ISSUES RELATING TO COMMERCIAL LEASING

U.S.A., NEW MEXICO
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1. Describe state or local transfer taxes payable on creation or assignment of a lease.

There are no state or local transfer taxes on the creation or assignment of a lease of commercial real estate now.¹

2. Describe any legal restrictions limiting the maximum term of a lease (including renewals).

There are none now for leases of commercial real property.

3. Describe any laws requiring landlords to allow a tenant to renew its lease.

There are none now for leases of commercial real property.

4. Describe any restrictions on rent that may be charged for to a tenant.

There are none now for leases of commercial real property.

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5. **Describe any laws permitting tenants to terminate a lease prior to its stated expiration date.**

No statute now permits tenants under a lease of commercial real property to terminate the lease prior to its stated expiration date, but the common law does so in cases of constructive eviction and other like breaches by the landlord.

In addition the federal Bankruptcy Code allows a tenant that is a debtor to reject a lease as an executory contract, thereby terminating it prior to its stated expiration date. If the tenant does so, however, the landlord has an unsecured claim against the tenant’s bankruptcy estate for the rent and is entitled to possession of the premises.

6. **Describe any laws allowing tenants to assign or sublease without landlord’s consent.**

A lease of commercial real property, like any other contract, is now generally assignable. Likewise, the tenant under a commercial lease can generally sublet unless the lease limits subleasing.

A tenant that is a debtor in a proceeding under the federal Bankruptcy Code may have the right to assign its lease without the landlord’s consent under 11 U.S.C. § 365 if the conditions to such an assignment are satisfied, regardless of whether the lease contains restrictions on assignment or subletting.

7. **Describe any laws allowing landlord to restrict assignments or subleases by tenants.**

A prohibition against any assignment or sublease of a lease of commercial real property may violate the common law rule against unreasonable restraints on alienation. For the same reason, a purported unfettered right to declare a default upon an assignment or sublease may be unenforceable. Instead, most New Mexico leases provide for a landlord’s right to consent to the assignment or sublease, which consent shall not be unreasonably withheld, conditioned or delayed.

The latter clause will be implied by our courts even if it is not contained in the lease. The reason for this implication is that in New Mexico, leases, like all other contracts, contain an implied obligation of good faith and fair dealing that benefits and burdens both the landlord and the tenant.

8. **What is the common form of eviction proceeding? What is the customary length of time for that proceeding?**

The common form of eviction proceeding for commercial real property held under a lease is now an unlawful detainer action in the magistrate court or the district court in the county in which the property is located. §§ 35-10-1 et seq.²

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² State statutory citations are to the New Mexico Statutes Annotated, 1978 Compilation.
If the tenant is a tenant from month-to-month or a tenant at will, the tenant must be given 30
days’ notice to vacate the premises before the landlord commences the action; otherwise,
only three days’ notice is required. Written notice is required. The case must be heard within
10 days after service of process upon the tenant, but the judge may continue the case for not
more than 10 additional days. No jury trial is permitted. *Reece v. Montaño*, 48 N.M. 1, 144
P.2d 461 (1943). If the judge finds in favor of the landlord, the judge customarily awards
damages equal to the rent owed and also awards possession of the premises to the landlord,
allowing the tenant a reasonable time to relocate.

9. **Are there any legal restrictions on pledging a leasehold interest as security for a financing?**

   There are no such restrictions now on pledging a leasehold interest in commercial real
   property as security for a financing.

10. **Describe any requirements for landlords to hold security deposits in separate accounts and, if
    such requirements exist, describe if there can be one separate account for all tenant security
    deposits or whether each security deposit must be held in its own separate security deposit.**

    There are no such requirements now for landlords of commercial real properties to hold
    security deposits in separate accounts, but there are such requirements for real estate
    management companies.

11. **Describe any required statutory or other legal disclosures to be made to all tenants.**

    There are no such required disclosures now to be made to all tenants under leases of
    commercial real property.

12. **Describe all taxes on rent or other taxes that landlords are required to collect from tenants.**

    There are no such taxes now which landlords are required to collect from tenants under leases
    of commercial real property.

