

Does It Really Need To Be So Binary?

By Joshua Stein, Joshua Stein PLLC



Most landlords like to choose each tenant carefully. But then, as soon as a tenant starts to negotiate its lease, it asks for the right to assign the lease—transfer it to a new tenant, some replacement that the original tenant finds somewhere—and in any case someone the landlord didn't choose and with whom the landlord didn't originally negotiate a lease. This matters to tenants because, in theory, it gives them an exit strategy if the lease no longer makes sense for them.

Landlords don't like that idea. They care who their tenant is. They worry that some future unknown new tenant might try to change the use of the premises. That concern isn't particularly real, because any new tenant will still have to comply with the lease. More generally, though, the landlord might worry that the new tenant will be more likely than the original tenant to violate the lease or not pay rent.

The landlord probably likes the creditworthiness of the original tenant. If that tenant assigns the lease, then as a legal matter it's still obligated under the lease, unless the lease says otherwise. But the landlord still worries that if the original tenant assigns, it will no longer have a business reason to pay its rent—its likely need to maintain an operating location. Instead, the original tenant will focus its efforts on figuring out a way to get off the hook. And, worst of all, if the lease is below market at the time of assignment, the landlord hates the idea that the tenant might profit on the assignment.

So, most landlords prohibit assignment without the landlord's consent. Often landlords agree to be "reasonable" about approving assignments. In essence, this means they'll approve an assignment if an ordinary landlord in the same circumstances would approve it. This is, of course, a murky standard. But we use it all the time. It often works.

If the landlord doesn't agree to be "reasonable," then the landlord can just say no—or can demand any payment or rent increase whatsoever as the price of consenting—to an assignment.

The outcome of this negotiation is typically binary, i.e., it has only two possible results. First, the landlord can lose any reliable right to control the identity of its tenant, even though the landlord originally cared a lot about who that tenant was. Second, the tenant can lose any ability to exit the lease because the tenant is at the landlord's mercy when it comes to assignment.

Maybe there's a third way, more nuanced. The parties can recognize that the landlord has a legitimate interest in knowing that its original tenant will stay in place. Any change in tenant can expose the landlord

to risks it didn't want to bear. Conversely, if the tenant wants the right to assign as a mechanism to exit the lease, maybe it's legitimate for the landlord not to want an assignment that creates a profit opportunity for the tenant. And the landlord wants some protections against a new and unknown tenant.

In response to some of those concerns, some leases let the landlord recapture the space if the tenant wants to assign. In my experience, no landlord ever exercises that right. It is of no value to anyone except the attorneys paid to negotiate it. Sometimes a lease will allow the landlord to increase the rent on an assignment, or require extra security, but it's usually up to the landlord's unfettered discretion to decide what to require. These requirements effectively allow the landlord to block any assignment.

Maybe the lease should instead give the landlord specific meaningful rights upon an assignment, but define those rights in a way that does not render illusory the tenant's right to assign. For example, the lease might allow the landlord to increase the security deposit up to a certain amount if the new tenant doesn't meet some reasonable financial test. Maybe any assignment should trigger a one-time fee. Maybe any existing lease guarantor should not only have to reaffirm its guaranty at the time of assignment, but also deliver security because the assignment changes the landlord's risk profile. Similar concepts might apply to the outgoing tenant. If the lease is below market at the time of assignment, the landlord might have the right to increase the rent to market, determined in some reasonable and objective way. That increase might be coupled with an extension of the lease, at the tenant's option. And, instead of leaving the possibility of a fight over what's a "reasonable" new tenant, the lease might define objective standards the new tenant needs to meet.

Each of these suggestions—and probably others along similar lines—would deal with assignments in a nuanced way that recognizes the needs of the parties, as opposed to just allowing assignments or just banning them. These measures could protect the landlord while also giving the tenant a reasonably reliable right to assign.

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