

# Managing Commercial Real Estate Leases: Nebraska

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Status: Law stated as of 13 Oct 2021 | Jurisdiction: Nebraska, United States

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A Q&A guide to state laws and customs on managing commercial real estate leases in Nebraska. Answers to questions can be compared across a number of jurisdictions (see Managing Commercial Real Estate Leases: State Q&A Tool).

Real estate and construction transactions are currently being impacted by emergency measures enacted in response to the 2019 novel coronavirus disease (COVID-19). For current updates on certain state and local laws impacted by COVID-19, including eviction and foreclosure moratoriums, business closures, electronic signatures, recordings and notarization laws, and general crisis management guidance in handling real estate and construction matters, see [Real Estate Global Coronavirus Toolkit](#).

## Letters of Intent

**1. How is the binding nature of a letter of intent determined in your jurisdiction? Is there an implied duty of good faith even if the letter of intent is non-binding?**

### Binding Letters of Intent

In Nebraska, letters of intent for leases are governed by contract law. To establish a binding contract, the letter of intent must not be cursory, indefinite, and conditioned as to fail as a matter of law in establishing an objective intent by the parties to be bound (*Viking Broad. Corp. v. Snell Publ'g Co.*, 497 N.W.2d 383, 386 (Neb. 1993)). Similar to other contracts, if the letter of intent is written in clear and unambiguous language, it is not subject to interpretation and must be enforced according to its terms (*Big River Constr. Co. v. L & H Props., Inc.*, 681 N.W.2d 751, 756 (Neb. 2004)). Ultimately, the specific details of each case determine if a letter of intent is binding.

### Implied Duty to Act in Good Faith

Nebraska law recognizes an implied covenant of good faith and fair dealing in every contract (*Stackhouse v. Gaver*, 801 N.W.2d 260, 271-72 (Neb. Ct. App. 2011)). However, the parties may agree otherwise, and in these instances the letter of intent should clearly state that the parties need not comply with the implied obligation of good faith and fair dealing.

## The Term and Renewals

**2. If the lease term expires on a Sunday, can the tenant surrender the premises on the next business day or is there a risk that the landlord will claim a default?**

Absent a specific lease provision stating otherwise, a tenant in Nebraska must surrender the premises on the expiration date specified in the lease regardless of whether the date falls on a Sunday or a holiday. If the tenant does not surrender on the date specified, the landlord may claim a default.

**3. If a tenant extends its term, are the tenant's options, such as a termination or renewal option, automatically included in the extension term?**

If a lease is renewed or extended in Nebraska, the renewal or extension will be on the same terms and conditions as the primary lease term unless there is an express lease provision providing otherwise (*Bishop Cafeteria Co. of Omaha v. Ford*, 129 N.W.2d 581, 592 (Neb. 1964)). Absent a specific lease provision stating otherwise, the tenant's termination and renewal options under the lease, if any, would also be renewed or extended.



### Payment of Rent

#### 4. Can the tenant withhold its rent if the landlord breaches a covenant under the lease?

In Nebraska, absent a specific contractual right under the lease, the tenant cannot withhold rent if the landlord breaches a covenant under the lease unless the breach constitutes a constructive eviction of the tenant.

#### 5. Can the tenant abate its rent if:

- There is no (or inadequate) heat or air-conditioning in the premises or the premises are otherwise untenable?
- There is a hazardous substance, such as asbestos or mold in the premises?
- The windows are completely or partially blocked?

### Premises That Have Inadequate Conditions or Are Untenable

The tenant may plead constructive eviction and rent may be abated for periods after a tenant abandons the property if both:

- The commercial premises are rendered unfit for occupancy for the purposes for which they were leased by act of the landlord.
- The tenant actually abandons the premises within a reasonable time as a result.

(*Keenan Packaging Supply, Inv. v. McDermott*, 700 N.W.2d 645, 657 (Neb. 2005); *Kimball v. Lincoln Theatre Corp.*, 251 N.W. 290, 291 (Neb. 1933).) Otherwise, absent specific provisions in the lease, the obligation to pay rent continues.

