

Issues in Handling Florida Leases

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Many states have their idiosyncrasies relating to lease transactions. Florida is no different. Here are ten Florida specific issues that impact lease transactions.

1. **Sales Tax.** Florida is the only state to impose a sales on rents under commercial leases on a statewide basis.¹ The Florida Business Rent tax is currently imposed at the rate of 5.8% of the rent payable under a commercial (i.e., non-residential) lease. That rate is scheduled to reduce to 5.7% per a bill passed in the 2018 legislative session. Counties may impose an additional sales surtax. Therefore, the total tax rate varies from county to county. The tax is imposed on the total rent payable by the tenant. This includes additional rent obligations for payment of real estate taxes, insurance, or other obligations of the owner of real estate, regardless of how the lease is structured regarding such payments. For example, if the lease provides that the tenant will pay the real estate taxes directly to the Tax Collector sales tax will still be imposed on the amount of the tax payments. Even leases between related parties (i.e. a doctor owns the property and leases it to his medical practice entity) are subject to the tax.
2. **Witnesses.** Under Section 689.01, Florida Statutes, a lease for a term of greater than one year must be executed by the landlord in the presence of two subscribing witnesses. An exception exists for corporate landlords. A lease signed by the president, any vice president, or the chief executive officer of a corporation and sealed is valid without witnesses. Under Section 695.07, Florida Statutes a scrawl or scroll seal constitutes a valid seal if the corporation has adopted it as its seal.
3. **Mechanics' Liens.** In Florida mechanic's liens are referred to as construction liens. Per Section 713.10, Florida Statutes, a landlord may exculpate its interest in the property from liens arising from work performed by a tenant if the lease contains "magic language" and notice of the exculpation is recorded.²
4. **Radon Gas Disclosure.** Section 404.056(5), Florida Statutes requires that notification regarding radon gas in a specified format be given in sales and lease transactions. Failure to provide the notification is at least technically a felony.³ The disclosure language was amended a number of years ago and many documents created from older templates still contain the old, superseded language.

¹ See Menor, *Legislation to Reduce Business Rent Tax Prevails*, ActionLine, Winter 2017-2018.

² See Menor, *Landlord Protection Against Construction Liens Arising from Work Performed by Tenants*, 87 Fla. Bar J. 6 (June 2013). Florida Real Property Complex Transactions Chapter 10 (Fla. Bar CLE 8th ed. 2016).

³ Section 404.161(1), Florida Statutes.

5. **Holdover.** Per Section 83.06, Florida Statutes, when a tenant holds over the landlord may demand double the monthly rent. Consequently, it is posited that a landlord may be better off not providing in the lease for double rent in the event of a holdover since these provisions commonly provoke a tenant to come back with a lower number.
6. **Eviction.** Per Section 83.20, Florida Statutes, a landlord must serve a written notice of default for non-payment of rent on the tenant at least three days prior to instituting an action for possession. Landlords must go to court to regain possession of premises following a default. Self-help provisions to regain possession are unenforceable.
7. **Acceleration of rent.** Provisions to advance the maturity of rent installments (or acceleration provisions, as they are most commonly called) are generally enforceable.⁴
8. **Security Deposits.** In Florida there is no requirement that a security deposit under a non-residential lease be held in escrow and such deposits are otherwise unregulated under Florida law.
9. **Assignment.** If the lease provides that the tenant may assign its interest with the landlord's consent and does not contain any standards for exercising that discretion than the implied covenant of good faith requires a landlord to be reasonable in deciding whether to consent.⁵ Where the assignment provision, however, expressly states that consent can be withheld in the landlord's absolute discretion, some Florida case law suggests that the duty of good faith cannot be used to vary that term.⁶
10. **Insurance.** In Florida, windstorm coverage is not included in a property insurance policy. It must be purchased as a separate policy and has a high deductible. Named storm coverage has an even higher deductible (typically 5% currently). The deductibles under windstorm and named storm coverage are usually an operating expense under Florida leases.

⁴ *Dobbs v. Petko*, 207 So.2d 11 (Fla. 4th DCA 1968). Florida Real Property Litigation Chapter 12 (Fla. Bar CLE 8th ed. 2016).

⁵ *Fernandez v. Vazquez*, 397 So.2d 1171 (Fla. 3d DCA 1981).

⁶ *Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc.*, 966 So. 2d 1 (Fla. 2d DCA 2007).