How to Control Changes to Tenant's Trade Name

Sometimes shopping center tenants want to change the trade name they operate under. For example, they might think a new name will draw more customers. But, if you let a tenant change its name, you run a risk that the new trade name will be unsuitable for your center or will even reduce customer interest.

In many situations, you'll want to bar the tenant from changing its name. But barring trade name changes completely may not be acceptable to a strong prospective tenant—say, a national chain. If a prospective tenant is desirable, you may have to give it the right to change its name.

According to the experts we've spoken with, you can accommodate the strong tenant while still protecting yourself—by giving the tenant a limited right to change its name. With the help of Chicago attorneys Miryam Rosie Rees and Jay Byron Leibovitz, we've put together a checklist of limits that you can pick from when giving a tenant the right to change its trade name. Plus, there's Model Lease Language that you can adapt for your lease.

Reasons for Changing Trade Name

There are many reasons a tenant may want to change its trade name during the lease, says Rees. For instance:

- The tenant may think that a new trade name will spark customer interest. For example, a health aids store currently using a generic trade name—ABC Supplies—may want to change its trade name to "ABC Live Well;"
- The tenant's business may have changed, and the existing trade name may no longer properly reflect it. For example, a restaurant may no longer want to use the trade name "The Chicken Coop" if, to increase sales, it adds other meats besides barbecued chickens to its menu;
- The tenant may have merged with another company or been taken over by a company that wants to use its trade name instead of the tenant's trade name; or
- The tenant may operate stores under various trade names and want to change the name of its store in your center to one of its other trade names.

How to Limit Trade Name Changes

If you decide to give the tenant the right to change its trade name, there are several ways you can limit this right, say Rees and Leibovitz. You might want to use one or more the following limits:

❑ Require List of Acceptable Trade Names

Attach a list of other acceptable trade names to the lease, says Rees. Then let the tenant change its trade name only to one of the listed names. If the tenant is owned by a big corporation that operates stores under different trade names, you can include all of those trade names on the list, so the tenant can switch to any of those names, she adds.

To do this, add the following language to your lease where you discuss trade names (you'll have to add a definition of "Trade Name" to the lease):

Model Lease Language

Tenant may change the Trade Name only to any of the trade names listed on Exhibit [*insert #*] hereof.

PRACTICAL POINTER: If a tenant wants to be able to change the list of approved names, it may want the lease to say that your approval of the change won't be "unreasonably withheld," says Leibovitz. Try not to give into this, says Rees.

❑ Tie Tenant's Name Change to Chain's Name Change

If the tenant's store is part of a chain, you may want to let it change its trade name only if all of the other stores in that particular chain change to the same trade name, says Rees. That way, you'll ensure that the tenant remains part of a recognized chain, she explains.

Model Lease Language

Tenant, upon Landlord's prior written approval, may change its Trade Name only to the same trade name used by all of the stores owned or operated by Tenant and any affiliate of Tenant that previously operated under the same trade name as the Premises.

PRACTICAL POINTER: The tenant may balk at the requirement that "all" of its stores must change the trade name. It may argue that some—or a majority—of the stores changing to a new name should be good enough, notes Rees. Whether you give into this depends on the strength of the tenant and the location of other stores in the chain, she says. For example, if there are a lot of stores from the chain in a certain area—such as, New York City—you might be willing to let the tenant change its trade name if all of the other stores in that area change to that trade name.

❑ Limit Number of Trade Name Changes

Consider limiting the number of times during the lease that the tenant can change its name—for instance, say that it can't change its trade name more than two times during the lease, says Rees. You might also want to limit the frequency of these changes—for instance, say that it can change the trade name only twice during the lease, and only once every five years, she adds. This prevents two quick changes within a one-year

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period, which could confuse customers and other tenants.

To limit the number and frequency of name changes, add the following language to the lease clause that gives the tenant the right to change its trade name:

Model Lease Language
Notwithstanding the foregoing, Tenant may change the Trade Name no more than [*insert #, e.g., 2*] times during the Lease Term, and no more than [*insert #, e.g., 1*] time during any [*insert #, e.g., 3*]-year period.

❑ Bar Same Trade Name in Center

If you give the tenant the right to change its trade name, make sure that it can't change to a trade name that's already being used by another tenant at your center, says Rees. For example, you may already have a tenant called "Shoe Box" at your center, so you don't want another tenant to change its trade name to "The Shoe Boxes."

Or suppose a national tenant operates two stores with different trade names at your center—you don't want a change that leaves both stores using the same trade name. Two different stores operating in the center under the same or similar trade names could cause confusion among customers and hurt both tenants' sales.

Model Lease Language
Tenant, upon Landlord's prior written approval, may change the Trade Name; *provided, however*, that such new Trade Name shall not be the same as, or substantially similar to, the name of any other tenant in the Center.

PRACTICAL POINTER: Require the tenant to replace its existing storefront sign with one that includes the new trade name, says Leibovitz. The new sign must meet your requirements, he adds. And make the tenant pay the costs of changing your center's directories to include the tenant's new trade name, he says. ▲

CLLI Sources

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How to Protect Yourself if You Allow Notice by E-Mail

Some leases now list e-mail as one way that owners and tenants can send required notices. But e-mail isn't always reliable. Like regular mail, e-mail sometimes gets lost. And that can lead to disputes. For instance, suppose you tell a tenant that it's in default because you sent it a notice of a lease violation by e-mail 10 days ago and the tenant didn't correct the violation. The tenant argues that the e-mailed notice never arrived, so it's not in default. Or suppose the situation is reversed—the tenant claims that you're in default because it sent you notice of a lease violation by e-mail. But since you didn't get the e-mail, you didn't correct the violation in time.

In either situation, the result could be the same. If your lease doesn't give you any guidance, you could end up battling with the tenant in court over who's in default and whose e-mailed notice was valid.

You can easily avoid these disputes and still allow e-mail notices to be used, says Internet and technology law attorney Harlan T. Greenman. Say in the lease that an e-mailed notice will be considered valid only if the e-mail transmission was "completed," he says. We'll give you Model Lease Language to help you do this.

Require 'Completed' E-mail Transmission

What's a "completed" e-mail transmission? Define it in the lease as an e-mail that reached the recipient's internal e-mail system or server, says Greenman. But don't require the recipient to have opened the e-mail, says Greenman. The sender shouldn't have to rely on the recipient opening the e-mail because a recipient can delete an e-mail without ever opening it, he says.

To set out the definition of a completed e-mail transmission, add the following language to your lease's notice clause, Greenman suggests. Place the language after you've listed "a completed e-mail transmission" as one of the acceptable ways to deliver notice.

Model Lease Language
A "completed e-mail transmission" for the purposes of this Clause [*insert #*] shall mean that an e-mail that reached the recipient's internal e-mail system or server.

Request Receipts

When the sender sends an e-mailed notice, it should try to get a receipt to prove that the e-mail transmission was completed. To do this, the sender should set up its e-mail "client"—that is, an application that runs on a computer or workstation and lets the sender send, receive, and organize e-mail—to request a receipt from the recipient's e-mail client or server, Greenman says. The receipt typically is generated automatically