A WeWork Agreement is Not a Lease, and Why This Matters Now

What does the new paradigm mean for co-workers and space providers, particularly in the wake of COVID-19?

By **Stephanie Friese and Jennifer Garner** | May 11, 2020

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Over the last decade, the way we work has changed dramatically. Technology has decoupled traditional associations of work and location, paving the way for a mobile workforce and a rethinking of how businesses use workspaces. Space as a service now makes up a considerable market share of the commercial real estate industry. However, the need for added flexibility came with a shift away from traditional leasing models. So, how is the legal relationship different, and what are the implications for services such as WeWork? What does the new paradigm mean for co-workers and space providers, particularly in the wake of COVID-19?

Co-Working Agreements vs. Leases

Space as a service agreement, or co-working agreement, are licenses, which are separate and distinct from leases. By design, the co-working agreement provides the licensor with more flexibility, and legally they are more like gym or club memberships. Flexibility and the retention of control however, may have the unintended consequence of licensors having heightened responsibilities to their customers.

The biggest difference in these two types of agreements is a lease gives a tenant more control, such as exclusive possession of a space. But in co-working agreements, the licensor maintains control, and the “tenants” must share their workspace and all the amenities. In a traditionally leased building, tenant spaces are not shared and common areas are limited to parking decks, cafes, elevators, fitness centers, restrooms, lobbies and shared conference rooms. In a co-working environment, every area is a common area, and no tenant has exclusive control over any area. The licensor maintains control over the space.

Accordingly, co-working agreements do not grant the "tenant" the right to quiet enjoyment of the property, do not create a landlord/tenant relationship between the parties and therefore laws that govern landlord/tenant relationships may not apply in co-working environments. Similarly, a licensor under a co-working agreement cannot rely on laws that protect traditional landlords who have relinquished control to traditional tenants.

For example, a landlord is not required to insure the safety of a tenant or invitee, because under a lease, a landlord relinquishes possession to the tenant, so the tenant is presumed to have the requisite control over the premises to keep itself safe. Co-working spaces, however, are especially known for their communal perks, which the licensor is responsible to provide. Accordingly, this model composed almost entirely of common spaces may carry more risk in a pandemic than a traditional office space. The licensor may have greater duties to warn licensees of conditions and risks and to abate conditions that pose risk of harm, to be more diligent in determining whether there is potential for COVID-19 exposure in the workplace and to take extra precautions to implement and enforce rules (such as wearing masks), to notify customers of risk and to sanitize common areas to mitigate risk to which other co-workers are exposed.

The Pandemic has Raised Issues Yet to be Tested in Court

These theories have of course not been tested, and results will vary depending on specific facts. When evaluating premises liability claims, varying fact patterns, and with COVID-19, especially timeframes, are important. Who will be liable will depend on a number of factors, including when the exposure occurred and whether the injured party acted reasonably in entering the shared space at all and therefore whether, in light of information available to the public, the injured party assumed the risk.

Co-working licensors have been under increased scrutiny recently as some reportedly have refused to pay rent to their landlords, but continued collecting monthly fees from the licensees. Perhaps this is because it is more difficult for a co-working licensor to maintain its income stream if it fails to provide the space as a service. A traditional landlord has the benefit of the doctrine of independent covenants, which provides that a landlord's obligations under a lease and a tenant's obligation to pay rent are independent of one another, so even if a government order prevents a tenant from staying open for business, that does not excuse the tenant's obligation to pay rent. A co-working licensor, however, must continue to make the space and amenities available in order to meet its contractual obligations, even if its members cannot or do not use them. By remaining open and continuing to provide services, a breach of contract on the part of the service provider is more likely foreclosed, and its members are faced with the choice of terminating their agreement (if the agreement allows such termination) or breaching the agreement and proving that a defense, such as frustration of purpose, which is much more difficult to prove, should apply.

The precise language of the co-working agreement should not be overlooked. The big players in this market space are shrewd, having been careful in the crafting of their waiver, limitation of liability, and indemnity provisions, and anyone who has ever negotiated an agreement with WeWork is painfully aware of the resistance of the licensor to modify its standard language. These provisions likely include narrow carve-outs for the licensor's conduct and give the service provider wide latitude in determining what space will be provided, when it will be provided, and under what conditions it will be provided. The viability and scope of these provisions will undoubtedly be tested during the course of litigation and will be an integral part of the analysis with respect to the service provider's exposure to claims.

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