

# Hybrid, In-Person, and Remote Work: Optimizing Real Estate and Employment Strategies for Employers

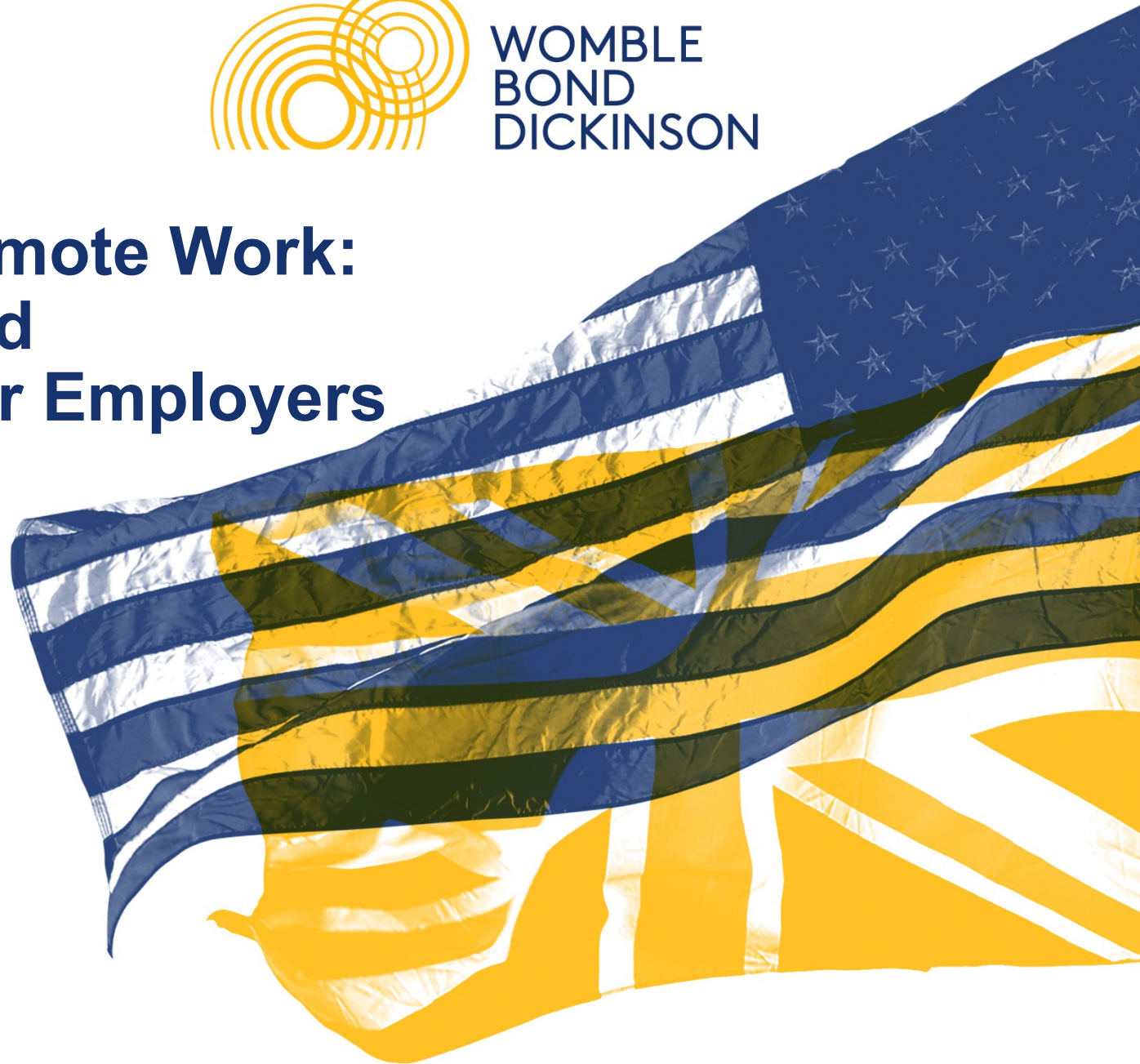
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# WORKFORCE OPTIONS

- Full time in the office for all employees
- Fully remote workforce
- Hybrid arrangement
  - Core days: Employees work remotely except for a set portion of the week or month
  - Job-based: Some positions are always remote and some are in person
  - Flexible: Employees or supervisors choose

