

## **BEWARE OF MAINTENANCE AND REPAIR RESPONSIBILITIES IN COMMERCIAL LEASES**

One of the most important aspects of a commercial lease is apportioning the maintenance and repair responsibilities for the leased premises. Maintenance and repair responsibilities vary greatly based on the type of lease, design of the leased premises, and negotiating power of the landlord and tenant.

At the outset, it is important to appreciate the structure of each lease. Generally speaking, there are two categories of leases based on how rent is calculated. On one end of the spectrum is the gross lease (sometimes called a “full-service lease”), which provides that a tenant’s rental payment includes all expenses associated with the leased premises. On the other end of the spectrum is the net lease, which provides that a tenant’s rental payment is net of certain expenses in association with the leased premises. In a net lease, the tenant reimburses the landlord for these expenses in the form of additional rent or pays the expenses directly.

Variations of the gross lease and net lease exist. A modified gross lease is more tenant-friendly and allows the landlord and tenant to negotiate which expenses relating to the leased premises should be included and excluded from the tenant’s rental payment. A triple net (NNN) lease is the most common type of net lease, and generally provides that a tenant pays the landlord for its proportionate share of real estate taxes, insurance, and operating expenses (usually specifically defined) in addition to the tenant’s base rental payment. An absolute net lease is the most landlord-friendly type of lease and apportions all risk and expenses associated with the leased premises, including all maintenance and repair responsibilities, to the tenant.

Chapter 704 of the Wisconsin Statutes governs landlord-tenant rights. Section 704.07 provides default rules for maintenance and repair obligations in the absence of contrary language in a commercial lease.

A landlord’s obligations include:

- Keeping common areas in good repair;
- Keeping equipment that furnishes services (e.g., heat, water, elevator, air conditioning) to the tenant in good repair;

- Making all necessary structural repairs; and
- Repairing and replacing plumbing, electrical wiring, machinery, and equipment furnished with the leased premises.

Wis. Stats. § 704.07(2).

A tenant's obligations include:

- Repair and remediation for damage and infestation caused by action or inaction of the tenant; and
- Ordinary and routine maintenance and repairs for plumbing, electrical wiring, machinery, and equipment furnished with the leased premises.

Wis. Stats. § 704.07(3).

Typically, a landlord is responsible for the repair of structural and major component parts of the leased premises, as well as any replacements that would be considered capital expenditures, such as the roof, parking lot, and foundation. The tenant remains responsible for maintenance and ordinary repairs to items inside of the leased premises over which the tenant has control. In many commercial leases, however, a landlord may attempt to shift repair and replacement responsibilities to a tenant for items that exclusively service the leased premises. One common example is heating, ventilation, and air conditioning (HVAC) systems, which can carry considerable costs.

A good rule of thumb is that the longer the lease term and the fewer number of tenants in a particular building, the more likely it is that a tenant will take on additional maintenance and repair responsibilities. Landlords and tenants should be careful to clearly apportion these responsibilities to avoid ambiguity. For example, "operating expenses" should be clearly defined to avoid any misunderstandings between the parties.

Whether you are a landlord or a tenant, our experienced legal team at O'Neil, Cannon, Hollman, DeJong & Laing S.C. can answer your lease questions and protect your interests.