

Set 15 Conditions in Your Sublet Consent

If your lease is like most, it requires the tenant to get your written consent if it wants to sublet all or a portion of its space to a third party. But when giving your written consent to a sublet, make sure the consent includes key protections. Without those protections, you risk giving away too much to the tenant or the subtenant. For example, if the consent doesn't say that it applies only to the current sublet, a tenant could argue, and a court may agree, that you've consented to future sublets as well.

To avoid this and many other problems, clearly describe in the written consent the conditions under which you're authorizing the sublet, says Chicago attorney Richard S. Rosenstein. He suggests putting 15 conditions in your written consent. There's a Model Consent on pp. 3–4 that you can adapt and use that includes those conditions.

Get Signatures of All Parties

Your written consent, like our Model Consent, should be signed by you, the tenant, and the subtenant to show that all parties accept your conditions, says Rosenstein. So if one of the other parties later violates the written consent, you can sue that party for damages or ask a court to force the party to follow the consent's conditions, he explains.

POBM Says: If there's a lease guarantor, require him to acknowledge in the consent that he agrees to be bound by its conditions, says Rosenstein.

15 CONDITIONS FOR SUBLET CONSENT

Make sure your written consent, like our Model Consent, includes the following 15 conditions:

No Release for Tenant

Say in your written consent that neither the tenant nor the subtenant is released from any liabilities or obligations that it has under the lease or sublease, says Rosenstein [Consent, par. 1]. Otherwise the tenant could argue, for example, that it no longer must indemnify you and defend you if you're sued by someone who was injured in the sublet space, he explains.

No Waiver of Your Lease Rights

Say that by signing the sublet consent, you're not waiving any of your lease rights, says Rosenstein [Consent, par. 1]. Otherwise the tenant might argue that you've waived important rights, such as the right to consent to alterations, he warns.

No Approval of Sublease

Make it clear in the written consent that you're consenting only to the particular sublet, says Rosenstein. But you're not consenting to the terms of the sublease, he says [Consent, par. 2]. This way, you haven't waived your right to object to any action by the tenant or subtenant that's permitted by the sublease but violates the lease, he explains. For example, you could demand that the subtenant remove hazardous materials from the sublet space if the lease bars those materials, even if the sublease allows them to be stored there.

No Sublease Amendment Without Your Consent

Require the tenant and subtenant to get your approval before they change any of the sublease's terms, says Rosenstein. Although you're not consenting to the terms of the sublease—and don't want to be bound by them—you still should know what its terms are, he explains. If the tenant and subtenant can change the sublease without your approval, you'll lose control over the sublet.

Plus say in the written consent that a sublease amendment may not modify the lease in any way, says Rosenstein. And if it does, make it clear that you're not bound by it even if you approve it, he says [Consent, par. 3].

Other Sublets Require Separate Consent

Don't inadvertently give your consent to future sublets, warns Rosenstein. To avoid doing so, say in your written consent that you're agreeing only to the current sublet. And say that you reserve the right to withhold consent to all future sublets, subsublets, or assignments of the lease or sublease, or to alterations, he says [Consent, par. 4].

❑ Tenant Remains Responsible

Say that the tenant remains responsible for any lease violation by either the tenant or the subtenant, says Rosenstein. Also say that you can enforce the lease against the tenant and/or the subtenant, he adds [Consent, par. 5]. Then if the subtenant's actions violate the lease, you can take action against the tenant, subtenant, or both, he explains.

❑ Sublease Is 'Subject to' Lease

Say that the sublease must be "subject to" and not conflict with the terms and conditions of the lease, says Rosenstein [Consent, par. 6]. This subject to language means that the tenant and subtenant must follow the lease's provisions if the lease and sublease conflict, he explains.

❑ Tenant Must Share Sublet Profits

Even if the lease has a sublet profit-sharing clause, it's a good idea to say in your written consent that the tenant must share sublet profits with you in accordance with that clause, says Rosenstein [Consent, par. 7]. This prevents a tenant from arguing that in return for its agreement to sign the written consent, you're releasing it from following the sublet profit-sharing clause, he says.

