notice and an opportunity to cure (say 10 days) before the Tenant's failure to pay rent is a default. Landlords generally agree to this change, although some will limit the number of notices they must give in any one calendar year.
4. **Reasonableness (good faith and fair dealing)** - Most standard leases do not require either party to act reasonably or in good faith and in some clauses the Landlord is specifically permitted to act unreasonably such as in granting consent to a sublease or alterations. Since a Landlord would have to argue that it wants the right to be unreasonable or act in bad faith, this change should be acceptable to all but the most unreasonable Landlords.
5. **Liability (mutual waiver of claims)** - Most standard leases require the Tenant to waive claims of damage or injury against the Landlord. The Tenant should change this so it is a mutual waiver that works in conjunction with the waiver of subrogation.
6. **Waiver of Subrogation (mutual waiver)** - Standard leases sometimes require a waiver of subrogation by the Tenant only but many provide for a mutual waiver. Some don't require a waiver by either party. It is important that the Tenant obtains a mutual waiver, which then works hand-in-hand with the mutual waiver of claims to transfer the risk of loss to insurance.

7. **Operating Expenses ("cap")** - No standard lease includes a cap that limits the maximum annual increase. Although this is a difficult operating expense change to get for a Tenant, it is a Tenant's first priority in managing the risk of unreasonable and costly increases in operating expenses. For a more complete description of this change as well as other operating expense issues appearing in the top 100 (audit, gross-up, general purpose, and exclusions) see Gary Goldman, *Tenant Triage: Operating on a Landlord's Operating Expense Clause*, 16 *The Practical Real Estate Lawyer* 19 (March 2000).
8. **Services (remedy for interruption)** - Most standard leases state that if the services (electricity, heat, etc.) are interrupted for any reason that the rent and lease continues. The services Tenant gets are as essential to the lease as the four walls and roof. Since this risk should be the Landlord's risk, or at least shared, it is important for the Tenant to obtain some relief, such as rent abatement for any interruption of essential services (such as electricity) lasting more than three days and cancellation if the interruption lasts more than 90-180 days. This remedy is similar to Tenant's relief if the premises are damaged on account of a casualty.
9. **Option - Cancellation (Tenant's right to cancel early)** - No standard lease provides Tenant a right to cancel early. The longer the lease term the more Tenant needs this option since business needs change. Some large retailers went bankrupt for the sole purpose of ending long-term leases at high rates they could no longer afford. You will need to negotiate the timing (notice period and point during lease you can exercise the option), and payment of a penalty (usually Landlord's unamortized costs for TIs and brokerage fees).
10. **Option - Right to Renew (Tenant's right to renew)** - No standard lease gives the Tenant the right to stay in the space for another term when the original term ends. Obviously, the Tenant needs this right so it will not be forced to move or renew at higher than market rates. Most Landlords will agree to a renewal, but as always, the devil is in the details.
11. **Indemnification (fair allocation)** - Most standard leases require the Tenant to indemnify the Landlord for any injuries or damage that occurs in the premises or building. The Tenant needs to change this unilateral indemnity to a fairer one by: making it mutual; by having the Tenant indemnify the Landlord for damages and injuries occurring in the premises and the Landlord indemnifying the Tenant for damages and injuries occurring in the common areas; or by having each party indemnify the other to the extent of the indemnifying party's fault.
12. **Term (commencement date)** - Many standard leases simply say that the lease (and rent) begins on a date certain. They do not provide that if the commencement is delayed because of some reason not caused by the Tenant (either a current Tenant holdover or the Landlord has not completed the TIs in time) that the commencement date (as to the Term and rent) shall be delayed.
13. **Term (delayed possession remedy)** - Some standard leases do abate the rent if commencement is delayed through no fault of the Tenant and in those cases where Tenant obtains the change in #12 above, the Landlord will provide that Tenant's sole remedy is the rent abatement. The Tenant must consider other remedies, however, since the Tenant may need to be out of its current space by a certain date or face penalties or need to open for business by a certain date if this is a new office. The Tenant should consider some additional

incentive for the Landlord to have the space ready when promised including money damages or a right to cancel.

