

EARLY YEARS LEASE GUIDANCE

SIGNING UP TO A LEASE AGREEMENT

A business lease is a legally binding contract between the legal property owner (Landlord) and the occupier (Tenant). Failure by either party to comply with the terms of the agreement could result in court action. Thus it is important that the lease agreement is comprehensive and covers all eventualities.

The following links are here to signpost you to further advice but it is important for you to do your own checks and research.

<https://www.gov.uk/renting-business-property-tenant-responsibilities>

[Code for leasing business premises 1st edition, February 2020](#)

When should I get professional advice?

We recommend that you ask for the services of a solicitor or licensed conveyancer on the following occasions.

- When you are first considering taking on a lease.
- When you are nearing the end of your lease.
- When you want to assign your lease.
- When you are dealing with any other matters relevant to the lease, for example, alterations change of use and so on.
- For general advice on your legal position and, in particular, if there is a dispute about your lease.

The Council's Lease Guidance document below is guidance only and as stated we do recommend that you ask for the services of a solicitor or licensed conveyancer. The aim of the lease code is that it be used as a checklist for negotiations before the grant of a lease and lease renewals. Landlords should be transparent about any departures from the code in a particular case and the reasons for them.

The checklists under each heading are a guide as to what should be included in a lease agreement. They should also be drafted in line with any grant agreement issued by the Council to the property owner so as to ensure that any liabilities and indemnities contained within the grant agreement are mirrored in the lease agreement as appropriate.

1 Lease negotiations

Landlords must make offers in writing which clearly state: the rent; the length of the term and any break rights; whether or not tenants will have security of tenure; the rent review arrangements; rights to assign, sublet and share the premises; repairing obligations; and the VAT status of the premises.

Landlords must promote flexibility, stating whether alternative lease terms are available and must propose rents for different lease terms if requested by prospective tenants.

CHECKLIST 1

- Every term and condition in the offer should be understood by the Tenant including the total cost until the lease ends.

- The Landlord or a representative should confirm in writing to the Tenant that the offer meets the Lease Code.
 - The offer should clearly show the extent of the property, with the boundaries clearly marked on plan and the floor area noted, together with all means of access, any access or areas that must be shared with other occupiers, any limitation of hours of use, any restrictions in the type of use, any legal or planning limitations or obligations that come with the property.
 - The offer should set out clearly who the Landlord is, together with any superior landlords.
 - The offer should set out that if the Landlord sells his interest to someone else the Tenant will have to deal with the new owner.
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2 Rent deposits and guarantees

The lease terms should state clearly any rent deposit proposals, including the amount, for how long and the arrangements for paying or accruing interest at a proper rate. Tenants should be protected against the default or insolvency of the landlord.

State clearly the conditions for releasing rent deposits and guarantees.

CHECKLIST 2

- For the avoidance of doubt, the Landlord should be explicit about costs and obligations in the lease in relation to the following costs:
 - Rent
 - VAT
 - Rates
 - Service charges
 - Insurance
 - Utilities
 - Repairs/Dilapidations
 - Fitting out/Alterations
 - For each cost item above the lease should detail who pays; how much is paid and how often; what is the occupier's cost each year; and if the occupier's cost is not fixed, what it depends on.
 - If a deposit is paid, the Landlord should accrue interest on the deposit at a fair rate. It should be held in an account that belongs to the Tenant (escrow or stakeholder account) in case the Landlord becomes insolvent.
 - The Landlord should make available to the Tenant statements to confirm that the money is still in the account and that all interest earned has been paid to the Tenant or, if required by the lease, has been held on the Tenant's behalf within the account.
 - The lease should detail that the deposit will be transferred to the new Landlord if the Landlord sells the property to another owner.
 - The lease should detail when and how a Tenant can get their deposit back, such as when they no longer have an interest or have satisfied agreed conditions.
 - If the Landlord asks the Tenant to give a personal guarantee, check that the Tenant understands the personal consequences of if the Landlord calls on this guarantee. The lease should detail when and how the guarantee may be called upon and what it would actually cover.
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3 Length of term, break clauses and renewal rights

The length of term must be clear.

The only pre-conditions to tenants exercising any break clauses should be that they are up to date with the main rent, give up occupation and leave behind no continuing subleases. Disputes about the state of the premises, or what has been left behind or removed, should be settled later (like with normal lease expiry).

The fall-back position under the Landlord and Tenant Act 1954 is that business tenants have rights to renew their lease. It is accepted that there are a number of circumstances in which that is not appropriate. In such cases landlords should state at the start of negotiations that the protection of the 1954 Act is to be excluded and encourage tenants to seek early advice as to the implications.

CHECKLIST 3

- THIS IS INTENTIONALLY LEFT BLANK FOR YOU TO COMPLETE
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4 Rent review

Rent reviews should be clear and headline rent review clauses should not be used. Landlords should on request offer alternatives to their proposed option for rent review priced on a risk-adjusted basis.

For example, alternatives to upward only rent review might include up/down reviews to market rent with a minimum of the initial rent, or reference to another measure such as annual indexation.

