

# Real Estate Leasing: State Q&A Tool

This tool enables subscribers to search and compare Practical Law's Real Estate Leasing State Q&A resources. Questions and answers cover state laws relating to commercial real estate leasing, including execution and enforceability of leases, term, renewal and early termination of leases, transfer taxes and other taxes relating to the direct and indirect assignment of leases, the transfer and financing of lease interests, and remedies. This excerpt addresses transfer taxes and whether there can be automatic terminations of leases in foreclosure actions in California, Florida, Massachusetts, and New York. For more states and complete versions of the questions and answers in our State Q&A resources, visit our Real Estate Leasing State Q&A Tool (<http://us.practicallaw.com/1-517-4023>).

**11. Are state or local transfer taxes triggered when the tenant undergoes a (direct or indirect) transfer of its ownership interests? In particular, please specify the:**

- Percentage of ownership interest that triggers the taxes.
- Rate for the taxes and how they are calculated.
- Returns required.
- Timing for filing the returns and paying the taxes.

## CALIFORNIA

**Mark S. Pecheck, Gibson, Dunn & Crutcher LLP, with Practical Law Real Estate**

### PERCENTAGE OF INTERESTS

The documentary transfer tax applies to leases having a term (including all options to extend the term) of 35 years or longer.

A transfer of an indirect interest in a tenant would trigger a transfer tax only if at the time of the transfer the remaining term of the lease was at least 35 years. If the tenant is a partnership or limited liability company (LLC), a transfer of ownership interests that results in the termination of that entity for income tax purposes is subject to a documentary transfer tax (Cal. Rev. & Tax. Code § 11925).

A transfer of 50% or more of the capital and profits of the partnership or LLC within a 12-month period is a termination, and therefore triggers the tax (26 U.S.C.A. § 708).

Many counties and cities have taken a more aggressive approach with indirect transfers (including transfers of corporate stock and interests in single-member LLCs) that result in a change in control of an entity. The ordinances and rules of these cities and counties should be consulted before structuring a transaction.

### RATE AND CALCULATION

The rate and method of calculation of the transfer tax applicable to an indirect transfer of the tenant's ownership interest are the same as for the initial execution of a lease.

### RETURNS

A transfer tax return is not required to be filed in connection with indirect transfers.

However, if an indirect transfer, either in a single transaction or when aggregated with prior indirect transfers, results in a change in control (when more than 50% of the interests are transferred), the law requires legal entities that own or lease real property to file a Statement of Change in Control and Ownership of Legal Entities (Form BOE-100-B) with the State Board of Equalization in Sacramento.

The State Board of Equalization shares the information on these forms with County Assessors and County Recorders, who may use the information to:

- Reassess for property tax purposes.
- Seek to collect a transfer tax.

### TIMING

If a change in control of an entity occurs (either in a single transaction or when aggregated with prior indirect transfers), the Form BOE-100-B must be filed with the State Board of Equalization

within 90 days following the transfer. If the Form BOE-100-B is not timely filed, a penalty assessed is 10% of either:

- The new base year taxes if the transaction would have resulted in a property tax reassessment.
- The current year's taxes if the transaction would not result in a property tax reassessment.

## FLORIDA

**Susanne Zabloudil, Dana Clayton, and Jennifer M. Kramer, Akerman LLP, with Practical Law Real Estate**

There are no transfer taxes triggered when a tenant undergoes a (direct or indirect) transfer of its ownership interests.

## MASSACHUSETTS

**Cynthia B. Keliher, McCarter & English LLP, with Practical Law Real Estate**

The transfer (whether direct or indirect) of a tenant's interest in a short term lease would not trigger transfer taxes. Though it would have to be determined on a case by case basis, generally a short term lease would have a definite term and be for less than 99 years.

Massachusetts law is not clear as to whether a direct or indirect transfer of ownership interests in an entity that holds a long-term lease that is subject to transfer taxes would trigger payment of transfer taxes. If it is determined that the Massachusetts transfer tax is triggered, then the transfer taxes would be the same as for the creation or assignment of a long-term lease.

While it is likely that only a percentage of the transferred interest is subject to the transfer tax, it is important to first determine whether a transfer tax would be triggered. The transferring tenant should consider obtaining a determination letter from the *Massachusetts Department of Revenue* to determine whether any transfer taxes on the long term leases (and a transfer of an interest in long term leases) are due in each particular case where the tenant's interest is being transferred.

### PERCENTAGE OF INTERESTS

Massachusetts law is not clear about whether a direct or indirect transfer of a percentage of ownership interest triggers the transfer tax.

### RATE AND CALCULATION

If a transfer of tenant's ownership interests triggers the Massachusetts transfer tax, the rate is the same as for the creation or assignment of a long-term lease but the transfer taxes owed are based on the percentage of interest transferred.

### RETURNS

If a transfer of tenant's ownership interests triggers the Massachusetts transfer tax, the returns required are the same as for the creation or assignment of a long-term lease.

### TIMING

If a transfer of tenant's ownership interests triggers the Massachusetts transfer tax, the timing is the same as for the creation of a lease.

## NEW YORK

**Vincent O. Hanley, Bond, Schoeneck & King PLLC, with Practical Law Real Estate**

### PERCENTAGE OF INTERESTS

Real Estate Transfer Taxes (payable at the same rates that apply to direct conveyances) also apply to transfers of a "controlling interest" in an entity having an interest in real property.

A "controlling interest" means, in the case of a:

- Corporation, either 50% or more of:
  - the voting power of all classes of stock; or
  - the capital, profits, or beneficial interests in the voting stock.
- Partnership, association, or other entity, 50% or more of the capital, profits, or beneficial interests in the partnership, association, or other entity.