❑ Tenant Must Pay Your Sublet Costs

Make the tenant pay all your sublet-related costs, such as your legal fees for reviewing the sublease and related documents, says Rosenstein. And say that if the tenant doesn't promptly pay those costs after getting your bill, it will have violated the lease, says Rosenstein [Consent, par. 7].

❑ Sublease May Continue After Lease Ends

If the lease ends early, then by law the sublease ends, too. But give yourself the option in your written consent to keep the sublease in effect and have the subtenant pay rent directly to you, says Rosenstein. Then you don't have to be left with an empty space if the lease ends early, he explains.

If you exercise this option, you'll need to require the subtenant to "attorn" to you—that is, recognize you as its new sublandlord (or its new landlord, depending on how you structure the deal), says Rosenstein. So say in the sublet consent that if you exercise the option, the subtenant must sign an agreement—known as an attornment agreement—saying that all of its obligations that were formerly owed to the tenant are now owed to you, he explains. And require the attornment agreement to be in a form that's acceptable to you [Consent, par. 8].

❑ Subtenant Pays for Services and Additional Charges

Require the tenant and subtenant to agree that, if the subtenant so requests, you can furnish services to the sublet space that aren't required by the lease, says Rosenstein. And say that you can bill the subtenant directly for those services, he says. For

example, the subtenant may want overtime air conditioning at the sublet space.

Require the subtenant to pay you directly for those services. But say that if it fails to do so, the tenant must pay the service costs on the subtenant's behalf, he says. Make sure you call those costs "additional rent." That way, if the tenant doesn't pay them, that'll be viewed as a nonpayment of rent, triggering a lease violation, he explains [Consent, par. 9].

❑ Subtenant Has No Legal Relationship with You

Say that the subtenant has no direct legal relationship—in legal terms, "privity"—with you, says Rosenstein [Consent, par. 10]. This way, you've no responsibility to the subtenant, only to the tenant, he explains. And only the tenant—not the subtenant—has the right to force you to carry out your lease responsibilities, he adds.

❑ Tenant and Subtenant Must Send You Notices

Require the subtenant to send copies to you of any notices it sends to the tenant, and require the tenant to do the same for any notices it sends to the subtenant, he says. And indicate how you want the notices sent to you, he adds [Consent, par. 11]. By getting copies of these notices, you'll find out about problems between the tenant and subtenant, says Rosenstein. For example, you'll know if the subtenant isn't paying its rent.

❑ Tenant and Subtenant Must Indemnify You for Broker's Fees

Require both the tenant and subtenant to jointly and severally indemnify you—that is, reimburse you—for all broker's fees and costs due or claimed to be due in connection with the sublet, says Rosenstein [Consent, par. 12]. So, for example, if a broker claims that it's entitled to a fee for the sublet, you can demand reimbursement from both or either party, he explains.

❑ Parties Agree to Be Bound by Consent

Make sure the tenant and subtenant agree to be bound by the terms of the written consent, says Rosenstein [Consent, par. 13]. This way, you can enforce its terms against both parties, he explains.

POBM Says: As a precaution, require the tenant and subtenant to sign the written consent before you do, says Rosenstein. If you sign it first, they may forget or deliberately fail to sign it. And since you'll want to see the final version of the sublease before you sign the written consent, have the tenant and subtenant attach a copy of the signed sublease to the written consent they've signed, he adds. ■

POBM SOURCE

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Make Sure Sublet Consent Protects Your Lease Rights

The following sublet consent form was drafted by Chicago real estate attorney Richard S. Rosenstein. It lets you protect your lease rights when you consent to a sublet.

The consent begins by giving the parties' names, describing the lease and sublease, and stating the consent's purpose. Paragraph 1 says that the consent won't release the tenant from its lease obligations. Paragraph 2 says that you're not approving the sublease. Paragraph 3 requires your consent to sublease amendments. Paragraph 4 limits your consent to the current sublet. Paragraph 5 requires the tenant to remain liable to you. Paragraph 6 says that the lease prevails where it conflicts with the sublease.

Paragraph 7 discusses sublet profit-sharing. Paragraph 8 discusses continuing the sublease after the lease ends. Paragraph 9 lets you bill the subtenant for extra services. Paragraph 10 says that there's no legal relationship between you and the subtenant. Paragraph 11 requires the parties to send you notices they send to each other. Paragraph 12 requires the parties to indemnify you for broker's fees. Paragraph 13 says that the parties agree to be bound by the consent's terms.