# **FULLY REMOTE** – IF YOU ALREADY HAVE AN EXISTING **LEASE IN PLACE**

## **HOW TO MINIMIZE EXISTING LEASE COSTS**

1. Review your lease for any early termination OR contraction rights that you may have.
2. Review assignment section of lease to understand requirements, limitations and costs associated with entering into a sublease arrangement
  - a. Consider if affiliate could use your space
  - b. Consider existing tenants of the building for a possible sublease
  - c. Put the space up for sublease to outside third parties
3. An early termination or contraction negotiated with the landlord
4. Relocation to less space in the same building/development

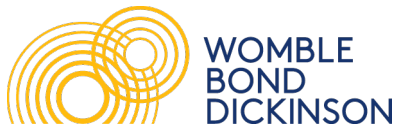
# FULLY REMOTE – IF YOU ALREADY HAVE AN EXISTING LEASE IN PLACE

## EXAMPLE OF TERMINATION OPTION/CONTRACTION OPTION LANGUAGE IN A LEASE

So long as Tenant (a) is not in monetary or material non-monetary Event of Default, and (b) has not assigned the Lease, Tenant shall have the one-time right (the “Termination Option”) **to terminate this Lease** effective as of the last day of the eighty-fourth (84<sup>th</sup>) month after the Rent Commencement Date (the “Termination Date”) **with respect to all of the Premises or a portion of the Premises comprising the entirety of a floor of the Premises** (as determined below, the “Contraction Space”), pursuant to the following terms and conditions:

1. Tenant shall exercise such right only by giving Landlord an irrevocable written notice (the “Termination Notice”) thereof not later than twelve (12) months prior to the Termination Date (the “Termination Deadline”), such Termination Notice to specify the Contraction Space (to include the total square footage and location that Tenant desires to terminate), subject to the provisions of this paragraph. If Tenant properly and timely exercises its Termination Option with respect to a portion of the Premises as set forth above, then all provisions of this Lease varying with square footage shall be re-determined to reflect the decreased rentable area of the Premises, and Tenant shall be responsible, at Tenant’s sole cost and expense, for restoring any internal stairwells affected by such termination or partial termination, and otherwise meeting the requirements of this Lease with respect to return of the Premises.

2. If Tenant properly and timely exercises its Termination Option, and as a condition precedent to the effectiveness thereof, then Tenant shall deliver to Landlord a termination payment (the “Termination Payment”) equal to what the balance of the Assumed Loan shall be as of the Termination Date. Fifty percent (50%) of such Termination Payment shall be paid, time being of the essence, together with delivery of the Termination Notice and the remaining fifty percent (50%) of such Termination Payment shall be paid on or prior to the thirtieth (30<sup>th</sup>) day prior to the Termination Date, in addition to, and not in lieu of, all rental and other payments due through the Termination Date. The “Assumed Loan” shall be a hypothetical loan made by Landlord to Tenant as of the Commencement Date. The original principal amount of the Assumed Loan shall be deemed to be comprised of the Allowance, all brokerage commissions paid by Landlord with respect to this Lease, all reasonable legal fees paid by Landlord to third parties in negotiating this Lease, and the amount of the Abatement granted to Tenant, the Additional Allowance (if accepted by Tenant), and Landlord Rooftop Contribution (collectively, the “Transaction Costs”). Landlord shall provide the amount of the Transaction Costs to Tenant within thirty (30) days after Tenant request. In the event Tenant exercises the Termination Option with respect to only a portion of the Premises (i.e., the Contraction Space), then the Assumed Loan shall be reduced by multiplying the Transaction Costs by a fraction, the numerator of which is the number of square feet of rentable area in the Contraction Space, and the denominator of which is the number of square feet of rentable area in the Premises leased under this Lease. Interest shall be deemed to accrue from time to time on the outstanding principal balance of the Assumed Loan at an annual rate of six percent (6%). For each full monthly installment of Fixed Rent paid by Tenant to Landlord, Tenant shall be deemed to have paid concurrently with such monthly payment to Landlord that amount which would fully amortize the original principal amount of the Assumed Loan and all interest earned thereon during the time period commencing on the expiration of the Abatement Period and continuing through the Expiration Date.



