

# Tenant's Right to Abate Rent (Commercial Lease)

PRACTICAL LAW REAL ESTATE

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These Standard Clauses detail a commercial tenant's right to abate rent in the context of a commercial real estate lease. These are jurisdictionally neutral clauses that can be used in all states. These Standard Clauses do not necessarily favor landlord or tenant, but include integrated notes with important explanations and drafting and negotiating tips for both parties.

## DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

### RENT ABATEMENT PROVISIONS

Rent abatement clauses allow a tenant to withhold all or some of its rental payments if all or some part of the leased premises becomes untenantable or unusable because of damage or destruction or for a failure or default by the landlord. Landlords often do not offer rent abatement in their standard leases (or limit their inclusion to only casualty and condemnation) so tenants must request language giving them this right. Tenants should keep in mind that, while state laws vary, a tenant is ordinarily bound by the lease terms, including its obligation to pay rent. A tenant cannot withhold rent, even if it cannot access or use the premises, unless:

- The lease includes an abatement right.
- State law permits.

A tenant should attempt to negotiate this right in the lease under whatever circumstances are appropriate.

Rent abatements are typically granted when the tenant cannot use the premises because of:

- Fire.
- Flooding.
- The presence of hazardous substances.
- Infestations.
- Natural disasters.

Depending on the negotiating leverage of the tenant, a landlord might also permit rent abatement if:

- The landlord is in default or fails to fulfill an obligation under the lease.
- The tenant spends money on a repair or obligation allocated to the landlord in the lease.
- The tenant cannot access the premises.

The period for rent abatement varies depending on the reason for the abatement, but usually continues until:

- The premises are:
  - restored;
  - accessible; or
  - usable.

- The landlord cures its default or failure.
- The tenant is reimbursed for amounts spent on the landlord's obligations.
- The lease is terminated.

For more information on rent abatement laws in specific jurisdictions, see Managing Commercial Real Estate Leases: State Q&A Tool, Questions 5 and 11.

### SCOPE OF STANDARD CLAUSES

These clauses do not favor one party over the other except where stated in the accompanying drafting note. However, the concept of a tenant's right to abate rent is generally tenant favorable. These clauses demonstrate the importance to both parties of accurately and clearly defining the reasons and process by which a commercial tenant may abate rent and how the amount of the abatement is determined.

Rent abatement is not an independent topic typically addressed in a lease. It is usually integrated into provisions addressing the topics that will trigger abatement of rent, such as:

- The tenant's right to access and use the premises.
- Casualty.
- The landlord's default or failure to perform.

The language in these Standard Clauses should be incorporated in the lease where appropriate.

### STATE AND LOCAL LAWS

Although real estate leases are governed by state and local laws where the leased premises are located, the information contained in this resource is useful and relevant to landlords and tenants in all jurisdictions. However, depending on where the leased premises are located, these Standard Clauses may need to be modified to meet state and local law requirements.

### ASSUMPTIONS IN STANDARD CLAUSES

Certain terms used in these Standard Clauses are capitalized but not defined here because they are defined elsewhere in the lease agreement (for example, Lease, Landlord, Premises, Rent, and Tenant). The parties should tailor these Standard Clauses (including the defined terms) for their particular lease agreement.

### BRACKETED ITEMS

All bracketed items containing uppercase text should be completed with the facts of the specific deal.

All bracketed items containing lower case text provide optional language or choices to be used, modified, or deleted depending on the specifics of the transaction.

All bracketed items containing lower case text and separated by a forward slash provide alternative language to be used, modified, or deleted depending on the specifics of the transaction.

## ABATEMENT OF RENT

**Access to and Use of the Premises.** If due to any work or installation performed by Landlord hereunder (other than by reason of Unavoidable Delays): (a) Tenant shall be unable [for at least [NUMBER IN WORDS] ([NUMBER]) consecutive [Business Days/days]] to operate its business in the Premises in [substantially] the same manner as such business was operated prior to the performance of such work or installation; (b) such interruption shall occur during business hours[; and (c) Tenant shall have been unable, after using reasonable efforts, to relocate its employees and property located in that portion of the Premises which is the subject of such work or installation so as to have been able to have continued to operate its business], Rent shall be reduced on a per diem basis in the proportion in which the area of the portion of the Premises which is unusable

bears to the total area of the Premises for each day following the aforesaid [NUMBER IN WORDS] ([NUMBER]) [Business Day/day] period that such portion of the Premises remains unusable.

