

COMMERCIAL LEASE LAW INSIDER®

The Practical, Plain-English Monthly Newsletter for Owners, Managers, Attorneys, and Other Real Estate Professionals

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Limit Liability by Modifying Standard Office Building Safety Clause

In recent years, building safety has become a hot-button issue, spurred by shootings in office buildings around the country, as well as terrorist attacks in New York, Washington, D.C., and Oklahoma City. In light of these developments, one key step you should take is to review any clause in your lease addressing office building safety. It may need modifications in light of the potential financial and physical consequences of a crime or terrorist act. For instance, lawsuits could lead to costly verdicts and skyrocketing insurance premiums. And a terrorist act could also cause catastrophic structural damage to your building.

If your lease is like many we've seen, you could bear the financial brunt of a crime or a terrorist act. The building safety clause may not anticipate that your building and tenants could be harmed by a serious crime or terrorist act. So it may make you primarily responsible for providing all "security" services at the building. As a result, a tenant harmed by a criminal or terrorist could claim that you violated your security obligations—and sue you for damages.

To avoid putting yourself in that situation, modify your lease's building safety clause in four ways, recommends San Francisco attorney Richard C. Mallory and Los Angeles attorney Anton N. Natsis. These modifications will help reduce the chances that you'll be held financially responsible if a criminal or terrorist harms your building or its tenants. We'll tell you what those modifications are. And we'll give you a Model Lease Clause on p. 3 that includes those modifications and that you can adapt and use in your lease.

Modify Safety Clause in Four Ways

Here are the four modifications to the lease's building safety clause that Mallory and Natsis suggest. The first modification revises existing language in the clause. The last three modifications are additions to the clause.

Provide access control—not security—services. Don't agree to provide security services to protect your building and its tenants from criminal and terrorist acts, warn Mallory and Natsis. Instead, agree to provide only "access control" services, they advise. The word "security" creates problems for you because:

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SAFETY CLAUSE (continued from p. 1)

► *“Security” is ambiguous.* “Security” is an ambiguous word that could be interpreted broadly by an angry tenant—and a court, says Mallory. You may end up being held to security of a higher standard than you thought you had to provide, he warns. For example, you may have thought that providing security services meant installing an alarm system and hiring unarmed security guards to patrol the building’s lobby. But a tenant may argue that security services required you to hire armed guards to patrol all of the building’s common areas, and screeners to search building entrants for weapons and explosives.

► *“Security” implies a guarantee of safety.* On a psychological level, agreeing in a lease that you’ll provide security services at your building gives tenants the impression that you’re guaranteeing to keep them safe, says Natsis. So if they’re harmed, in their minds you’ve broken your guarantee. But this isn’t a feasible guarantee because criminals and terrorists are hard to stop. Despite this, the tenant is more likely to sue you for violating that guarantee.

“Access control” services is better terminology. You’re agreeing to provide a lower level of building safety services than security services, so you don’t give tenants the impression that you’re guaranteeing their safety, says Natsis. Access control services may include hiring special personnel whose main responsibility is to stop people from trespassing at the building, Mallory says. They’ll stop loitering, solicitation, and panhandling in the common areas during business hours, he explains.

Also, agree only to access control services that are consistent with similar services provided in comparable buildings, say Mallory and Natsis [Clause, par. a]. The point is not to be required to provide any more or fewer access control services than others provide, says Natsis. To avoid disputes with the tenant later about the meaning of “comparable buildings,” define that term elsewhere in the lease.

PRACTICAL POINTER: It’s also important to clarify how often you’ll provide access control services—for example, 24 hours per day, every day of the year, advises Mallory [Clause, par. a]. This too can prevent disputes.

No liability resulting from access control failure. Although you’re agreeing to hire access control personnel, make it clear that you’re not liable if a criminal or terrorist harms a tenant at your building because of something the access control personnel did or didn’t do, says Natsis [Clause, par. b]. Many office building leases we’ve seen don’t have this owner protection. Putting this into the lease should help stop a tenant from suing you if your access control personnel let a criminal or terrorist into your building.

But this protection may not be enforceable in some states if the tenant was harmed because you or your agents did something that prevented access control personnel from carrying out their duties, notes Mallory.