# FULLY REMOTE – IF YOU ALREADY HAVE AN EXISTING LEASE IN PLACE

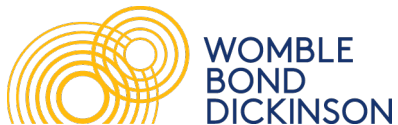
## EXAMPLE OF ASSIGNMENT LANGUAGE IN A LEASE

a. Transfers; Consent. Tenant shall not, without the prior written consent of Landlord (which shall not be unreasonably withheld); (a) assign, transfer, or encumber this Lease or any estate or interest herein, whether directly or by operation of law; (b) permit any other entity to become Tenant; (c) sublet any portion of the Premises; (d) grant any license, concession, or other right of occupancy of any portion of the Premises; or (e) permit the operational use of the Premises by any parties other than Tenant (any of the events listed in clauses (a) through (e) being a “Transfer”). If Tenant requests Landlord's consent to a Transfer, then Tenant shall provide Landlord with a written description of all terms and conditions of the proposed Transfer, copies of the proposed documentation, and the following information about the proposed transferee: name and address; reasonably satisfactory information about its business and business history; its proposed use of the Premises; banking, financial, and other credit information; and general references sufficient to enable Landlord to determine the proposed transferee's experience and credit worthiness and character. Tenant shall reimburse Landlord for its attorneys' fees and other expenses incurred in connection with considering any request for its consent to a Transfer. In no event shall the proposed Transfer be an existing tenant currently in the Building or at the Property and in no event shall the proposed Transfer be a person or entity with whom Landlord or its agent is negotiating and to or from whom Landlord or its agent has given or received any written or oral lease proposal within the past six (6) months regarding leasing space in the Building....

b. Additional Compensation. Tenant shall pay to Landlord, immediately upon receipt thereof, fifty percent (50%) of any rent received by Tenant for a Transfer that exceeds the Rent payable by Tenant to Landlord for the applicable portion of the Premises covered thereby, after subtracting therefrom the costs incurred by Tenant with respect to such Transfer (such as brokerage commissions and legal fees).

c. Cancellation/Right of Recapture. Landlord may, within thirty (30) days after submission of Tenant's written request for Landlord's consent to a Transfer, cancel this Lease (or, as to a subletting or assignment, cancel as to the portion of the Premises proposed to be sublet or assigned) as of the date the proposed Transfer was to be effective.

d. Permitted Transfer. Notwithstanding anything set forth herein to the contrary, Tenant may assign this Lease or sublet the Premises or any part thereof, without the prior consent of Landlord (a “Permitted Transfer”), to (a) an Affiliate (as defined below) of Tenant, (b) an entity into which Tenant is merged, consolidated or converted (or the resulting entity in any merger of any other entity into or with Tenant), (c) to an entity to which fifty percent (50%) or more of Tenant's assets are transferred, or (d) any third party business that is contractually obligated to perform contract-related work with Tenant (each, a “Permitted Transferee”); provided, however, (i) Tenant shall give Landlord written notice (which shall describe the nature of the transfer, specify the assignee or sublessee, the duration of said Permitted Transfer, the effective date of such Permitted Transfer, the exact location of the space affected thereby) of such Permitted Transfer at least thirty (30) days prior to such Permitted Transfer, (ii) the Permitted Transferee carries on the same use from the Premises as Tenant (i.e., general office use) and has a financial worth that is the same or better than Tenant immediately prior to the Transfer, As used herein, (1) the term “Affiliate” means any person or entity controlled by, under common control with, or which controls, the Tenant, and (2) the term “control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the entity referred to, whether through ownership of voting securities, by contract or otherwise, and the terms “controlling” and “controls” have meanings correlative to the foregoing.



# **FULLY REMOTE – IF YOU ALREADY HAVE AN EXISTING LEASE IN PLACE**

## **OTHER CONSIDERATIONS FROM THE LEASE STANDPOINT**

- Did you sign a subordination, non-disturbance and attornment agreement (SNDA)? If so, review it to see if the lender has consent rights over amendments and terminations of your lease.
- Review lease to make sure that vacating the premises is not considered a default or is not otherwise forbidden.
- Review the lease to make sure you can remove your personal property and equipment.
- Be on top of your maintenance obligations even when not using the space.
- It is your responsibility to keep the space secure even if you're not using it.
- Confirm that you're meeting any requirements of your insurer since you need to continue to insure the space even after you vacate.
- Don't forget to change your official notice address if it used to be the premises.
- Review the lease for the required surrender condition; for example, do you need to remove any alterations?