Since this consent form is generic, consult your attorney to adapt it to your specific lease provisions and laws of your state.

SUBLET CONSENT

[Insert your name] ("Landlord"), as Landlord under that certain lease (the "Lease"), dated [insert lease date] by and between Landlord and [insert tenant's name] ("Tenant"), as Tenant, subject to and specifically conditioned upon the following terms and conditions, hereby grants its consent ("Sublet Consent") to the sublet of certain premises (the "Sublet Premises") in the building commonly known as [insert building address and name, if any], as more particularly described in the sublease, dated [insert sublease date], made by and between Tenant, as sublandlord, and [insert subtenant's name] ("Subtenant"), as subtenant, a signed copy of which is attached hereto as Exhibit [insert #] (the "Sublease").

Capitalized terms used herein and not otherwise defined herein shall have the meanings ascribed thereto in the Lease or the Sublease, as the case may be. The titles or headings to the various paragraphs of this Sublet Consent are for convenience of reference only, do not define or limit the contents thereof, and should be ignored in any construction thereof.

As conditions to Landlord's consent to the sublet of the Sublet Premises, it is understood and agreed as follows:

1. NO RELEASE

This Sublet Consent shall in no way release the Tenant, or any other person or entity claiming by, through, or under Tenant including, without limitation, Subtenant, from any of its covenants, agreements, liabilities, and duties under the Lease (including, without limitation, all duties to cause and keep Landlord and others named or referred to in the Lease fully insured and indemnified with respect to any acts or omissions of Subtenant or its agents, employees, or invitees, or other matters arising by reason of the Sublease or Subtenant's use or occupancy of the Sublet Premises), as the same may be amended from time to time, without respect to any provision to the contrary in the Sublease. In no event shall anything contained in this Sublet Consent be deemed a waiver of any of Landlord's rights under the Lease.

2. NO APPROVAL OF SUBLEASE

This Sublet Consent does not constitute approval by Landlord of any of the provisions of the Sublease, or agreement thereto or therewith, but only approval of the sublet of the Sublet Premises to Subtenant.

3. NO AMENDMENT OF SUBLEASE

Tenant and Subtenant shall not amend in any respect the Sublease without the prior written approval of Landlord. In no event shall any such amendment, whether or not Landlord shall approve the same, affect or modify or be deemed to affect or modify the Lease in any respect.

4. LIMITED CONSENT

This Sublet Consent shall be deemed limited solely to the Sublease, and Landlord reserves the right to consent or to withhold consent with respect to any other matters under the Lease including, without limitation, any proposed alterations to the Premises or the Sublet Premises, and to any further or additional sublets, assignments, or other transfers of the Lease or any interest therein or thereto, including, without limitation, a sub-sublet or any assignment of this Sublease.

5. TENANT'S LIABILITY; LANDLORD'S REMEDIES

Tenant shall be liable to Landlord for any default under the Lease, whether such default is caused by Tenant or Subtenant or anyone claiming by, through, or under either Tenant or Subtenant. The foregoing shall not be deemed to restrict or diminish any right which Landlord may have against Subtenant pursuant to the Lease, or in law or equity for violation of the Lease or otherwise, including, without limitation, the right to enjoin or otherwise restrain any violation of the Lease by Subtenant. Landlord may at any time enforce the Lease against Tenant, Subtenant, or both.

6. SUBORDINATION TO LEASE

The Sublease is, in all respects, subordinate and subject to the Lease, as the same may be amended. Furthermore, in the case of any conflict between the provisions of this Sublet Consent or the Lease and the provisions of the Sublease, the provisions of this Sublet Consent or the Lease, as the case may be, shall prevail unaffected by the Sublease.