14. **Operating Expenses (limit time period to contest)** - Most standard leases limit the time period to dispute operating expenses statements. A typical standard lease limits the period to 30 days after the Landlord gives the Tenant an operating expenses statement. This acts as an unreasonable statute of limitations and the Tenant should argue for no time limit other than the state statute of limitations. The Tenant will need to compromise between the unreasonable 30 days and the state statute of limitations period.
15. **Operating Expenses (audit)** - Standard leases do not contain a right to audit operating expenses unless the clause is designed to limit the Tenant's right. Since the Tenant may not have the right to audit unless expressly provided in the lease, Tenant should negotiate the right to audit. The audit right is the only complete method by which a Tenant can uncover the errors in a Landlord's operating expense statement.
16. **Operating Expenses ("gross-up")** - More standard leases include a gross-up today because it protects the Landlord as much as the Tenant. But, if the lease does not include it the Tenant must insist on this clause because if the base year expenses are based on a low occupancy level, the Tenant will end up paying unfair and disproportionate increases in later years when the occupancy level rises.
17. **Operating Expenses (efficient operation)** - It is the rare standard lease that requires the Landlord to operate the building efficiently and economically. Although the Landlord will argue that to remain competitive it must operate efficiently and keep operating expenses down, since the Tenant pays for the operating expense increases it is important that the lease language prevent the Landlord from being a profligate spender.
18. **Operating Expenses (general purpose)** - Standard leases do not state the general purpose of this clause. Since many Landlords have used this clause as a profit center, the parties' intent should be clearly stated. A short general-purpose clause would say, "this clause is meant to fairly reimburse the Landlord for the increased costs to operate, manage, and repair the building and not as a profit center." A comprehensive general-purpose clause would incorporate some of the other Top 100 such as "fairly calculate."
19. **Operating Expenses (calculate fairly)** - No standard lease states that the Landlord will fairly and accurately calculate the operating expenses. Unfortunately, Landlords do not always fairly and accurately calculate the expenses. See Gary Goldman, Common Area Maintenance Overcharges May Be a Deceptive Trade Practice, 13 The Practical Real Estate Lawyer 61 (November 1997). Nevertheless, Landlords typically agree to this change because if they refused they would have to argue that they might unfairly and inaccurately calculate the expenses, an untenable argument.
20. **Environmental (Tenant's responsibility)** - The majority of standard leases today include a clause dealing with Tenant's environmental responsibility. The key is that the Tenant makes sure that the clause is limited to those environmental problems caused by the Tenant.

21. **Environmental (Landlord's responsibility)** - Most of the standard lease environmental clauses do not mention Landlord's responsibility. Even though the Tenant may not have caused the environmental problem, it could be liable anyway under applicable law or if not liable, then it could be damaged by having to vacate, have their business operations disrupted, or face workers' compensation losses for injured employees. So, the Tenant would want the Landlord bound by the types of covenants, warranties, and indemnities that the Landlord imposes on the Tenant.
22. **Compliance with Laws (Landlord's compliance)** - Standard leases make the Tenant responsible for compliance with laws during the term. This could make the Tenant liable for compliance for those conditions that were out of compliance even before the Tenant took possession. So, it is important to limit the Tenant's responsibility by limiting its obligation to compliance required because of "Tenant's particular use" or to require the Landlord to warrant that the premises are in compliance at the time of delivery to Tenant. If the Landlord won't agree to a warranty, then the Landlord should at least remain liable for compliance if the condition existed before Tenant's possession.
23. **Services (quantity and quality)** - Many standard leases either do not expressly provide for services that the Landlord's agent says will be provided or states the services but states they will be provided in accordance with Landlord's judgment. Since services (e.g., electric) are intrinsic to the essence of what is being leased, all services should be listed with the quantity and quality (e.g., heating, ventilation and air conditioning ("HVAC") at the following temperature ranges [68-75 degrees Fahrenheit], or in such quantities and at such temperatures as generally provided by other class "A" buildings in the metropolitan area in which the building is located).
24. **Operating Expenses (exclusions)** - The typical standard lease includes most conceivable expenses through a listing of specific expenses and then a broad catchall clause. Not surprisingly, the same lease is completely silent on exclusions from operating expenses, those expenses that the Landlord cannot bill the Tenant. So, the Tenant needs to add a list.
25. **Sublease/Assignment (affiliated entity)** - Most standard lease sublease clauses require Landlord's consent, with no exception for affiliated companies. Since the Tenant remains liable (absent a specific novation), the Tenant should obtain an exception to those subleases requiring consent when the Subtenant is a related company.
26. **Option - Right to Renew (renewal rent)** - When Landlords agree to a renewal right their standard clause sets the renewal rent at the market rate and then allows the Landlord sole say on what the market rate is. The Tenant needs a fairer approach and the fairest is establishing that renewal will be at fair market value, taking into consideration all relevant factors (such as size of space, need for Tenant improvements, etc.) and that if the parties cannot agree then the rate will be decided by baseball arbitration.

