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Data center leases: critical industry-specific provisions protect tenants

A tenant who is leasing space to operate a data center has unique needs that require more flexibility and autonomy than a typical commercial tenant. Whether the tenant is an enterprise business planning on operating the facility for its own internal needs or a provider using the space to operate a retail data center, the data center tenant should negotiate a lease that provides assurances that the tenant can efficiently operate and grow its business. Several of the most critical areas for a tenant's consideration when negotiating a data center lease are summarized in this article.

■ **Customer co-location.** If the tenant will be operating a retail co-location facility within the premises, the lease should grant the tenant the right to allow customers to co-locate equipment and use office space on a temporary or as-needed basis, without triggering the subletting or assignment provisions in the lease. It is essential for the tenant to be able to enter into customer contracts without needing to obtain the landlord's consent, which would likely require the tenant to disclose the customer's identity, provide the landlord with the customer's confidential financial information, and pay a review fee to the landlord. In addition, signing customer contracts should not trigger any landlord rights to recapture or share in compensation paid to the tenant as if the customer contracts were subleases, or allow the landlord to collect payments directly from customers if there is a default by the tenant under the lease. Such rights are often included in standard subletting and assignment provisions.

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■ **Alterations.** When operating a data center, the tenant needs to control the heating, ventilation, and air-conditioning system and mechanical and electrical infrastructure to assure a certain level of service to its customers. The tenant will want the right to install, repair, augment, remove and replace data center equipment, as well as cabinets, cages, cabling and antennas, within or around the premises at the start of the lease and throughout the lease term without requiring the landlord's ongoing approval. Most landlords, however, will be resistant to concede that level of freedom to a tenant. The parties may end up compromising by agreeing upon a list of alterations that the tenant can undertake without any additional landlord approvals, as well as the process that the tenant must follow to complete such alterations. If the tenant desires to make any alterations that are not included on the list, then the tenant must obtain the landlord's consent, which should not be unreasonably withheld, delayed or conditioned.

■ **Support space.** The interior of the premises will not be sufficient to provide all the space needed to install data center equipment and infrastructure. The tenant should negotiate the right to place antennas and other technical and data center equipment on the roof of the building, to use riser and shaft space within the building, and to place generators and other equipment outside in a dedicated support area. The tenant should ensure that it has sufficient space to augment its operations and infrastructure as needed from time to time, including additional generator space. In multitenant buildings, the tenant should be careful to not include this additional space in the square footage of the premises, which also will increase common area maintenance charges proportionately. Landlords usually are willing to provide these rights but may negotiate additional charges to do so, particularly on the roof.

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■ **Access agreements.** Since building out, operating and expanding a data center requires extensive capital, the tenant should ensure that the lease provides the tenant flexibility to grant certain rights to its lenders. A typical lender to a data center operator requires the landlord to waive or subordinate any rights and security interests in the collateral located at the premises and enter into an access agreement allowing the lender to access the premises to remove collateral, cure defaults under the lease and, in some cases, assume the lease. The lender additionally may require a leasehold mortgage against the tenant's property. If such lender agreements are negotiated concurrently with the lease, or are agreed to in the lease, then the tenant has significantly more leverage to secure the agreements when needed.

■ **Surrender.** The lease clearly should state that all equipment, whether or not affixed to the premises, installed by the tenant is owned by the tenant during the lease term. The best result for the tenant is to have the flexibility to decide whether to leave the alterations, equipment, and other trade fixtures at the premises or to remove them before vacating the premises at the end of the lease term. The tenant's data center equipment may have significant value at lease end, in which case the tenant may want to remove it so that it can be sold or relocated to another facility. The standard lease provision that requires a tenant to restore the premises to its original condition or remove all trade fixtures and equipment may be extremely costly for a data center tenant, particularly if it does not plan to use the removed equipment. The tenant and landlord may be able to strike a balance that provides the landlord with basic infrastructure necessary to release the premises but allows the tenant latitude to determine which items it removes or leaves behind.▲