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The Bowditch & Dewey Real Estate Blog

Office Leases vs. Office Sharing: What Landlords and Shared Space Users Should Consider with Coworking Space on the Rise

BY GEMMA YPPARILA AND PAUL BAUER • JUNE 8, 2016

“The word coworking won’t be a word in the future, it will probably just be the way we work.” This statement by Rahul Prakash, partner at Hatch Today, could be a very accurate prediction for the Boston real estate market as the availability of coworking spaces has erupted over the past few years with both industry specific spaces, such as life science incubators, cleantech and food tech startup collaborative spaces, and general community coworking spaces, such as Workbar Boston, WeWork, and Framingham State University’s Entrepreneurial Innovation Center.

Coworking is typically facilitated by a primary tenant that licenses portions of its leased premises to end user licensees. In a more recent trend, coworking space is often managed by multisite companies that offer a network of shared office space. In either instance, this “distributed work space” draws startups because it is cost effective, offers flexibility compared to a traditional lease, and provides access to office support services and amenities. A big draw for users is that these spaces provide valuable opportunities for collaboration. For coworking space structured by a primary tenant, shared space users typically enter into a space sharing license agreement, with terms for occupancy and use under which the end user licensee pays an occupancy fee as well as fees for various additional services and amenities, typically on a per-use basis. For space managed by one of the multisite chains, a shared space user will enter into a membership agreement, similar to a gym membership, where the shared space user will pay a membership fee dependent upon what membership subcategory the shared space user desires, such as a social membership for networking activities, classes and special events, day passes or access to other centers within the multisite chain’s network.

While these models provide beneficial alternatives to standard commercial leases for some companies, particularly early stage companies, with evolving space needs, they do create issues for landlords, tenants and shared space end users that must be addressed in order to protect the interests of the applicable party.

In addition to standard assignment and sublease restrictions, a landlord will want its standard lease form to require landlord consent for all arrangements that a tenant might contemplate for coworking purposes. Where the tenant

contemplates sub-occupancy deals as the primary use of the premises, landlord and tenant should address in the lease all the relevant details of landlord consent, occupancy agreement form approval, adequate indemnities, insurance, limits on use or perhaps minimum size requirements, performance security, and termination rights. Where space is not separately demised for each occupying business, concerns as to compliance with law, confidentiality and security should be addressed. Other issues that landlord and tenant must address as to a proposed coworking space include ensuring compatibility of uses within the building, relationships among tenants, compliance with state and local regulations, and clarity as to any sharing of occupancy fees received by the tenant.

The occupancy licenses between the coworking managing entity (which may be the tenant, the building owner, or a third party managing the coworking space) and the occupant business will need to address several concerns unique to shared space. As mentioned above, shared space is generally not separately demised. For all parties, use of space needs to be clearly defined in the license, including identification of any space to be exclusively used by the end user, shared space that will be used by several or all occupants, how and when the shared space may be used, and how the costs of the shared space is allocated among users. The license also needs to define the ultimate responsibility for the space, including any fixtures or equipment to avoid any future disputes over property damage liability. The end user licensee must confirm that the licensor has obtained any written consents to the license required by the landlord or any lenders. Without such confirmation, the continuing validity of the license is at risk should such third party object to the license.

A significant issue for some end user businesses is the treatment of confidentiality and intellectual property. By its nature, coworking space is less private. Where a company has nondisclosure agreements with its clients or is working on early stage innovations, that company may have concerns as to the open nature of coworking space. At the same time, collaboration can exponentially accelerate the innovation process. It is not uncommon for licenses to address specifically the need to protect the openness of the collaborative process in coworking spaces to ensure that businesses share appropriate information by prohibiting a business from requiring other businesses in the coworking environment to sign nondisclosure agreements.

While coworking space is an exciting new way of maximizing the use of commercial space, it requires a thoughtful approach to documenting such occupancy to avoid headaches down the road.