# FULLY REMOTE – IF YOU ALREADY HAVE AN EXISTING LEASE IN PLACE

## EXAMPLE OF SNDA LANGUAGE WITH LIMITATIONS ON AMENDMENTS AND TERMINATIONS

Tenant acknowledges and agrees that from and after the date hereof, Tenant will not modify or amend the Lease, or agree to terminate the Lease (except with respect to any termination which may unilaterally undertaken to a party to the Lease pursuant to the express terms thereof) without the prior written consent of Lender.

If a Foreclosure Transfer occurs, upon attornment by Tenant as provided herein, the Foreclosure Transferee shall be bound to Tenant under all the terms of the Lease; provided, however, the Foreclosure Transferee shall not be liable or bound to Tenant by any amendment or modification of the Lease made after the date hereof without Lender's consent (i) that (A) results in a reduction of rent or other sums due and payable pursuant to the Lease (B) modifies any operating covenant of Tenant in the Lease, (C) reduces the term of the Lease, (D) terminates the Lease, (E) modifies the terms of the Lease regarding surrendering possession of the Leased Premises, or (F) materially increases Landlord's or decreases Tenant's obligations under the Lease.

## EXAMPLE OF LANGUAGE IN A LEASE LIMITING ABILITY TO VACATE

The occurrence of any one or more of the following events shall constitute a "Default" of this Lease by Tenant: The vacating or abandonment of the Premises by Tenant.

## EXAMPLE OF LANGUAGE IN A LEASE LIMITING REMOVAL OF PERSONAL PROPERTY AND FF&E

In addition to all statutory landlord's liens granted under applicable law, Tenant grants to Landlord, to secure performance of Tenant's obligations hereunder, a security interest in all equipment, fixtures, furniture, improvements, and other personal property of Tenant now or hereafter situated on the Premises, and all proceeds including insurance therefrom (the "Collateral"), and the Collateral shall not be removed from the Premises without the consent of Landlord until all obligations of Tenant have been fully performed. Upon the occurrence of an Event of Default, Landlord may, in addition to all other remedies, without notice or demand except as provided below, exercise the rights afforded a secured party under the Uniform Commercial Code of the State in which the Building is located (the "UCC"). In connection with any public or private sale under the UCC, Landlord shall give Tenant five (5) days prior written notice of the time and place of any public sale of the Collateral or of the time after which any private sale or other intended disposition thereof is to be made, which is agreed to be a reasonable notice of such sale or other disposition. Tenant grants to Landlord a power of attorney to execute and file any financing statement or other instrument necessary to perfect Landlord's security interest which power is coupled with an interest and shall be irrevocable during the Term. Landlord may also file a copy of this Lease as a financing statement to perfect its security interest in the Collateral. Tenant further agrees to execute any financing statements requested by Landlord to evidence or perfect the liens set forth in this section

# FULLY REMOTE – IF YOU ALREADY HAVE AN EXISTING LEASE IN PLACE

## EXAMPLE OF SURRENDER REQUIREMENTS LANGUAGE IN A LEASE

At the expiration or termination of this Lease, Tenant shall immediately deliver to Landlord the Premises with all improvements located thereon in good repair and condition, reasonable wear and tear and casualty damage excepted, and shall deliver to Landlord all keys to the Premises and access cards to the Building. **Provided that Tenant has performed all of its obligations hereunder, Tenant may remove all unattached trade fixtures, furniture, and personal property placed in the Premises by Tenant.** Additionally, Tenant shall, at its sole cost and expense, promptly remove from the Premises alterations, additions and improvements made by Tenant; however, **Tenant shall not be required to remove any addition or improvement to the Premises if Landlord has specifically agreed in writing that the improvement or addition in question shall not be removed.** Tenant shall repair all damage caused by such removal. At Landlord's election, all items not so removed may be removed by Landlord and Tenant shall pay the cost therefore, or may be deemed to have been abandoned by Tenant and may be appropriated, sold, stored, destroyed, or otherwise disposed of by Landlord without notice to Tenant and without any obligation to account for such items, all at Tenant's sole cost and expense.