13. **Describe any limitations on the ability of landlords to exercise self-help.**

    There are no statutory limitations now on the ability of landlords to exercise self-help
    remedies under leases of commercial real property, except those statutes barring criminal acts
    and the like. However, if the tenant is still occupying the premises, most well-advised
    landlords ordinarily do not exercise self-help remedies except to prevent damage to the
    premises from hazards, or waste by the tenant, which self-help remedies do not materially
    interfere with the tenant’s use of the premises.

    This reluctance is because of (a) the implied duty of good faith and fair dealing owed by the
    landlord to the tenant (see Number 7 above), (b) the relative speed and ease of obtaining
    either or both of court-ordered remedies or an unlawful detainer judgment (see Number 8
    above), if they are warranted, and (c) the fear of liability to the tenant for one or more of the
    following: breach of the peace, lost profits or other special damages, and punitive or
    exemplary damages which are recoverable in New Mexico more easily than in some other
    states. A jury trial is available to the tenant for the claims listed in clause (c) of the preceding
    sentence.
14. Describe whether remedies such as acceleration of rent must be expressly stated or whether they are implied.

We have no statutes or case law now on the subject whether remedies such as acceleration of rent must be expressly stated in leases of commercial real property or whether they are implied.

15. Describe whether there are any expedited remedies for tenant default and, if so, what lease provisions (such as waiver of jury trial, for example) would be required for a landlord to seek expedited remedies.

There are no expedited remedies now for tenant default under leases of commercial real property, other than those for unlawful detainer that are described in Number 8 above.

Even though jury trials are not available in those proceedings, it is nevertheless customary to put into these leases clauses waiving jury trials, forum-selection clauses, choice-of-law clauses and all the other provisions that are customary in commercial contracts. These clauses are useful in negotiations and litigation with the tenant over matters that do not give rise to a claim for immediate possession. These clauses may also be helpful if a future legislature or court should decide to provide jury trials in unlawful detainer actions.

16. Describe any formal requirements for the execution of a lease.

There are no formal requirements now for the execution of a lease of commercial real property, but if the lease or a memorandum of lease is to be recorded, which is recommended, all signatures on the document to be recorded must be acknowledged. New Mexico has adopted the Uniform Law on Notarial Acts, which can be consulted for the forms of acknowledgment which should be accepted by our county clerks, who are our recording officers. §§ 14-14-1 et seq.

This act makes special provision for an acknowledgment taken in a foreign country. §14-14-6. The use of an “Apostle” is recommended in addition to an acknowledgment taken in a foreign country, the form of which is reproduced in the Official Comment to Section 6 of the uniform act. See 14 Uniform Laws Annotated 201, 216 (2005); it is also available at http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/ulna82.pdf (visited 4/1/2009).

17. Describe whether a memorandum of lease or other document would need to be recorded for the lease to be enforceable against third parties.

All leases with a term, including option terms, of more than five years, or a memorandum of the “material terms” of such leases, must be recorded. § 14-9-1. There is, however, no time limit for recording the lease or memorandum, as New Mexico is a notice jurisdiction. Angle v. Slayton, 102 N.M. 21, 697 P.2d. 940 (1985). Any other lease, or memorandum of the “material terms” thereof, may also be recorded. §14-9-1.

A lease or a memorandum of the “material terms” of the lease must be recorded in order to give constructive notice of the lease to third parties. § 14-9-1 & -2. It must be recorded in the office of the county clerk of each county in which the premises are located. § 14-9-1.
“Material terms” of the lease means “the names and mailing addresses of all lessors, lessees or assignees; if known, a description of the real property subject to the lease; and the terms of the lease, including the initial term and the term or terms of all renewal options, if any.” §14-9-1.

If all of the signatures on the lease or the memorandum of the “material terms” of the lease are not acknowledged, the document does not provide constructive notice to third parties, even if it is accepted by the county clerk and recorded. § 14-8-4; New Mexico Properties, Inc. v. Lennox Industries, Inc., 95 N.M. 64, 618 P.2d 1228 (1980). New Mexico is not unusual in this regard; it is still the law in many, if not most, American states. See Number 16 above for our current requirements for acknowledgments.

18. Describe any restrictions on the transfer of ownership of real properties subject to a lease. Does such a transfer affect the tenant’s rights or obligations?

There are no statutory restrictions now on the transfer of ownership of commercial real property subject to a lease. Such a transfer is permitted without the permission of, or notice to, the tenant, but the tenant may continue to pay rent to the transferor until the tenant receives notice of the transfer. § 47-1-22.