27. **Default (offset)** - When the Landlord defaults, the standard Landlord lease gives the Tenant limited remedies. Almost all standard leases prohibit the Tenant from offsetting the rent. Although even a partial offset (e.g., no more than 20 percent of any one rent payment) is difficult to obtain, it is so critical a remedy that it is included in the top 50.
28. **Workletter (Landlord's Allowance)** - The workletter is the document setting forth the parties obligations regarding building out the space. Even for a plain vanilla build-out for small 5000 square foot space the workletter allowance will exceed \$100,000 and the Tenant will be responsible for paying for the build-out costs exceeding the allowance. So the integrity of the allowance is critical. The Tenant needs to make sure that the allowance can be applied to all of its costs including the preparation of plans, etc.
29. **Workletter (competitive bidding)** - In the typical small lease the Landlord builds out the space. Since the Tenant will pay the costs exceeding the allowance, it is important that the costs incurred be priced competitively or the Tenant will get less "bang for the buck," such as where the Landlord's own construction company does the work at "sweetheart" prices.
30. **Use (general office)** - Many standard leases list the use as the specific requested use (such as "accounting office") which limits any potential subleases (since limited by use clause) and prohibits Tenant from using the premises for a different office use. Instead, list the specific use and "general offices."
31. **Square Footage (measurement)** - Most standard leases today state that the square footage is an agreed-to amount. Since the amount of square footage can greatly affect the amount of money you will pay over the term this is a very important issue. The lease should specify how square footage was measured [e.g., Building Owners and Managers Association ("BOMA")]. You may have to take out a tape measure and measure it yourself unless your architect is able to give you a good computer aided design ("CAD") measurement. As said in Gary Goldman's, "Are You Sure You Know What the Lease Rate Is?", The Practical Real Estate Lawyer (November 1991), "Finding the actual square footage of your office is like trying to solve an Agatha Christie mystery: 'The Case of the Disappearing Square Feet'."
32. **Alterations (removal obligation)** - Most standard leases require that the Tenant remove the alterations Tenant makes during the term, provided the Landlord notifies Tenant to remove them before the lease term ends. This is completely unnecessary and gives the Landlord a lot of leverage when the lease ends to have you remove the alterations or pay the Landlord a fee instead. Since the Landlord is usually not any worse off because of your alterations (either the new Tenant can use them or the Landlord would have to demolish them as they would have the original build-out) this should be changed. The agreeable change is requiring the Landlord to make the removal election at the time the alterations are to be made instead of at the end of the lease.
33. **Damages (right to abate and cancel)** - Most standard leases don't provide for cancellation and many others allow rent abatement only for covered casualties. Landlords generally will agree to abate rent regardless of whether it is a covered casualty since they can obtain rent insurance and will agree to cancellation if the premises are not repaired within a specified time (e.g., 180 days).