# FULLY REMOTE – EMPLOYMENT LAW COMPLIANCE

Compliance challenges when employing remote workers outside of the state(s) a business is located / registered to do business:

- Tax
  - Wage withholding rules of the state where the employee works will generally apply
  - Having employees in a state may create tax nexus in the state
- Registering to do business / Certificate of Authority
  - Having employees working in a state may require registration to do business / obtaining a Certificate of Authority
- Unemployment taxes will need to be addressed, and accounts with a state agency may need to be established

# FULLY REMOTE – EMPLOYMENT LAW COMPLIANCE

Compliance challenges when employing remote workers outside of the state(s) a business is located / registered to do business:

- Fair Labor Standards Act (FLSA) regulations govern classifying workers as exempt and non-exempt for overtime purposes (29 CFR part 541).
  - There are two tests which must be satisfied to be exempt under the FLSA, the salary basis test and the duties test.
    - Salary Basis: Exempt employees must be paid, on a salary basis, at least \$684 per week (\$35,568 / year). (**Note:** USDOL has published proposed regulations to raise the rate to \$1,059 per week, which would impact over 3 million workers in the U.S.)
    - Duties: Different tests apply for executive, administrative, professional, outside sales, computer employees, and highly compensated employees.
- State and local law: May provide for a higher minimum wage, and a higher salary level and different duties test for exempt employees.

# FULLY REMOTE – EMPLOYMENT LAW COMPLIANCE

Compliance challenges when employing remote workers outside of the state(s) a business is located / registered to do business:

- Employee expense rules for remote work. For example:
  - California: Labor Code § 2802 provides that an employer must reimburse an employee for all “necessary expenditures or losses incurred by the employee in direct consequence or discharge of his or her duties.” This has been interpreted to include home internet and phone service.
  - Illinois: 820 Ill. Comp. Stat. Ann. 115/9.5 provides that employers must reimburse employees for all necessary expenditures or losses incurred by the employee within the employee's scope of employment and directly related to services performed for the employer. This has been interpreted to include home internet and phone service.

# FULLY REMOTE – EMPLOYMENT LAW COMPLIANCE

Compliance challenges when employing remote workers outside of the state(s) a business is located / registered to do business:

- Pay equity / pay transparency
- Paid sick or family/medical leave (both state and municipal) which provide for paid sick leave benefits. For example:
  - Maryland Healthy Working Families Act
  - District of Columbia Accrued and Sick Safe Leave Act, as amended
  - California Healthy Workplaces, Healthy Families Act (Cal. Lab. Code § 245 et seq.)
- State rules on vacation / PTO policies (e.g., a number of states prohibit forfeiture of accrued time, including “use it or lose it” policies)
- Workers’ compensation (registration requirements; need to confirm policy covers remote employees; whether a particular state requires participation in a state fund)
- Information and systems security and monitoring
  - Employers should have a written policy to inform employees of nature and types of monitoring to dispel any reasonable expectation of privacy on company systems.

# FULLY REMOTE – EMPLOYEE RELATIONS

Employee relations challenges to create and maintain the desired “workplace” culture:

- Good and consistent lines of communication can be challenging to develop and sustain
- Building relationships with remote workers so they are engaged/connected
- Accountability: managing performance and productivity is often more difficult in a remote environment
- “Quiet quitting” (low engagement and bare minimum effort) is real
- Privacy concerns / objections of employees who are required to appear by video from the employee’s home

# **HYBRID ARRANGEMENT** – IF YOU ALREADY HAVE AN EXISTING LEASE IN PLACE FOR TOO MUCH SPACE

## **MINIMIZING LEASE COSTS**

Decide whether you'd prefer to stay in your space or find other space. One consideration is whether existing space meets your needs, or will it need to be altered?

If you prefer to start with different space:

1. Review lease for any termination rights.
2. Negotiate with landlord to relocate to less space in the same building/development.
3. Negotiate with landlord to terminate early.
4. Review assignment section of lease to understand requirements, limitations and costs associated with entering into a sublease arrangement for the entire space.

