



What Happens if You Break a Commercial Lease?

Urgent message: Whether starting a new urgent care center and entering into a lease for the first time, or evaluating, moving, closing, or selling an existing urgent care center, understanding the conditions under which it's permissible—and not permissible—to break a commercial lease can save you time, money, and legal headaches.

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Entrepreneurs, including physicians and physician groups looking for a new business opportunity like owning their own urgent care practice, must understand several key aspects of a commercial lease.

Typically, urgent care centers are located in retail spaces in an attempt to drive patient visits through visibility and traffic from nearby stores that appeal to the same target demographic. Retail developers are doing their part to encourage more urgent care tenants by designing more intimate, walkable shopping centers that focus on entertainment and everyday needs.¹

Urgent care owners should realize that a commercial lease is significantly different from a residential lease. You may recall the consequences of breaking an apartment lease typically include the loss of the security deposit and perhaps a penalty equal to one month's rent. However, breaking a commercial lease has much more serious consequences—ones that may severely impact your business.

Commercial Leases are Grounded in Contract Law

Courts generally treat a commercial lease as a contract and, in the absence of a provision in the lease to the contrary, ordinary contract principles apply.² That notion is critical; how a lease is interpreted and enforced depends on what terms are specifically included in the lease.

The principles of landlord-tenant law, designed to protect fam-

ilies from sudden and unfair eviction, are not applicable to a commercial lease.^{3,4} When a commercial lease is broken or "breached," the contract dispute may be litigated. If a commercial landlord claims a breach of contract, the landlord will need to show:

1. That a contract existed
2. The parties' obligations under the contract
3. The nature of the breach
4. That the breach was material to the contract
5. Whether the breaching party has a legal defense to enforcement of the contract
6. The damages caused by the breach

However, a majority of courts have held that a lease can't be forfeited for a trivial or technical breach—even when the parties have specifically agreed that "any breach" gives rise to the right of termination.⁵ Thus, courts hold that to justify forfeiture, the breach must be "material, serious, or substantial."⁶ For example, a lease may stipulate that the tenant keep the flower beds maintained; while a few weeds won't lead to termination, not paying the rent for several months will.

Remedies

When a landlord terminates a lease following the default of a tenant, the tenant is obligated to pay the rent due *prior* to the termination. However, the tenant has no obligation to pay any rent that accrues after the termination *unless the lease provides otherwise*.⁷ In most instances, a commercial lease drawn up by legal counsel will have a remedies clause that outlines what will occur if a party breaches the contract.

If an urgent care center owner defaults under a commercial lease, the landlord (and its attorney) will consult the lease agreement that both parties signed. A landlord who doesn't have an adequate remedy following breach of the lease by a tenant has



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“only itself to blame for entering into a lease that failed to provide such a remedy.” A court won’t “disrupt the settled expectations of leasing parties in order to protect a landlord from the consequences of failing to insist on an adequate remedy in the negotiation of a commercial lease.”⁸ If the landlord failed to include sufficiently detailed default remedies in the commercial lease, they won’t have the standing to protect their position.

A landlord’s remedies in case of breach are not set by law, but rather, negotiated into the lease contract.

Typically, a commercial lease will contain these default remedy clauses:

- *Re-entry upon default.* The circumstances for the landlord’s right of re-entry should be specifically detailed in the lease, such as the nonpayment of rent, breach or nonperformance, failing to occupy, abandoning the premises, or using the premises for an unauthorized purpose. A landlord may also include a right to accelerate rent (discussed below) which is automatically triggered when the right of re-entry is exercised.
- *Lease termination.* If a landlord is given the right to re-enter and take possession of the property, it will want the right to terminate the lease, if necessary. This right of termination should be specified in the lease, and should only be exercised upon written notice to tenant.
- *Acceleration of payments.* An acceleration clause in a commercial lease allows the landlord to declare that all amounts due under the lease for the *balance* of the agreement are immediately due and payable upon the default.⁹ For example, once a tenant abandons the property prior to expiration of the lease, a “landlord [is] within its rights under New York law to do nothing and collect the full rent due under the lease.”¹⁰
- As an alternative to an acceleration clause, an urgent care center owner may negotiate a clause in lieu of accelerating the rent. This clause will frequently say that the defaulted tenant is only liable for the difference between the rent and other amounts it owes under its lease—and the rent and other charges actually collected by the landlord from any new tenant to whom the re-lease the property.
- *Repayment of unamortized tenant improvement allowance.* This is a lease provision that states that, upon default, the landlord gets back the money borrowed by the tenant for any improvement project. The lease will contain a provision in which the tenant agrees to pay back the landlord over the term of the lease.
- *Repayment of unamortized brokerage commissions.* The landlord may have unamortized transaction costs, such as tenant improvements, free rent, legal fees, along with brokerage commissions, that are typically amortized or

spread out (with interest) over the entire lease term. The lease may state that the landlord will get those costs from the tenant in the event of a breach.

- *Late charges.* A lease may also contain a clause permitting the landlord to impose late charges for failing to pay rent or other additional rent obligations on time, and that states that the late charges are also additional rent. These terms are generally enforced by the courts.¹¹

An urgent care center owner should also be aware of a stipulation in the lease that allows the landlord to exercise more than one remedy in a single default by the tenant (commonly termed “Cumulative Rights”).

