TEN THINGS TO CONSIDER IN CO-WORKING AGREEMENTS

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The rise in the importance of co-working arrangements in lieu of typical office leases should not be a surprise to anyone in 2018. It is well documented that, at least for now, millennial workers have a preference for co-working arrangements rather than traditional offices. But corporations requiring office space can also realize a number of potential benefits in electing to enter into co-working arrangements such as flexible term length and ongoing expansion and contraction options atypical of office leases. Other less obvious benefits of co-working may include a reduction in office management staff due to the services being provided and, as one national client real estate manager told us, the fact that no space planning is involved cuts out the headache of obtaining the approval of local office heads on design matters. And when co- working space is coupled with exclusive space, co-working companies have offered keen pricing of tenant improvement packages.

However, the legal agreement between the Co-working Entity ("CWE") and your company ("you" or "your company") is very different than a traditional office lease. This article will highlight ten key points for you to consider when entering into a Co-Working Agreement (the "agreement") which should help you clarify your rights in the agreement and give you some ideas on how the agreement can be negotiated.

ONE: Your Relationship to the CWE.

In a lease, it is clear what the legal relationship of the parties is: landlord and tenant. Moreover, you have a clear idea of what that means. You have the right to the exclusive use of a designated premises for a period of years in exchange for rent paid to the landlord. An agreement with a CWE however often does not make the relationship clear, using words like "member" or "guest" instead of tenant. Oftentimes, the CWE will itself be a tenant of the building, so you may think you are a type of subtenant.

Although we are not aware of any court cases in the U.S. which have firmly established what the legal relationship is, we believe it is most akin to a license which is often used for short term occupancy agreements. In fact, some CWE form agreements specify that your relationship to the CWE is like the relationship of a hotel guest to the hotel. In jurisdictions we have studied, a license is not an "interest in property" like a lease, but it is a personal right to occupy the space. A license is often terminable at any time by either party, and if the CWE believes, rightly or wrongly, that you have committed a default

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under the agreement, the CWE may be able to terminate your occupancy of the space with no notice and without statutory process of law. So if this is your primary office space, or at least an important location for your company, it will be very important that you try to avoid a dispute with the CWE because, in effect, the CWE can much more easily disrupt your business operations than a landlord can in most states.

TWO: Defining Your Space.

In virtually every lease, the tenant's premises are defined by a description thereof and usually a diagram showing its exact location on the relevant floor or floors of the building. However, in most cases, the space under an agreement with a CWE will be defined not by physical boundaries but by the number of seats and/or workstations being provided. Many agreements provide that the CWE reserves the unilateral right to reduce or increase the size of the space you occupy or change its configuration at any time. If the space arrangement mandated by the CWE is not appropriate for your business, your only option generally is to terminate the agreement. And then, your termination right will not be exercisable without advance notice to the CWE (See Section 3 below for further discussion).

The closest counterpart to this type of clause in a lease is the "relocation clause" found in landlord form leases. However, most relocation clauses are negotiated to provide that the landlord must deliver "comparable" space in size and quality and must pay all of tenant's relocation costs. The agreement with a CWE does not have these protections for the relocation of your co-working space. However, if you are getting "exclusive" space from the CWE, we strongly recommend resisting the CWE's rights to relocate or reconfigure your space or, alternatively, requiring the types of commitments one receives typically from a landlord from the CWE.

THREE: The Term of the Agreement.

Most agreements with CWEs run on a month-to-month basis with a stated commencement date and expiration date. But unlike leases, many agreements do not automatically expire on their stated date of expiration. Instead they require you to provide the CWE prior notice (in some cases as much as 60 days prior notice) that you do not want the agreement to extend beyond the stated expiration date. If the required notice is not given, you may need at least thirty (30) days' notice to terminate the agreement and, most form agreements, provide that the end of the term must be the last day of a calendar month.

