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Eight Considerations for Colleges and Universities When Negotiating Master Leases With Apartment and Hotel Owners for Spaces for Students' Use

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As colleges and universities grapple with the prospect of how to provide housing and adequate distancing opportunities for their students for the Fall 2020 term, numerous institutions have negotiated (or may be considering negotiating) master leases with apartment and hotel owners for spaces in which to house students.

Here are eight considerations for colleges and universities in those negotiations:

1. A Master Lease Is Important to Reflect the Parties' Relationship and Expectations. Although an apartment owner might prefer as a matter of expedience that the college or university sign several of the owner's standard form leases, a master lease is preferable from the standpoint of the college or university. A master lease allows the parties to address more fully their relationship and expectations unique to the housing requirements and protocols for students. For example, the other topics mentioned in this piece will almost certainly be absent from the standard apartment lease.
2. The College or University May Want to Remain the Primary Interface With the Student Residents. From the institution's standpoint, one of the objectives of the master lease structure is to allow it to house and manage students who have elected to (or are required to) procure housing from the university in off-campus accommodations in a manner consistent with the procedures implemented for those students who live in on-campus dormitories. Even though the housing in a master lease situation is in an apartment or hotel, the institution will likely still want to preserve its role as the main housing interface with students. For example, it should be allowed to select the specific students to reside in specific units. Also, to the extent that any code of conduct or housing contract enforcement measures need to be taken against a student, the institution should reserve that right for itself and not (for example) allow the apartment or hotel owner to take enforcement actions against the student.
3. The College or University Needs Access to the Common Areas and the Units. The institution will need access rights to the common areas of the apartment or hotel and access rights to each of the individual units so that it can check in on its students as appropriate. It will need access passes for the building and the parking lot as well as unit keys and the right to enter the apartment or hotel on a 24/7 basis. If it is providing furniture for the leased units, it will need access to units before the students arrive to install it or confirm that the existing furniture is in good condition.
4. The Institution May Want to Have Floors With Only Its Students as Residents. If an institution is master leasing part of but not all of a hotel or apartment building, it may try to require that all of the units it is leasing are located on the same floor(s), with no interspersing of other occupants on the floor(s). In that event, the institution may push for specific occupancy requirements for those floors, such as established quiet hours, controlled guest privileges and elevators that only open on those floors with programmed key cards.
5. The University Should Aim to Negotiate Termination Rights as to Any or All of the Units. Given that the institution's need for student housing in these uncertain times is uncertain, the institution should consider negotiating rent on a "per bed" or "per unit" basis as well as termination rights as to any or all of the units so that it can make appropriate adjustments. The greater the number of beds or units that the college or university is leasing, the more leverage it may have in negotiating termination rights. Additionally, the college or university should consider negotiating the right to terminate the entire master lease without penalty if the COVID-19 pandemic causes it to suspend on-campus instruction.

6. The Master Lease Should Contain a Waiver of Claims/Subrogation and Appropriate Insurance Provisions. As in other commercial leases, the institution as tenant will want to have a mutual waiver of claims/subrogation so that, for instance, each party looks to its own property insurance in the event of damage. Additionally, from the institution's standpoint, the apartment or hotel owner's waiver should include a waiver for claims against students who cause damage to the extent that damage is or should be covered by such owner's property insurance (the coverage and limits of such insurance as may be mutually agreed by the parties). A college or university likely will not want a private apartment owner to have the right to sue a student who allegedly caused damage but probably rather would prefer to determine itself whether or not to bring such an action.
7. The Master Lease Should Contain Holdover Provisions That Treat the Units Distinctly. When a college or university is leasing several units in an apartment or hotel for student use, the master lease should provide that a holdover student in one unit is not deemed a holdover tenancy as to all of the units. Instead, for purposes of holdover, each of the units should be considered as distinct. Thus, a holdover in one unit only should trigger holdover rent as to that unit.
8. The Master Lease Should Contain Provisions to Facilitate the Institution's Clery Act Reporting Obligations and Its Ability to Respond to Emergency Situations. The Clery Act imposes on institutions the duty to report certain incidents that occur on real estate that the institution controls. If an institution is leasing units in an apartment complex or hotel for students' use, the college or university should include in the master lease language requiring the master landlord to inform the institution of incidents occurring in the units or common areas within a specified period of time so that the institution can comply with its Clery Act obligations. Also, to the extent that there is an emergency situation in the apartment or hotel, the master lease should obligate the landlord to give the institution immediate notice of such occurrence. The institution will want to be able to take appropriate and immediate action to address an emergency situation in the apartment or hotel, including but not limited to sending alerts consistent with its timely warning and emergency notification policies.

While master leases between higher educational institutions and apartment or hotel owners contain elements of typical commercial leases, they vary in many respects from those types of agreements. The eight considerations noted above are only a sample of the material differences that institutions should consider. It is worth the effort for an institution to push for a master lease that fits its particular circumstances and the needs of its students.

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