(continued on p. 4)

7. EXCESS RENT AND SUBLEASE CHARGES

Notwithstanding anything to the contrary herein, Tenant acknowledges and agrees that it will promptly pay to Landlord throughout the Lease Term any excess Rent owed to Landlord as required under Clause *[insert # of sublet profit sharing clause]* of the Lease, and otherwise comply with the provisions of such Clause and any other Clause of the Lease which may be relevant to the Sublease. Without limiting the generality of the foregoing, Tenant specifically agrees to pay all of Landlord's costs, charges, and expenses, including reasonable attorney's fees as provided in Clause *[insert # of assignment and subletting clause]* of the Lease, incurred in connection with the Sublease and this Sublet Consent upon submission of bills therefor. Any failure to pay such excess Rent or charges upon demand shall be a default under the Lease.

8. TERMINATION OF LEASE

If at any time prior to the expiration or termination of the Sublease, the Lease shall expire or terminate for any reason (or Tenant's right to possession shall terminate without termination of the Lease), the Sublease shall simultaneously expire or terminate. However, Subtenant agrees, at the election and upon the written demand of Landlord, and not otherwise, to attorn to Landlord for the remainder of the term of the Sublease, such attornment to be upon all of the terms and conditions of the Lease, with such reasonable modifications as Landlord may require, except that the Minimum Rent set forth in the Sublease shall be substituted for the Minimum Rent set forth in the Lease and the computation of Additional Rent as provided in the Lease shall be modified as set forth in the Sublease.

The foregoing provisions of this Paragraph shall apply notwithstanding that, as a matter of law, the Sublease may otherwise terminate upon the termination of the Lease and shall be self-operative upon such written demand of the Landlord, and no further instrument shall be required to give effect to said provisions; provided, however, Subtenant agrees to execute an attornment agreement, in form and substance acceptable to Landlord, pursuant to which Subtenant confirms that all obligations owed to Tenant under the Sublease shall become obligations owed to Landlord for the balance of the term of the Sublease.

9. SERVICES

Tenant and Subtenant hereby agree that Landlord may furnish to the Sublet Premises services requested by Subtenant other than or in addition to those to be provided under the Lease, and bill the Subtenant directly for such services for the convenience of and without notice to Tenant. Subtenant hereby agrees to pay to Landlord all amounts that may become due for such services on the due dates therefor. If Subtenant shall fail to make such payment, Tenant agrees to pay such amounts to Landlord upon demand as Additional Rent under the Lease, and the failure to pay the same upon demand shall be a default under the Lease.

10. NO PRIVACY

Notwithstanding anything to the contrary in this Sublet Consent, in no event shall Landlord be deemed to be in privity of contract with Subtenant or owe any obligation or duty to Subtenant under the Lease or otherwise, any duties of Landlord under the Lease or required by law being in favor of, for the benefit of, and enforceable solely by Tenant.

11. NOTICES

Subtenant agrees to promptly deliver a copy to Landlord of all notices of default and all other notices sent to Tenant under the Sublease, and Tenant agrees to promptly deliver a copy to Landlord of all such notices sent to Subtenant under the Sublease. All copies of any such notices shall be delivered personally or sent either by recognized national overnight courier service or by United States registered or certified mail, postage prepaid, return receipt requested, to *[insert name and address of owner or managing agent]*, with a copy to *[insert name and address of owner's attorney]*, or to such other place or persons as Landlord or its agent may from time to time designate.

12. REAL ESTATE BROKERS

Tenant and Subtenant jointly and severally agree to indemnify and hold Landlord harmless from all loss, costs (including, without limitation, reasonable attorney's fees), damages, and expenses arising from any claims or demands of any broker or finder for any commission or fee due or alleged to be due in connection with the Sublease or this Sublet Consent.

13. CONSENT CONDITIONED; PARTIES BOUND

Tenant and Subtenant understand that Landlord has agreed to consent to the sublet of the Sublet Premises to Subtenant, and to execute this Sublet Consent, conditioned upon Tenant's and Subtenant's express acknowledgment of and agreement to be bound by all of the terms and conditions hereof. By executing this Sublet Consent, Tenant and Subtenant hereby acknowledge and agree to be bound by all of the terms and conditions of this Sublet Consent.

IN WITNESS WHEREOF, the parties hereto have duly executed and delivered this Sublet Consent as of *[insert date]*.

Tenant: _____

Subtenant: _____

Landlord: _____

GUARANTOR'S ACKNOWLEDGMENT

The undersigned Guarantor acknowledges that he or she has read this Sublet Consent and agrees to be bound by its terms.

Guarantor: _____