This type of provision may be difficult for a real estate manager to handle. For example, if the agreement requires prior notice of at least thirty (30) days and provides that the term can only end on the last

day of a calendar month, then if you send a notice two days late, you will likely not be able to terminate until the last day of the following month!

We know that this type of clause, where renewal beyond a stated expiration date is automatic without a prior termination notice being given, can trip up even the most careful companies. We have in the past two years been involved in two litigation matters focused around leases set up this way. Caveat emptor.

FOUR: The CWE Can Change the Agreement.

In any lease, with the sole exception of landlord's rules and regulations concerning conduct in the common areas of the building, the landlord cannot change any of the lease terms without the written consent of the tenant. However, in a typical CWE agreement, the CWE reserves the right to change the terms of the agreement without your consent provided the CWE has given you the required notice to the change. Often, if you do not then choose to exercise your right of termination after the change, then you are deemed to have ratified the change. In effect, you have been given the choice of accepting the new term or terms or leaving the facility.

This right may even extend to the fees you are paying under the agreement. Most agreements with CWE provide a base monthly fee which includes a list of services to be provided with some services being billed separately. Often the CWE will retain the right to automatically increase the base fee at stated intervals (or increase the base fee upon prior notice) and to increase the fees for services at any time. In some cases, the CWE will also reserve the unilateral right to change the services that are provided to the space. You have the right to terminate if the changes are not acceptable, but the lack of stability in the stream of fees payable to the CWE may limit your ability to commit to a longer term agreement.

FIVE: Stoppage of Services.

Form agreements from CWEs normally omit any provision about what remedy you will have if some or all of the services to be provided under the agreement stop or are provided inadequately. Services will typically include copying, access to the CWE network and coffee service. You may incur costs providing the services you were supposed to get under the agreement but won't have a mechanism to offset your costs against the fees payable under the agreement.

SIX: Interruptions in HVAC and other Building Services.

Coffee is one thing, but HVAC and janitorial services are much more important. Because you have no

contractual rights against the building owner who provides the basic building services, you are left without any remedy, and the CWE does not take responsibility for such stoppages because it is not providing the base building services. Further, the agreement will usually provide for no refunds of any payment made to the CWE. Thus, we suggest that you try to negotiate a right of abatement of the fees to the extent you are prevented from using all or part of your space. We would also suggest that just as in a sublease agreement, you require the CWE to make commercially reasonable efforts with respect to its landlord to compel the restoration of services.

If all else fails, of course, you still have the termination to fall back on. However, keep in mind there will be delays associated with the notice (see Section 3 above).

SEVEN: Your Employee Causes Damage to the Facility or the Building.

One of the biggest differences between the agreement and a lease is how each addresses the situation when an employee, either intentionally or not, causes damage to the building (owned by the landlord) or the contents of the facility (owned by the CWE).

Typically as a tenant, you receive "waiver of subrogation" protection from the owner of the building/landlord, which means that even if your employee causes a casualty, the landlord must look only to its property insurer for coverage of the repair costs and neither landlord nor its insurer can sue you for the damage or repair costs. Although to our knowledge it has not been tested in the courts, a licensee probably does not have waiver of subrogation rights as against the landlord or the landlord's property insurer who "subrogates" to landlord's rights once it pays the claim. Many companies who are co-working participants would be surprised to discover that if their employee causes a casualty or damage to the building they are in, their company will end up footing all or some of the bill unless they carry a substantial limit on their liability insurance policy.

We find this problem to be one of the most vexing aspects of an agreement with a CWE. We believe the best practice is to include a provision in the agreement whereby the CWE extends the release of claims and required waiver of subrogation rights in the CWE's lease to you as the user under the agreement. We think this is fair because you are in effect paying your prorata share of the CWE's insurance costs under the CWE's lease and also the landlord's property insurance costs. Since you are in effect underwriting this insurance, you deserve the benefit of it.

We can say with assurance CWEs will not want to agree to this. If you are taking exclusive space, you should insist on it. If you plan to go without waiver of subrogation-type protections, we would recommend a discussion with your internal or external risk manager before you do.