PRACTICAL POINTER: Adding this protection to the lease is still a good idea, even if it isn’t currently enforceable in your state, says Natsis. State law may change in the future, he notes.

Set office building safety protocols. Add a list of office building safety protocols to give the tenant an idea of what the access control services will

involve, says Mallory. Attach a list of the protocols as an exhibit to your lease. (You can use the exhibit on p. 4 as an example.) Also, make sure that you've got the flexibility to add to, change, or delete the building safety protocols as you see fit—although you'll need to send the tenant notice of the additions, changes, and deletions, says Mallory [Clause, par. c].

What should be on your list of building safety protocols? That will vary depending on the type of building it's for, but in general, like our exhibit example, it should: 1) set the qualifications of the access control personnel; 2) require that you implement emergency procedures comparable to other buildings; and 3) set procedures for the reporting incidents in the building, controlling building entranceways, deliveries to the building, and authorized removal of items.

PRACTICAL POINTER: Expect a savvy tenant to demand that all additions, changes, and deletions that you make to the building safety protocols be reasonable. That's an acceptable demand, says Natsis.

Set three conditions if tenant can install 'security' systems. You can benefit if a tenant takes charge of its security. In that situation, you won't be held responsible for harm the tenant suffers as a result of its own security failures, notes Natsis. A tenant could easily install a variety of security systems in and around its space, including, for example, installing and managing an access or key card system that its employees use to gain entry, Mallory says. But if you give the tenant a right to install its own security system, clarify that the system must meet the following three conditions. This way, the tenant's security system won't interfere with your access control personnel or building systems or hurt your wallet:

(continued on p. 4)

MODEL LEASE CLAUSE

Include Four Modifications to Cut Your Liability for Crimes or Terrorism

The following lease clause was drafted by San Francisco attorney Richard C. Mallory and Los Angeles attorney Anton N. Natsis. This clause includes four modifications to the standard office building safety clause. Use this clause if you're worried that a criminal or terrorist act could harm your building or its tenants.

Paragraph a says that you'll provide access control—not security—services at your building. Paragraph b

limits your liability for damage caused by access control personnel. Paragraph c refers to your building safety protocols. Paragraph d says that the tenant may install its own security system at its space. You'll need to define "Comparable Buildings" elsewhere in the lease.

Show this clause to your attorney before putting it into your lease.

CLL10055

BUILDING SAFETY

a. ACCESS CONTROL SERVICES

Landlord shall provide access control services consistent with such services in Comparable Buildings. Such services shall include the hiring of [insert #, e.g., 24]-hour a day, [insert #, e.g., 7] days a week, [insert #, e.g., 365] days a year on-site access control personnel.

b. NO LIABILITY

Although Landlord agrees to provide such access control personnel in Paragraph a hereof, notwithstanding anything to the contrary contained in this Lease, neither Landlord nor the "Landlord Parties," as that term is defined in Clause [insert #] hereof, shall be liable for, and Landlord and the Landlord Parties are hereby released from any responsibility for, any damage either to person or property (specifically including any damage or injury resulting from a criminal or terrorist attack) sustained by Tenant incurred in connection with or arising from any acts or omissions of such access control personnel.

c. BUILDING SAFETY PROTOCOLS

Landlord shall maintain the access control services as are set forth in Exhibit [insert # of Building Safety Protocols exhibit] to this Lease ("Building Safety Protocols"), the terms of which are hereby incorporated in this Lease to the same extent as if fully set forth herein. Landlord shall have the right, in its sole and absolute discretion, to add to, change, or delete any of the access control services listed in the Building Safety Protocols upon [insert #] days' prior notice to Tenant.

d. TENANT'S SECURITY SYSTEM

Subject to Clauses [insert #s, e.g., of alterations and surrender clauses] hereof, Tenant may, at its own expense, install its own security system ("Tenant's Security System") in the Premises; provided, however, that Tenant shall coordinate the installation and operation of Tenant's Security System with Landlord to assure that Tenant's Security is compatible with Landlord's access control services and the Building Systems and to the extent that Tenant's Security System is not compatible with Landlord's access control services and the Building Systems, as Landlord determines in its sole discretion, Tenant shall not be entitled to install or operate Tenant's Security System. Tenant shall be solely responsible, at Tenant's sole cost and expense, for the monitoring, maintenance, operation, and removal of Tenant's Security System.