Where landlords are unable to offer alternatives, they should give reasons.

Leases should allow both landlords and tenants to start the rent review process.

CHECKLIST 4

- The lease should outline the basis on which the rent can be changed.
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5 Assignment and subletting

Leases should:

- allow tenants to assign the whole of the premises with the landlord's consent not to be unreasonably withheld or delayed; and
- not refer to any specific circumstances for refusal, although a lease would still be Code compliant if it requires that any group company taking an assignment, when assessed together with any proposed guarantor, must be of at least equivalent financial standing to the assignor (together with any guarantor of the assignor).

Authorised Guarantee Agreements should not be required as a condition of the assignment, unless at the date of the assignment the proposed assignee, when assessed together with any proposed guarantor:

- is of lower financial standing than the assignor (and its guarantor); or
- is resident or registered overseas.

For smaller tenants a rent deposit should be acceptable as an alternative.

If subletting is allowed, the sublease rent should be the market rent at the time of subletting.

Subleases to be excluded from the 1954 Act should not have to be on the same terms as the tenant's lease.

CHECKLIST 5

- The lease should reflect the flexibility a Tenant requires in the sharing provisions of the lease.
 - The lease should ensure that the Landlord, including any superior landlords, is required to give written consent for subleases. The Landlord's duty to respond only applies when he has received from the Tenant adequate information about the proposed assignee or subtenant and full details of the proposed transaction.
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6 Service charges

Landlords must, during negotiations, provide best estimates of service charges, insurance payments and any other outgoings that tenants will incur under their leases.

Landlords must disclose known irregular events that would have a significant impact on the amount of future service charges.

Landlords should be aware of the RICS 2006 Code of Practice on Service Charges in Commercial Property and seek to observe its guidance in drafting new leases and on renewals (even if granted before that Code is effective).

CHECKLIST 6

- Landlords should provide clear estimates to the Tenant, in writing, of the likely service charge costs for each year of the lease term (including any known or planned capital costs).
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7 Repairs and Statutory Compliance

Tenants' repairing obligations should be appropriate to the length of term and the condition of the premises. Both tenants and landlords should be aware of their responsibilities to maintaining childcare settings in line with the Council's guidance document "**Compliance Check 2**" which is available on the HUB.

Unless expressly stated in the heads of terms, tenants should only be obliged to give the premises back at the end of their lease in the same condition as they were in at the commencement of the lease.

Repairs and maintenance can be divided into three categories: reactive maintenance, planned maintenance or cyclical (service contracts) maintenance.

Reactive maintenance can be defined as all maintenance work associated with failure of a building element that is required to be repaired within 14 days. Reactive repairs include but are not exclusive to:

- Broken glazing
- Roof leaks

- Blocked drains
- Leaking pipes
- Electrical power or lighting failure
- Heating or hot water failure
- Broken locks

Planned maintenance projects can be described as any work, which does not come under the criteria for reactive maintenance, and can be any of the following:

- Planned larger projects agreed in advance of a financial year.
- Small projects following repetitive day-to-day reactive maintenance.
- Regulatory or Health & Safety works of an urgent nature.

Planned maintenance does not include improvement works. Examples of planned maintenance include but not exclusive to:

- Roof renewals
- Window renewals
- Boiler renewals
- Joinery repairs of a non-reactive maintenance nature. (e.g., a number of windows may need various repairs that are not of an urgent nature and the value may be higher than a simple repair. As this work is not reactive maintenance, it could be treated as planned maintenance).
- Paving or tarmac in larger areas.
- Heating problems other than reactive maintenance (e.g., a heating system which does not adequately heat the premises, or has had far too many reactive problems in the past.)
- Electrical problems other than reactive maintenance.

Cyclical maintenance can be defined as periodic works to keep equipment running efficiently and prevent deterioration. It is for works that are performed on a cycle or regular basis. It can relate to service contracts against plant (mechanical and electrical plant), but can also include other cyclical compliance inspections/certification (both statutory and non-statutory) to do with the building fabric.

Some examples include:

- Gas safety/servicing - **Statutory** requirement annually
- Fire alarm servicing – **Statutory** (minimum annually but will be stated on the existing valid certificate)
- Intruder alarm servicing – **Statutory** (minimum annually but will be stated on the existing valid certificate)
- Electrical test & inspect – **Statutory** (normally every 5 years but will be stated on the existing valid certificate)
- Lift servicing – **Statutory** (minimum annually but will be stated on the existing valid certificate)
- Annual drain jetting and gutter clearance
- Fire equipment serving – **Statutory** (minimum)
- Water safety (including Legionella) – **Statutory** (Every 2 years but will be stated on the existing valid WRA)
- Air Conditioning – **Statutory** (minimum annually but will be stated on the existing valid certificate)
- Energy Performance Certificate: - **Statutory**
- Emergency Lighting – **Statutory** (weekly/monthly/annually)
- Pressure equipment – **Statutory**
- Fire Risk Assessments – **Statutory** (annually or when internal re-modelling changes escape routes)

- Asbestos (**Statutory**) - It is a statutory duty for you to manage asbestos in buildings. You will need to ensure that there is an up to date asbestos management survey/register. Depending on the type of lease you have, you should ask your landlord to provide you with full copies of all statutory certification and risk assessments, including the asbestos management survey.