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EIGHT: What a CWE is Liable For.

We have already discussed a number of ways that CWEs create barriers to you obtaining recompense if the CWE defaults or fails to deliver services. However, many CWE agreements go further and attempt to insulate the CWE from liability for personal injuries or property damage you or your employees may suffer even if, for example, it was the CWE's employee or contractor who caused the injury or the damage. Depending on the state in which the underlying facility is located, this release of the CWE may be enforceable or it may not. Most states, however, would not enforce the release in the agreement because it is either prohibited by statute or the court decisions of that state. It is therefore important to understand the law of the state in which the facility resides before finalizing this issue.

A CWE goes a step further in its form agreement, however, and often provides that any damages you might be entitled to if the CWE defaults (assuming you have surmounted the numerous other hurdles described above), is capped at one to two months of your actual payments to the CWE. Depending on the size of your payments, this can be a major detriment to recovery because damage limitation clauses in contracts are universally enforced. We recommend negotiating any such damages cap upwards or preferably, away.

Further, some form agreements also limit the time period in which you have to bring a suit to enforce the agreement or commence an action against the CWE. The time periods can be as short as six (6) months to one year after the cause of action accrues. This is significantly less time than you would have under the applicable statute of limitations in most states. Therefore, we recommend that you be aware of these limitations and either negotiate longer time frames or delete the applicable limitations from the agreement.

NINE: Expectations of Privacy.

There are physical and data security concerns in co-working spaces. The CWE typically reserves the right to access your space (whether such space is exclusive or not) at all times upon no notice to the co-working participant. If the space is not for your exclusive use, other members will also have access and may view, photograph or steal any items left in the space. In addition to rights of access, some CWEs also reserve the right to take photos and video of the space (even space exclusively licensed) at any time for advertising or security purposes.

Co-working participants typically have the right to use shared networks or shared printers in the space, and some CWEs reserve the right to monitor member network usage. Because a shared printer keeps copies of all printed documents on its hard drive for a period of time, anyone with access to a shared

printer may be able to obtain copies of any printed documents. It is important for you to decide whether the security risks attendant to participating in co-working arrangements is appropriate for your company. One of our major corporate clients has decided against using co-working facilities despite their attractiveness for hiring tech employees because of the concerns over potential breaches of proprietary information. If your company has data security protocols, you should consult with your data management group to see if what the CWE offers meets your standards.

TEN: Negotiating with a CWE.

We negotiate CWE agreements of all sizes for our corporate tenant clients. Often, we negotiate specific terms of the agreement with an employee of the CWE who is a manager or sales manager for the facility and who may have little, if any, background in negotiating leases or licenses for space. Furthermore, this manager is often not supported by counsel. The result is often the same: you are told the CWE will make no changes to the terms of the form agreement.

This poses significant difficulties for all potential users of co-working spaces. Large corporations, who have established protocols for negotiating agreements related to office space, chafe at being asked to accept what much lower credit users are required to sign on to. But all users should recognize that despite the advantages of co-working, there may be some things you cannot, or will not, accept. If the local manager is unwilling or unable to make necessary concessions, you are totally within your rights to ask to deal with a more senior executive and/or CWE counsel.

There is also a matter of degree. A three-month license for 25 work stations is a much different equation than 50 co-working stations plus an exclusive area of 30,000 square feet for a minimum of four years. Ultimately, it is up to your counsel to walk you through these issues and

for you to decide the cost-benefit analysis for your company. Given the growth of and interest in co-working, it appears that the companies choosing to go forward outnumber those who don't.

It is our hope that as co-working evolves, there will be less of a "one size fits all" approach to agreements by CWEs. We would particularly welcome, in the case of exclusive space, the development of new forms which are more "lease-like" in providing certainty to the user and less like poor adaptations of pure co-working agreements.

But in all events, we believe that if you keep these ten points in mind when you enter an agreement with a CWE, you will significantly improve the end results for your company.