34. **Sublease/Assignment (recapture)** - Most standard Landlord leases allow the Landlord to recapture the space (take it back) if the Tenant wishes to sublease and allows the Landlord to make this decision within 30 days after the Tenant obtains a Subtenant. If the Tenant is unable to delete this clause, it should change it so the Landlord must make its recapture decision at the time Tenant announces its desire to sublease, rather than after Tenant goes through the entire process to obtain a Subtenant. Changing the point in time when the Landlord must make its decision saves the Tenant the brokerage fee and the time involved as well as eliminating a potential roadblock to obtaining a Subtenant (some Subtenants may refuse to even consider space that can be pulled out from under them by the Landlord at the last minute).
35. **Repairs (Landlord's obligation)** - Many standard leases do not impose any repair obligation on the Landlord. At a minimum the lease should state that the Landlord would maintain, repair, and replace the roof, structure, load bearing walls, and all systems (HVAC, electrical, plumbing, and mechanical).
36. **Non-disturbance** - Although more leases today include non-disturbance clauses (protection against lender/mortgagee kicking the Tenant out upon the Landlord's foreclosure) the majority still require subordination without non-disturbance. If the particular building location is important to the Tenant, or the Tenant spent significant sums to improve the premises, a non-disturbance agreement may actually be #1 on the Tenant's list.
37. **Security Deposit (waived)** - Every standard lease requires a security deposit that usually equals one month's rent. The Landlord does not pay interest on the deposit and co-mingles the money with the Landlord's other funds. This is a free unsecured loan to the Landlord. Any self-respecting Tenant with good financials should delete the security deposit requirement.
38. **Relocation (delete or limit)** - If the particular location of the premises is important then this clause is critical. This clause allows the Landlord to move the Tenant to new premises so the Tenant should either delete this clause or limit where you can be moved (e.g., same building, same floor, elevator exposure, no lower than the 50th floor). Small Tenants may have to agree to be relocated so a large Tenant can be accommodated, but they should negotiate the terms of that relocation.
39. **Default (vacate or abandon)** - Most standard leases say that a Tenant commits a default if it vacates or abandons the premises. Does this mean that the Tenant must continuously operate in the space even if it no longer has a business need to do so? What if it subleases the space and there is a gap between the times it stops operating and the Subtenant begins? In a non-retail setting vacating is generally not a problem and Landlords will readily agree to some reasonable change such as it is a default only if coupled with a rent default.
40. **Lease (timeframes)** - Standard leases contain numerous timeframes that are almost always unrealistic (e.g., five-10 days to return an estoppel letter, 10 days to pay additional rent, 60 days for Landlord to respond to a sublease request). The Tenant needs to change these timeframes to work in the real world considering internal corporate workings (e.g., 20 days to respond to estoppel certificate) or the real world (sublease response by Landlord within 20 days so proposed Subtenant doesn't go elsewhere).

41. **Sublease/Assignment (remedy not limited to injunctive relief)** - More standard leases today limit a Tenant's remedy to injunctive relief if Landlord unreasonably withholds consent to a sublease or assignment in breach of the lease. This gives Landlord virtual immunity to breach. So, a Tenant must either delete this restriction or at least require expedited arbitration with the loser paying arbitration costs.
42. **Default (mitigation)** - Most standard leases do not require mitigation of damages by Landlord if Tenant defaults. And, state case law may or may not require it. So, a Tenant should require the Landlord to mitigate.
43. **Entry (minimize interference)** - Most standard leases expressly permit the Landlord to enter the premises for various reasons (make repairs, check on Tenant compliance, show to prospective Tenants and buyers). However, the lease is usually silent about causing interference with Tenant's use and enjoyment during such entry. The Tenant should require the Landlord to "minimize interference" during the entry.
44. **Option - Cancellation (clarify termination date)** - Although a cancellation option is never in a standard lease boilerplate, when such an option is negotiated the Landlord's standard option clause usually leaves the cancellation date unclear. For example, in a five-year lease the clause may say that Tenant may cancel at the end of the third year by giving six months' notice. Does this mean that the cancellation date is effective (a) on the third anniversary of the lease with six months' prior notice provided by the Tenant (i.e. Tenant's notice given by the end of month 30) or (b) upon reaching the end of month 36, that the Tenant can cancel the lease at the end of month 42 by giving notice to the Landlord on the third anniversary date? Clarify, clarify, clarify.
45. **Option - Cancellation (penalty calculation before due)** - The Landlord's standard cancellation option requires the Tenant to pay a penalty to exercise the cancellation and requires the penalty to be paid at the time Tenant exercises its cancellation option. If the penalty is a fixed sum (e.g., \$50,000) that is not a problem. But, if the penalty is the unamortized Tenant concessions (usually brokerage fee and Tenant improvement allowance) the Tenant is faced with a Catch-22 of paying a penalty when it does not know the amount. The answer is to fix the sum, use a formula with a fixed amount, or require the Landlord to calculate the penalty and provide it to Tenant at some point before the payment is due.
46. **Options - All (unreasonable conditions)** - In standard expansion, renewal, and cancellation option clauses the Landlord imposes as many conditions as possible, any one of which could nullify these important Tenant rights. The most common condition is that Tenant must never have been in default. This is not appropriate in a cancellation option because since the Tenant is canceling, the Tenant's prior default does not affect Landlord's future security in the property. In expansion and renewal options a Landlord should not have to deal with a hard-core defaulter, but Tenant should make this condition more reasonable by making it defaults that remain uncured after applicable grace periods. Also, change short window notice periods.
47. **Remedies (non-recourse)** - Standard leases contain a clause that limits any Tenant remedy to the Landlord's estate in the property (as if it were a sole asset entity). Although changing this is important, Landlords regard

this clause as their constitutional right. So, although this could be in the top 10 of changes, it is only #47 because it is so difficult to change.

