

Beware of Blanket ‘Time Is of the Essence’ Clause

If your leases contain a blanket clause that says “time is of the essence” for all the lease provisions, consider deleting it. A blanket time is of the essence clause could hurt you badly. It applies not just to the tenant—but to you. That means that you must perform all of your lease obligations without any delay. That’s a result you probably neither intended nor expected. Plus a blanket time is of the essence clause might conflict with other lease clauses that set time limits.

But deleting the blanket clause shouldn’t mean that you should banish a time is of the essence requirement from your leases, say Washington, D.C., attorney Desmond D. Connall Jr., and South Carolina attorney W. Lindsay Smith. They suggest two ways to add the time is of the essence requirement to your leases without having it come back to haunt you.

Limit ‘Time Is of the Essence’ Requirement

Both alternatives for adding the time is of the essence requirement to your leases limit the requirement to clauses that grant special rights or options to the tenant and are “time-sensitive,” says Smith. These include clauses that grant the tenant the right of first refusal, and renewal, expansion, or purchase options, says Connall. They’re time-sensitive because if the tenant doesn’t act by a set deadline, it’s supposed to lose the special right or option, he explains.

Connall and Smith suggest either of the following alternatives for adding the time is of the essence requirement in your leases so it applies only to time-sensitive clauses:

Alternative #1. Put the time is of the essence requirement in each clause you want it to apply to, says Connall. For example, here’s a sentence from a renewal option that includes the requirement at the end (in italics):

Model Lease Language

To exercise this option to renew the lease, Tenant must give written notice of its election to exercise same, to be received by Landlord no later than [*insert #, e.g., 180 days*] prior to the expiration of the Initial Term, *time being of the essence for the giving of such notice.*

Alternative #2. Put the time is of the essence requirement in a free-standing provision, but make it applicable only to specific clauses that you list in the freestanding provision, says Smith. For example, add the following language to your lease:

Model Lease Language

Time is of the essence with respect to Tenant’s exercise of any [*insert special rights or options, e.g., expansion, renewal, or purchase options*] granted to Tenant under Clauses [*insert #s of expansion, renewal, and purchase option clauses*] hereof.

PRACTICAL POINTER: Although requiring time to be of the essence may greatly increase your chances of winning in court against a tenant who delays its performance, it won’t guarantee that the tenant will lose a special right or option because of the delay, says Connall. Suppose you and the tenant wind up in a legal dispute over a renewal option that the tenant exercised late. A court may ignore the time is of the essence requirement and let the tenant exercise the option late because otherwise the harm to the tenant would be too great, he says. ▲

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