(N.Y. Tax Law § 1401(b).)

### RATE AND CALCULATION

The state portion of the Real Estate Transfer Tax is payable at the rate of \$2 for each \$500 of "consideration" or fractional part of the consideration (N.Y. Tax Law § 1402(a)).

Some counties charge an additional Real Estate Transfer Tax that is payable along with the state portion. The party should contact the county clerk to determine if there is an additional tax.

### RETURNS

A Form TP-584 return must be completed and executed in connection with a transfer of a "controlling interest" in an entity having an interest in real property. However, the party must file the form with the New York State Department of Taxation and Finance in Albany, New York, rather than with the county clerk.

### TIMING

Within 15 days of the delivery of the instrument effecting the transfer of a controlling interest in an entity having an interest in real property, the party must do both of the following:

- File Form TP-584 with the New York State Department of Taxation and Finance.
- Pay the applicable real estate transfer tax.

Failure to do so can result in a penalty of 10% of the amount of tax due plus an interest penalty of 2% of the tax due for each month of delay, not to exceed 25% in the aggregate (N.Y. Tax Law § 1416(b)).

**19. When a landlord's lender forecloses on its lien recorded against the landlord's property, would the lease interest that is subordinated to the lender's lien automatically terminate? If so, how do the parties avoid automatic termination of subordinated lease interests?**

## CALIFORNIA

**Mark S. Pecheck, Gibson, Dunn & Crutcher LLP, with Practical Law Real Estate**

California follows the typical rule of lien priorities, so that a previously recorded lien in favor of a lender has priority over any subsequent leases. Accordingly, the foreclosure of the lender's lien operates to terminate the tenant's leasehold estate.

To avoid automatic termination, a tenant may enter into a non-disturbance agreement with the lender. Often non-disturbance rights are included in a three-party subordination, non-disturbance, and attornment agreement entered into by the lender, landlord, and tenant which is recorded concurrently with the lender's deed of trust.

## FLORIDA

**Susanne Zabloudil, Dana Clayton, and Jennifer M. Kramer, Akerman LLP, with Practical Law Real Estate**

The subordinated leasehold interest of the tenant is not foreclosed unless, in the lender's foreclosure action, the tenant is:

- Named as a party defendant.
- Properly served with the suit papers.

(See *Redding v. Stockton, Whatley, Davin & Co.*, 488 So. 2d 548 (Fla. Dist. Ct. App. 1986).)

If a subordinated tenant is named as a defendant in a foreclosure action, the tenant can avoid termination of the leasehold interest:

- By exercising a contractual right, if one exists, between the tenant and the lender, giving the tenant the right to redeem or otherwise avoid foreclosure.
- Through a negotiated arrangement between the tenant and the foreclosing lender.
- By exercising the right of redemption through the mortgagor/owner (see *Burns v. Bankamerica Nat'l Trust Co.*, 719 So. 2d 999 (Fla. Dist. Ct. App. 1998)).

The right of redemption must be exercised before the clerk of court issues the certificate of sale, unless the final judgment of foreclosure specifies a later deadline. Redemption requires payment in full to the foreclosing plaintiff of all sums awarded under the final judgment of foreclosure, including post-judgment interest. (Fla. Stat. § 45.0315.)

When the tenant exercises the right of redemption through the mortgagor/owner, the mortgagor/owner is the beneficiary of the redemption. The mortgagor/owner retains ownership and possession of the mortgaged property free and clear of the mortgage debt. The tenant's leasehold interest survives, but remains subject to the lease and to the interests of the mortgagor/owner.

## MASSACHUSETTS

**Cynthia B. Keliher, McCarter & English LLP, with Practical Law Real Estate**

When a landlord's lender forecloses on its lien recorded against a landlord's property, a non-residential lease interest that is subordinated to the lender's lien may be disaffirmed by the lender after foreclosure. The tenant then becomes a tenant at sufferance.

A subordinate tenant may avoid a disaffirmance if it is able to obtain a non-disturbance and attornment agreement with the lender before foreclosure.

A lender with a lien with priority over a tenant's lease may avoid terminating the lease on foreclosure by either:

- Obtaining an attornment agreement with the tenant before foreclosure.
- Subordinating its lien to the tenant's leasehold interest before foreclosure.
- Demanding attornment from the tenant under that provision of the lease after foreclosure, if the lease contains an express provision requiring the tenant to attorn to the landlord's mortgagee or successors in title.

For more information, see Standard Document, Office Leasing: Subordination, Non-disturbance, and Attornment Agreement (Pro-Lender) (<http://us.practicallaw.com/4-503-3456>).

## NEW YORK

**Vincent O. Hanley, Bond, Schoeneck & King PLLC, with Practical Law Real Estate**

Commercial leases entered into after the execution and recording of the mortgage may be extinguished by a foreclosing mortgagee, provided the tenant is named and served as a defendant in the mortgage foreclosure action.

However, when a foreclosure affects residential property, tenants are entitled to remain in possession from the date the foreclosing mortgagee mails an "Occupancy Notice" to the tenants informing them of their rights of occupancy until the greater of:

- The remainder of the lease term.
- 90 days.

(N.Y. Real Prop. Acts. Law § 1305.)

Tenants wishing to prevent their leases from being extinguished through a mortgage foreclosure action may request that the landlord's mortgage lender provide them with a non-disturbance agreement (see Standard Document, Office Leasing: Subordination, Non-disturbance, and Attornment Agreement (Pro-lender) (<http://us.practicallaw.com/4-503-3456>)).

### ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at [practicallaw.com](http://practicallaw.com). For more information or to schedule training, call **888.529.6397** or e-mail [training.practicallaw@thomsonreuters.com](mailto:training.practicallaw@thomsonreuters.com).