48. **Workletter (quality)** - In a typical lease the Landlord builds out the premises agreeing to pay an “allowance” and the Tenant is responsible for the build-out costs in excess of the allowance. The Landlord’s standard workletter tends to leave out things like: the quality of the build-out, performing the work in a good and workman-like manner, compliance with laws, and warranties. So, the Tenant needs to add those protections.
49. **Term (confirming letter)** - Some standard leases include this and others don’t. It simply requires the parties after the commencement date is known to confirm in writing the lease term (commencement and termination dates). This is important because it determines when the rent begins, when the lease ends, and the trigger date for exercising options (expansion, renewal, and cancellation).
50. **Insurance** - Although standard lease insurance clauses are all similar, they all have their own nuances. Since any major Tenant already has its own insurance program, it is important to make sure the Landlord’s lease doesn’t require different types or amounts of insurance than the Tenant already has.
51. **Americans with Disabilities Act (warranty of compliance);**
52. **Alterations (consent not unreasonably withheld to nonstructural interior alterations that do not adversely affect systems);**
53. **Arbitration (required arbitration for specified disputes);**
54. **Attorneys’ Fees & Disbursements (non-prevailing party pays);**
55. **Authority (Landlord’s representation of authority to enter lease);**
56. **Damages (not limited to insured casualties);**
57. **Damages (Landlord must rebuild);**
58. **Default (limited liability for Tenant);**
59. **Default (no unreasonable remedies such as rent acceleration);**
60. **Environmental (Landlord provide copies of all environmental reports);**
61. **Estoppel Certificates (mutual);**
62. **Holdover (reasonable amount);**
63. **Holdover (damages to Landlord only for unconsented to holdover);**
64. **Insurance (Landlord’s insurance requirement stated);**
65. **Insurance (A.M. Best’s ratings vs. Landlord’s approval of Tenant’s insurer);**
66. **Insurance (limit on Landlord’s right to increase Tenant insurance types/amounts);**
67. **Lender modification (no material adverse effect on Tenant’s rights or obligations);**
68. **Notice (copy to Tenant’s second address);**
69. **Operating Expenses (base year adjusted for atypical expenses);**
70. **Operating Expenses (right to use contingent auditor);**
71. **Operating Expenses (Landlord pays for audit if discrepancy exceeds fixed percentage);**
72. **Operating Expenses (Landlord must submit itemized annual statement of expenses);**
73. **Operating Expenses (expense stop - Landlord represents current grossed-up expenses);**

74. Option - Right to Expand);
75. Option - Renewal Rights - Landlord to give last chance notice to Tenant);
76. Parking (rights and costs, if any, specified));
77. Premises (condition at commencement));
78. Relocation (all costs paid by Landlord));
79. Remedies (specify Tenant's remedies for Landlord default));
80. Remedies (delete Tenant's prohibition of canceling the lease));
81. Rent (add grace period before late rent penalty));
82. Rent (limit to one-time fixed charge or interest, not five percent monthly penalty until paid));
83. Repairs (Tenant makes repairs on account of its negligence only));
84. Rules & Regulations (modify those that interfere with Tenant's particular use));
85. Rules & Regulations (exclude from Landlord right to give exclusive use, the Tenant's right to continue using premises for Tenant's current use));
86. Rules & Regulations (limit future rules to those necessary for orderly maintenance of building));
87. Satellite Dish (Tenant's right to install on roof));
88. Security Deposit (Landlord pays interest));
89. Security Deposit (Landlord not to co-mingle funds));
90. Services (after-hours availability and cost specified));
91. Signs (Tenant's rights specified));
92. Square Footage (warranty of Landlord's measurement));
93. Sublease/Assignment (share profit));
94. Sublease/Assignment (limit on Tenant payment of Landlord's costs));
95. Surrender (condition returned subject to reasonable wear and tear and other lease applicable clauses such as damages));
96. Workletter (define allowance payment schedule));
97. Workletter (turnkey exhibits complete and accurate));
98. Workletter (building standard clarified));
99. Workletter (plans - reasonableness of what is needed and timeframes));
100. Workletter (require a punch list upon completion to repair incorrect or damaged items)).

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