#### DRAFTING NOTE: ACCESS TO OR USE OF PREMISES PREVENTED BY LANDLORD

A tenant should try to negotiate for an abatement of rent right if the landlord's work in the premises interferes with the tenant's:

- Business.
- Access to or use of specific areas.

Most landlords typically only agree to rent abatement under this circumstance if:

- The interruption occurs for more than a certain number of days.
- The interference with the tenant's business is substantial or material.
- The premises is unusable.

Landlords do not want this right to be triggered if the tenant's business

is immaterially or only temporarily interrupted.

The abatement amount is calculated based on the proportion of the unusable space to the total area of the leased premises. The abatement amount accrues on a per diem basis.

Optional bracketed language in subsection (c) in the proposed abatement clause requires the tenant to try to move its employees and property to a portion of the premises that is usable before the tenant can withhold rent. This is a landlord-favorable condition and tenants should try to resist its inclusion.

**Damage and Destruction.** If the damage or destruction renders all or part of the Premises untenable, Rent shall proportionately abate commencing on the date of the damage or destruction and ending on the date the Premises are delivered to Tenant with Landlord's restoration obligation substantially complete. The extent of the abatement shall be based upon the portion of the Premises rendered untenable, inaccessible, or unfit for the Permitted Use.

#### DRAFTING NOTE: DAMAGE AND DESTRUCTION

This rent abatement clause is typically incorporated in a more extensive casualty provision of the lease. The tenant's rent is abated proportionately during the time that it cannot use all or part of the leased premises because of casualty damage and the ongoing repair. This is a standard provision typically found in commercial leases.

Landlords may negotiate that the rent abatement provisions will not apply if the damage or destruction is caused by:

- The tenant or an agent of the tenant.

- Unavoidable delays or force majeure events.

If the premises is partially damaged, then the landlord's restoration obligations are triggered and including this language gives the tenant a right to abate its rent proportionately until the repairs are substantially completed.

If the premises is completely destroyed, the casualty provision will typically further provide that the tenant's obligation to pay rent is relieved and the parties can terminate the lease.

**Landlord Default or Failure.** If the Landlord [defaults in any of its [material] obligations under this Lease]/[fails to perform [SPECIFIC LANDLORD OBLIGATION]], Rent shall abate commencing on the date [of][that is [NUMBER IN WORDS] ([NUMBER]) days following] such [default/failure] [subject to any notice or cure rights as set forth in Section [SECTION ADDRESSING LANDLORD OBLIGATION AND TENANT'S NOTICE OBLIGATION FOR LANDLORD FAILURE]] and ending on the date such [default is cured/obligation is fully performed] by the Landlord.

#### DRAFTING NOTE: LANDLORD DEFAULT OR FAILURE

If the Landlord defaults under the lease or fails to perform certain obligations, the tenant wants the right to withhold rent until the default is cured or the performance completed. This is the only real leverage a tenant has over a landlord that is not performing.

The language in this proposed clause can be incorporated in:

- A landlord default or tenant remedy provision.
- A requirement that the landlord perform an obligation.
- Multiple clauses addressing a landlord default or performance obligation.
- A stand-alone clause.

A landlord will not include the right to abate rent in these situations in its form of lease. Tenant must raise the request during lease negotiations. Sometimes landlords are agreeable, but it depends heavily on the negotiating position of the tenant. Only tenants with strong leverage

are likely to have this concept included in a lease.

If a landlord agrees to give a tenant abatement rights under any one or more of these circumstances, it will generally want to:

- Require that the tenant first give the landlord notice and an opportunity to cure.
- Limit the situations when the tenant can abate rent to specified defaults or failures rather than any default or failure.
- Impose other restrictions, such as:
  - a materiality threshold on the default or failure;
  - the time period during which a tenant can abate rent;
  - defaults or failures caused by force majeure or other factors outside of the landlord's control not triggering rent abatement rights; and
  - if a cure will take time, abatement terminates once the landlord starts a remedy.

**Tenant Self-Help Reimbursement.** If the Landlord fails to perform such [work/alteration/obligation], the Tenant shall have the right to perform same at Landlord's expense and Rent shall abate until such time as the Tenant is fully reimbursed for such expense.

### DRAFTING NOTE: TENANT SELF-HELP REIMBURSEMENT

Tenant self-help reimbursement is an extremely tenant-favorable concept and is usually refused by landlords. However, its inclusion depends heavily on the negotiating position of the tenant.

This language could be incorporated into one or more lease provisions that outline particular obligations of the landlord. These might include the landlord's obligations to perform:

- Work.
- Maintenance.
- Repairs.
- Alterations.

Only a tenant with significant negotiating leverage is likely to have a self-help rent abatement right in its lease.

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