A Tenant’s Legal Early Termination

Review the terms of your commercial lease to understand each party’s obligations in the event of an early termination. Typically, a tenant can only terminate a commercial lease before the lease term is over without liability if there’s a provision contained in the lease that allows for such action.

A tenant’s right to legally terminate a commercial lease, including assigning the lease or subleasing the space to another tenant, is only assured if the tenant negotiates an early termination option into the lease.

Common reasons for commercial tenants to request an early release are when they’ve outgrown the space and require more room, or their company has had a drastic decrease in size or is going out of business.¹²

If your urgent care is in a desirable location, the landlord will be more willing to entertain an early termination of the lease. One option is to offer a lump-sum payment (perhaps 50 cents on the dollar). Here are a few of the “outs” for a tenant:

- *Break clause.* There may be a break clause that gives a tenant or a landlord the option to terminate a lease at least once during the term. This clause may be invoked by a party only when the conditions of the break clause are satisfied. Commercial landlords are usually very reticent to agree to a termination clause.
- *Assignment.* An urgent care owner may be able to transfer their interest in a leased property to another party before the original lease expires. An assignment must be written into the lease.
- *Subleasing.* A tenant can also ask the landlord to sublease the property to another business for the rest of its lease. This also can be a clause negotiated into the lease. If it isn’t included, a tenant may still ask the landlord to consent to a sublease. Note that an assignment is the better option because the new tenant takes 100% of your obligations. In addition, know that it’s common for a lease to contain a term that stipulates that the landlord to has the

right to approve of any possible new tenants under an assignment or sublease.

- **Co-tenancy.** This clause allows the tenant to leave if an important anchor tenant leaves; perhaps it's the big box store or grocery that draws major traffic to the property.
- **Bailout clause.** This term lets a tenant be released from the lease if its sales don't reach a predetermined level.

Remember that a landlord must make reasonable efforts to *mitigate damages* when a tenant breaches the lease and abandons the property, provided the commercial lease doesn't say otherwise.¹³ That means making a good faith effort to rent the property.

Finally, the parties are always free to negotiate to modify the length of the term at any time during the lease.¹⁴

Conclusion

Work with a business attorney when first negotiating the lease for your urgent care center. Breaking a commercial lease will be much easier—and less costly—if you anticipate the scenarios discussed in this article and negotiate to include as many as possible into your lease agreement. ■

References

1. Ryvicker K, Hall S. How local retail dev. is shifting in the Internet age. *New Engl Real*

Estate J. October 19, 2018. Available at: <https://nerej.com/how-local-retail-dev-is-shifting-in-the-internet-age-by-ken-ryvicker>.

2. Harold Schnitzer Props v Tradewell Grp, Inc, 104 Or. App. 19, 23, 799 P.2d 180 (1990).
3. Movement Workshop, Inc v FFT Props. 2018 Del. C.P. LEXIS 14, *9, 2018 WL 1801274 (Del. Ct. Comm. Pls. 2018).
4. Kutkowski v Princeville Prince Golf Course, LLC, 129 Hawai'i 350, 359, 300 P.3d 1009, 1018. (2013).
5. Foundation Dev. Corp. v Loehmann's, Inc., 163 Ariz. 438, 445, 788 P.2d 1189, 1196 (1990).
6. Kiriakides v UA Commc'ns, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).
7. Krasne v Tedeschi & Grasso, 436 Mass. 103, 109, 762 N.E.2d 841 (2002) ("Termination of a lease ends a tenant's obligation to pay rent in the absence of any provision otherwise") (emphasis added).
8. 275 Wash. St. Corp. v Hudson River Int'l, LLC, 465 Mass. 16, 17, 987 N.E.2d 194, 196 (2013).
9. Bailey AL. Seven secrets to drafting an effective commercial lease default lease. *Huffington Post.* (April 24, 2017). Available at: https://www.huffingtonpost.com/entry/seven-secrets-to-drafting-an-effective-commercial-lease_us_58fe2648e4b086ce58981388.
10. 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass'n, Inc., 2014 NY Slip Op 08872, ¶ 4, 24 N.Y.3d 528, 535, 2 N.Y.S.3d 39, 43, 25 N.E.3d 952, 956 (N.Y. Ct. App. 2014) (quoting Holy Props. v Cole Prods., 87 NY2d 130, 661 NE2d 694, 637 NYS2d 964 1995).
11. Goldman v MJI Music, Inc., 17 Misc.3d 1127 (A), 851 N.Y.S.2d 69 (N.Y.C. Civil Ct. 2007); Super Nova 330, LLC v. Mun. Partners, LLC, 2009 NY Slip Op 32481(U), ¶ 7 (N.Y. Sup. Ct. 2009).
12. Emerson D. How to negotiate an early exit from a lease. *Finance @ Commerce.* March 19, 2014. Available at: <https://finance-commerce.com/2014/03/how-to-negotiate-an-early-exit-from-a-lease/>.
13. GKG Net, Inc. v Mitchell Rudder Props., L.P., 330 S.W.3d 426, 431-32 (Tex. App. 2010).
14. Chung C. Can I terminate a commercial lease early? *LegalMatch.* February 27, 2018. Available at: <https://www.legalmatch.com/law-library/article/commercial-lease-early-termination-lawyers.html>.

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