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Beware of Hidden Rent Increase Clauses

Think your commercial landlord cannot change your annual rent? Think again! Some commercial landlords insist on lease provisions giving them the unfettered right to re-measure the square footage of the office space. Such clauses may provide, "The rentable square feet of the premises and the building are subject to verification from time to time by the landlord." Such clauses provide the landlord a unilateral right to re-measure tenants' office space **any time**. Of course, the landlord will likely "re-measure" only if it results in a rental rate increase.

Recently, a landlord re-measured a tenant's office space **twice** in a given year. Both times, the landlord found the space's square footage increased, and the landlord increased the annual rent accordingly. These re-measurements hurt the tenant in an additional way – they increased the tenant's share of common expenses because that rental term is also based on the square footage of the tenant's space.

If you find yourself in a lease dispute based on a one-sided "re-measurement" clause, you have a few options. First, seek to strike the "re-measurement" clause as unconscionable. Factors which support a conclusion that the re-measurement clause is unenforceable include failing to give the tenant a right to challenge the landlord's calculation and burying the clause in a lengthy lease. If the landlord unjustifiably re-measures your space multiple times in a year, you may be able to prove the landlord breached the implied covenant of good faith and fair dealing. This is because one of the fundamental reasons of signing a lease is to have predictable rent.

The best way to avoid one-sided re-measurement provisions is to strike them before signing the lease. If the landlord convinces you it will not lease the space without a re-measurement provision, then try and negotiate the right to hire your own architect to verify any alleged change in square footage. Limit how often, and under what circumstances, a re-measurement may take place. For example, re-measurement may only take place after the initial term of the lease and no more than every 18 months. Negotiating a fair re-measurement clause at the outset may avoid an unexpected rent increase.

Call us when you have a lease dispute. We will evaluate the dispute and provide you an economical strategy to resolve it. 949.631.3300, wilson@kleinandwilson.com

Mark B. Wilson

Mr. Wilson, a trial attorney, has won nearly every case he has tried or arbitrated. He lost only one jury trial but then obtained a complete reversal on appeal. This year, Mr. Wilson was listed in the Super Lawyers® Top 50 Orange County list, and he is a past Chair of Orange County Bar Association's Business Litigation section.



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KLEIN & WILSON
BUSINESS TRIAL LAWYERS

4770 Von Karman Avenue
Newport Beach, California 92660
(949) 631-3300 | kleinandwilson.com