### Hazardous Substances

Nebraska law does not specifically address the right of a tenant to abate its rent if hazardous substances are present on the premises. However, if a landlord's action causes the premises to be unfit for occupancy because of the presence of hazardous substances, the tenant may make a claim for constructive eviction if the tenant abandons the premises.

### Blocked Windows

Nebraska law does not specifically address the right of a tenant to abate its rent if the windows on the commercial

premises are blocked. However, if a landlord's action causes the blocked windows to make the premises unfit for occupancy, the tenant may make a claim for constructive eviction if it abandons the premises.

### Guarantors

#### 6. If the guaranty does not expressly require a guarantor's consent to a lease amendment, can a guarantor still be held liable for the lease as amended?

A guaranty is a contract. If the terms of the guaranty are clearly defined, the guarantor's liability is controlled by and limited to the precise terms of the guaranty and cannot be enlarged beyond those terms (see *Braunger Foods, LLC v. Sears*, 834 N.W.2d 779, 784 (Neb. 2013); *Eagle Run Square II, L.L.C. v. Lamar's Donuts Int'l, Inc.*, 740 N.W.2d 43, 49 (Neb. Ct. App. 2007)).

The liability under a guaranty should be consistent with the risk anticipated by the guarantor when the guaranty was made (*NEBCO, Inc. v. Adams*, 704 N.W.2d 777, 782 (Neb. 2005)). Absent a specific provision, the guarantor remains liable for a lease amendment unless the amendment creates an unanticipated liability the guarantor could not have contemplated at the time the guaranty was entered into. In that case, the guarantor may argue that it is released from further liability. If there is a material change in the obligations created by the original guaranty, the guarantors are released (*Hunter v. Huffman*, 189 N.W. 166, 168 (Neb. 1922)).

#### 7. If the lease is assigned, is the guarantor automatically released from the obligations under the lease or is an express release required?

Generally, if the tenant remains liable under the lease after an assignment, the guarantor's liability under the guaranty continues. If the tenant is released from ongoing liability after the assignment, the guarantor is released.

### The Premises

#### 8. Is there a standard procedure for measuring the tenant's premises and the building?

There is no general requirement for the use of any standards to measure the premises. However, the Building Owners and Managers Association International standards are often used, especially for:

- Office leases.
- Measuring the square footage of the premises.

Additionally, a commonly used measurement procedure is to measure the premises from:

- The exterior face of exterior walls and the exterior face of service corridor walls.
- The line along the front of these premises where it abuts the sidewalk or other common areas.
- The center line of any wall that the premises share with adjoining premises.

This measurement may include all columns, hallways, or any interior construction or equipment.

### 9. Can a landlord access the tenant's premises without the tenant's prior consent? Can the tenant refuse to give the landlord access?

#### Landlord Access Without Consent

A tenant is entitled to the exclusive use and possession of the premises absent other provisions in the lease (*Maas v. Platte Valley Pub. Power & Irrigation Dist.*, 91 N.W.2d 409, 414 (Neb. 1958)). The terms of the lease govern:

- The landlord's right to enter the premises.
- Whether prior consent or notice by the landlord to the tenant before the landlord's entry is required.

If the lease requires the landlord to make repairs or perform maintenance to the premises, the landlord has an implied right to access the premises without consent to perform the landlord's duties. The landlord also has a right to access the premises in an emergency.

#### Deny Landlord Access

If the lease allows a landlord to have access to the premises in certain circumstances, a tenant cannot deny the landlord access to the premises in those cases. If the tenant does deny the landlord access, the tenant may have committed a default under the lease.

### 10. Can the tenant obligate the landlord to make repairs or improvements to the premises when the lease is silent? Can the tenant demand reimbursement from the landlord for repairs or improvements in the premises paid for by the tenant?

#### Obligate the Landlord to Repair

Unless the lease provides otherwise, the tenant takes the leased premises "as-is" and the landlord:

- Makes no implied warranty that the premises are safe or fit for occupancy.
- Is not obligated to make repairs to the premises.

(See *Gehrke v. Gen. Theatre Corp.*, 298 N.W.2d 773, 775-76 (Neb. 1980); *Sky Harbor Air Serv. v. Airport Auth. of the City of Omaha*, 117 N.W.2d 383, 384 (Neb. 1962); *Wattles v. S. Omaha Ice & Coal Co.*, 69 N.W. 785, 787-88 (Neb. 1897).)