Important Note: You will be expected to provide evidence that all statutory compliance are in place and valid as part of the approval process before you will be able to offer free early years places so ensure that you are clear who will be responsible for each part of premises compliance and agree this within your lease. Even if the landlord has agreed to take responsibility for all or some of the statutory compliance, you will **need full copies on site** in your childcare provision and still have a duty of care through monitoring.

CHECKLIST 7

- Landlords should be aware that the Tenant may get a formal photographic schedule of condition carried out by a firm of surveyors or take photographs on or before taking the lease to record the condition at the beginning of the lease.
- If the Tenant takes the photographs themselves the Landlord should only accept them if they are dated and witnessed.
- The lease should make clear whether it is a 'full repairing and insuring lease' or 'FRI lease'. This means that the Tenant is responsible for all repairs. In any case, the lease should be explicit about whose responsibility certain areas of the property are e.g. roof, structure etc.
- The lease should make clear the responsibilities with regards to reactive maintenance, planned maintenance or cyclical maintenance, as described above.

8 Alterations and changes of use

Landlords' control over alterations and changes of use should not be more restrictive than is necessary to protect the value, at the time of the application, of the premises and any adjoining or neighbouring premises of the landlord.

Internal non-structural alterations should be notified to landlords but should not need landlords' consent unless they could affect the services or systems in the building.

Landlords should not require tenants to remove permitted alterations and make good at the end of the lease, unless reasonable to do so. Landlords should notify tenants of their requirements at least six months before the termination date.

Before a lease is agreed, the premises where a childcare provision is proposed to be operating from must have planning approval for the right "class" of use. Childcare settings should have planning class D1, as defined by part of the UK Statutory Instrument 1987 No. 764, The Town and Country Planning (Use Classes) Order 1987. The Council Planning Department should be contacted to find out whether a childcare setting can be operated from the premises. A "change of use" planning application may need to be submitted.

CHECKLIST 8

- Landlords should provide the Tenant with all relevant information for the Tenant to check that their proposed use of the property complies with any planning consent.
 - The Landlord should agree in writing any changes the Tenant intends to make to the property at the beginning of the lease period. The Landlord's duty to respond only applies when he has received from the Tenant adequate information about the proposed alterations.
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9 Insurance

Where landlords are insuring the landlord's property, the insurance policy terms should be fair and reasonable and represent value for money, and be placed with reputable insurers.

Landlords must always disclose any commission they are receiving and must provide full insurance details on request.

Rent suspension should apply if the premises are damaged by an insured risk or uninsured risk, other than where caused by a deliberate act of the tenant. If rent suspension is limited to the period for which loss of rent is insured, leases should allow landlords or tenants to terminate their leases if reinstatement is not completed within that period.

Landlords should provide appropriate terrorism cover if practicable to do so.

If the whole of the premises are damaged by an uninsured risk as to prevent occupation, tenants should be allowed to terminate their leases unless landlords agree to rebuild at their own cost.

CHECKLIST 9

- Landlords should, if requested, provide a copy of their insurance policy to the Tenant before they sign the lease.
 - Landlords should make the Tenant aware that they have a duty to inform the Landlord if they intend to change the way they use the property; if they are storing any hazardous chemicals in the context of their business or if they propose to leave the property vacant and unattended at any time. The Landlord should ensure inclusion of such activities in the insurance policy and consult the Tenant over any changes in the insurance policy terms.
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10 Ongoing management

Landlords should handle all defaults promptly and deal with tenants and any guarantors in an open and constructive way.

At least six months before the termination date, landlords should provide a schedule of dilapidations to enable tenants to carry out any works and should notify any dilapidations that occur after that date as soon as practicable.

When receiving applications for consents, landlords should where practicable give tenants an estimate of the costs involved.

Landlords should normally request any additional information they require from tenants within five working days of receiving the application. Landlords should consider at an early stage what other consents they will require (for example, from superior landlord or mortgagees) and then seek these.

Landlords should make decisions on consents for alterations within 15 working days of receiving full information.

CHECKLIST 10

- Landlords must inform Tenants of any breaches and give Tenants a reasonable opportunity to remedy the breach before taking legal action.
 - Try to stay on good terms with the Tenant. This should help make any situation easier to handle and should allow you both to pursue your business interests without unnecessary outside interruptions.
 - The lease should have clear 'Forfeiture' provisions; they should allow the Tenant enough time to pay, and should allow the Tenant to restructure their business without necessarily making their lease vulnerable to forfeiture.
 - Landlords should confirm in writing to the Tenant that the property complies with all regulations e.g. Disability Discrimination Acts, Health & Safety Acts, Town and Country Planning Acts etc. before entering into the lease.
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