SAFETY CLAUSE (continued from p. 3)

► *It's compatible with your services/systems.* Have the tenant coordinate the installation and operation of its security system with you to assure that the system is compatible with your access control services and the building's systems. If the tenant's security system isn't compatible—say, for instance, its security system drains your building's electrical system—the tenant can't install or operate it, says Mallory.

► *It's paid for and maintained by tenant.* Make the tenant solely responsible, at its own cost, for installing, operating, maintaining, and removing its security system, says Natsis. Otherwise, the tenant might try to shift some of those costs and responsibilities to you.

► *It meets alterations/surrender standards in lease.* Say that the installation of the tenant's security system must meet any requirements set out in the lease's alterations and surrender clauses, says Mallory. Plus, the tenant must remove the security system at the end of the lease, he adds [Clause, par. d].

PRACTICAL POINTER: A savvy tenant may want the right to install any type of security system that it decides on, as long as the system doesn't affect your ability to operate the building. But since you don't want a tenant to use a system that might scare other tenants or visitors to the buildings—such as armed guards—you'll have to negotiate this point with the tenant, says Mallory. Also, if the tenant hires its own private security personnel, make sure that you're not held accountable if the personnel cause someone to be hurt. Require the lease's indemnification clause to say that the tenant will indemnify—that is, reimburse—you if you're sued because of something the tenant's private security personnel did or failed to do, say Mallory and Natsis. ▲

CLLI Sources

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► List Access Control Services in Lease Exhibit

Here's an example of an exhibit listing office building safety protocols that you could attach to the lease. The exhibit was drafted with the help of San Francisco attorney Richard C. Mallory. By attaching an exhibit like this to the lease, you notify the tenant up front of the standard of access control services you'll provide at your office building. This may help avoid disputes later on over what the lease term "access control" services means.

The exhibit begins by saying that you'll provide access control services at a standard consistent with those services provided in comparable buildings. The exhibit then lists examples of the services to be provided. In this example, they are access control personnel who meet certain qualifications (par. 1), the implementation of emergency procedures (par. 2), reporting procedures for incidents in the building (par. 3), and controls for building entranceways, management of mail and deliveries, and removal of items (par. 4).

Adapt the exhibit to fit your building's needs. Show it to your attorney before attaching it to your lease.

OFFICE BUILDING SAFETY PROTOCOLS

Landlord shall provide access control services for the Building to meet the standard, at a minimum, of access control services consistent with the access control services of the "Comparable Buildings" as defined in the Lease.

As an example of the foregoing, access control services shall include, but not be limited to, the following:

1. All access control personnel employed at the Building shall be skilled in the work assigned, have the required State of [insert state's name] guard permits and shall be properly supervised.
2. Landlord shall implement and maintain access control rules and regulations, emergency/evacuation procedures, and life/safety plans consistent with the operating procedures of the Comparable Buildings.
3. Landlord shall provide access control services to proactively monitor the Building, including the recordation, in a daily activity report, of all reported or observed accidents, incidents, damage, breakage, and/or apparent plumbing or electrical problems in or about the Building and immediately report all such matters to Building Management;
4. Landlord shall implement, administer, and maintain procedures to:
 - (i) Manage entry to the Building by tenants, contractors/agents, and visitors;
 - (ii) Manage the delivery and distribution of all mail and other receivables. Landlord shall direct all individuals who are making deliveries (other than items which may be hand carried) to the Building to utilize the loading dock elevator during normal business hours. Under no circumstances will any access control officer accept deliveries or sign for any packages unless a Landlord or a representative of a Building tenant provides prior written approval. Landlord shall provide written procedures on the handling of all deliveries and pick-ups after normal business hours, and shall coordinate the issuance of identification badges to all vendors or contractors performing work in or about the Building; and
 - (iii) Control the removal of only those items that have been authorized for removal from the Building (e.g., by a Building removal pass).