#### Reimbursement of the Tenant for Costs of Repair

Generally, unless otherwise provided, the tenant cannot demand reimbursement from the landlord for repairs or improvements paid for by the tenant.

### 11. If the lease is silent, what rights does the tenant have when the premises are damaged by fire or flooding? In particular, can the tenant:

- Terminate the lease?
- Abate its rent?
- Require the landlord to restore the premises?

#### Termination Right

The rights and obligations of both parties concerning a casualty to the leased premises are typically incorporated into the lease. If the leased premises are deemed untenable or unfit for occupancy, the tenant may quit and surrender possession of the leased property.

#### Rent Abatement Right

The tenant generally may not abate its rent. However, if leased premises are rendered untenable or unfit

for occupancy by the landlord, the tenant may abandon and surrender possession of the leased premises. If the reasons for abandonment constitute a constructive eviction, the tenant may abate rent for periods after the abandonment. For example, failure of the landlord to perform a duty under the lease to repair or restore the premises may constitute a constructive eviction, if the failure:

- Renders the premises unfit for occupancy for the purposes the premises were leased.
- Deprives the tenant of the beneficial use of the premises and if the tenant abandons the premises as a result.

### Landlord's Restoration

The landlord is not required to restore the premises unless the terms of the lease require the restoration.

## Landlord Lien Waivers and Lease Improvements

### 12. Does a landlord have any statutory or common law lien rights on the personal property, inventory, and equipment of the tenant?

In Nebraska, a landlord does not have a statutory or common law lien right on the personal property, inventory, and equipment of a tenant. If a landlord desires such a lien, the lease must:

- Specifically grant the landlord a security interest in these items.
- Authorize the landlord to file its lien in the appropriate filing office.

The landlord must comply with the filing requirements of Article 9 of the Nebraska Uniform Commercial Code to perfect its security interest (*Ag Servs. of Am., Inc. v. Empfield*, 587 N.W.2d 871, 873-74 (Neb. 1999)).

### 13. When the lease is not clear regarding the ownership of the lease improvements, generally is the tenant or landlord deemed the owner of the improvements? Is the landlord obligated to pay the tenant for improvements paid for by the tenant but deemed as part of the landlord's realty?

## Ownership of Lease Improvements

Unless the lease provides otherwise, improvements to the premises made by the tenant that become a part of the real estate are the property of the landlord and are not the tenant's property (*Schmeckpeper v. Koertje*, 388 N.W.2d 51, 54 (Neb. 1986); *Lienemann v. Lienemann*, 268 N.W.2d 108, 111 (Neb. 1978)). A tenant's trade fixtures are not considered part of the premises and may be removed by the tenant if removal would not cause substantial damage to the premises (*Fuel Expl., Inc. v. Novotny*, 374 N.W.2d 838, 842 (Neb. 1985)).

## Tenant's Cost of Improvements

Absent a provision to the contrary, the landlord does not need to reimburse the tenant for any improvements to the premises made by the tenant while in possession of the premises (*Lienemann*, 268 N.W.2d at 111).

## Compliance with Laws

### 14. Do most leases provide that tenants are responsible to comply with all laws in the premises? Absent specific language in the lease, which party is responsible for compliance with laws in the premises relating to:

- The Americans with Disabilities Act (ADA)?
- Local zoning and building code laws?
- Environmental laws?

Although the compliance with law provision is usually negotiated by the parties, it is common in Nebraska for tenants to be responsible for complying with the laws applicable to their premises. Most leases expressly address the landlord's obligations for compliance with laws, and most landlords require the tenant to indemnify the landlord for the tenant's failure to comply with applicable laws.

## Americans with Disabilities Act

There is no definitive law in Nebraska that specifies whether the landlord or the tenant is responsible for compliance with the Americans with Disabilities Act (ADA). However, federal cases in other jurisdictions suggest that both the landlord and the tenant will be liable to third parties for compliance with the ADA

(*Botosan v. Paul McNally Realty*, 216 F.3d 827, 833 (9th Cir. 2000)).

### Zoning Laws and Building Codes

There is no definitive law in Nebraska that specifies whether the landlord or the tenant is responsible for zoning laws and building code compliance. Many tenants require the landlord to represent and warrant that the premises are in compliance with applicable laws and zoning and building codes at the start of the lease. Many landlords require the tenant to assume the responsibility of compliance based on the tenant's specific use of the premises.

### Environmental Laws

There is no definitive law in Nebraska that specifies whether the landlord or the tenant is responsible for environmental compliance. However, federal and state laws address liability for persons or entities causing a violation of applicable environmental laws and for contamination discovered on the premises. Most landlords require that the tenant comply with all environmental laws and indemnify the landlord for any damage caused by hazardous substances brought onto the premises by the tenant. Additionally, many tenants request or require that the landlord represent and warrant that the landlord is not aware of any existing violations of environmental law as of the date of the lease. Depending on the nature or historical uses of the premises, some landlords and tenants obtain an environmental assessment at the beginning of the lease term to establish a baseline of the environmental condition of the premises.

### Subordination, Non-Disturbance, and Attornment Agreements (SNDA)

#### 15. Are SNDAs commonly recorded by the parties?

Whether a subordination, non-disturbance, and attornment agreement (SNDA) is required is negotiated between the parties and is usually expressly provided for in the lease. Generally, if SNDAs are obtained, they are recorded. Lenders routinely require SNDAs when a property is subject to one or more leases.

### Assignment and Subleasing

#### 16. What rights does the tenant have if the landlord:

- Fails to respond timely or unreasonably withholds its consent to a tenant's request to assign its lease or sublet its premises?
- Refuses to release the original tenant after an assignment of the lease and then amends and modifies the lease? Would the original tenant likely be held liable for the lease as amended?

#### Delay or Failure to Consent

In Nebraska, lease provisions prohibiting assignment are not regarded favorably and are liberally construed in favor of the tenant. However, if the assignment requires the landlord's consent, the assignment is ineffective without consent. (*Am. Cmty. Stores Corp. v. M.J. Newman*, 441 N.W.2d 154, 158 (Neb. 1989).) If an assignment or sublease requires the landlord's consent, the withholding of consent must be based on a good faith and reasonable objection (*Newman v. Hinky Dinky Omaha-Lincoln, Inc.*, 427 N.W.2d 50, 53-54 (Neb. 1988)).

#### Ongoing Liability After an Assignment of Lease

In Nebraska, the assignor/tenant generally remains primarily liable for the obligations of an assignee under the lease unless either:

- The lease expressly provides otherwise.
- The landlord releases the assignor from further liability under the lease.

If the landlord and the assignee materially alter the lease after the assignment without the original tenant's consent, the original tenant may have a defense to further claims of liability.

### Defaults and Preservation of Rights

#### 17. Is a landlord required under law to send a default notice even if the lease does not specify that notice is required? What can a tenant do to prevent termination?

### Mandatory Default Notice

Under Nebraska law, the landlord is not required to give a default notice. However, if a landlord commences a forcible entry and detainer action, the landlord must serve the tenant with written notice to quit the premises at least three days before commencing the action (Neb. Rev. St. § 25-21,221).

### Avoiding Termination

A tenant can avoid termination by timely and fully complying with the terms of the lease for curing any alleged defaults. If the landlord maintains a forcible entry and detainer action against the tenant and the court issues a writ of execution to remove the tenant from the premises under Neb. Rev. St. § 25-21,230, the tenant may avoid removal by timely appealing the judgment and depositing

a cash bond with the clerk of the court (Neb. Rev. St. § 25-21,234). Otherwise, once the landlord has obtained the writ of execution from the court, the tenant will be forced to leave the premises.

### 18. If a tenant is evicted from its premises, can the landlord still collect the rent until the lease term expires?

If the landlord elects to terminate the lease, the tenant is generally responsible for any accrued liabilities, including rent. Termination of the lease relieves the tenant of any future liabilities and rent, unless the lease expressly provides that a termination does not affect the accrual of future liabilities. (*Sacher v. Taco Grande of Iowa, Inc.*, 313 N.W.2d 257, 258 (Neb. 1981).)

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