If you prefer to stay in your space:

1. Review your lease for any contraction rights.
2. Consider if it is possible to sublease a portion of the space you don't need.
  - a. Review assignment section of lease to understand requirements, limitations and costs associated with entering into a sublease arrangement.
  - b. Consider whether it would be easy to demise it from the space you keep.
3. Negotiate with landlord to give up some space.

# **HYBRID ARRANGEMENT** – IF YOU ALREADY HAVE AN EXISTING **LEASE IN PLACE FOR TOO MUCH SPACE**

## **OTHER LEASE-RELATED CONSIDERATIONS**

- Do you sign an SNDA? Lender may have consent rights over amendment or termination of your lease.
- Review the Alterations section of your lease if you:
  - Will need to demise the space for a sublease
  - Alter your own space to better fit current needs
- Review what condition you must leave the space in when you surrender it.

# HYBRID ARRANGEMENT – IF YOU ALREADY HAVE AN EXISTING LEASE IN PLACE FOR TOO MUCH SPACE

## EXAMPLE OF ALTERATION REQUIREMENTS LANGUAGE IN A LEASE

Tenant shall not make any replacement, alteration, improvement or addition to the Premises (collectively an “alteration”) without the prior written consent of Landlord, which consent shall not be unreasonably withheld. In the event Tenant proposes to make any alteration, Tenant shall, prior to commencing such alteration, submit to Landlord for prior written approval: (i) detailed plans and specifications; (ii) the names, addresses and copies of contracts for all contractors; and (iii) certificates of insurance in form and amounts required by Landlord, naming Landlord and any other parties designated by Landlord as additional insureds; and (iv) all other documents and information as Landlord may reasonably request in connection with such proposed alteration. Landlord consent shall not be required with respect to painting the drywall in the Premise. Tenant shall obtain all necessary permits for the performance of such work, and shall provide copies thereof to Landlord prior to the commencement of any alternation. Tenant shall be solely responsible for paying for all architectural, engineering, surveying and all other miscellaneous fees, costs and expenses associated with the alteration(s) unless Landlord agrees in writing to assume such costs and expenses. Tenant agrees to reimburse Landlord for any out-of-pocket expenses reasonably incurred by Landlord for review (including, without limitation, any architectural or engineering review) of all such items and supervision of the alteration (provided that any such supervision of the alteration by Landlord shall only be in connection with alterations which may affect Building systems or structure). Neither approval of the plans and specifications nor supervision of the alteration by Landlord shall constitute a representation or warranty by Landlord as to the accuracy, adequacy, sufficiency or propriety of such plans and specifications or the quality of workmanship or the compliance of such alteration with applicable law. Tenant shall pay the entire cost of the alteration as and when due. Each alteration shall be performed in a good and workmanlike manner, in accordance with the plans and specifications approved by Landlord, and shall meet or exceed the standards for construction and quality of materials established by Landlord for the Building. In addition, each alteration shall be performed in compliance with all applicable governmental and insurance company laws, regulations and requirements. Each alteration shall be performed by contractors approved by Landlord and in harmony with Landlord’s employees, contractors and other tenants. Each alteration, whether temporary or permanent in character, made by Landlord or Tenant in or upon the Premises (excepting only Tenant’s furniture, equipment and trade fixtures) shall become Landlord’s property and shall remain upon the Premises at the expiration or termination of this Lease without compensation to Tenant; provided, however, that Landlord shall have the right to require Tenant to remove such alteration at Tenant’s sole cost and expense in accordance with the provisions of this paragraph. Tenant, at the time it requests approval for a proposed alteration may request in writing that Landlord advise Tenant whether the proposed alteration, or any portion thereof, shall be required to be removed by Tenant at the expiration or earlier termination of the Term. Within ten (10) days after receipt of Tenant’s request, Landlord shall advise Tenant in writing as to which portions of the alterations must be removed at the expiration or earlier termination of the Term.

# HYBRID ARRANGEMENT – EMPLOYMENT CONSIDERATIONS

- Hybrid work environments can be very difficult to design and maintain.
- Balancing the expectations / wants / needs of the work force against those of supervisors and the business can be difficult. Not everyone will agree.
- When deciding whether to require remote/hybrid work, or permitting employees to select remote/hybrid work, consider:
  - What is the impact on workplace culture?
  - Whether existing inequities might be reinforced, or if the decision will result in less opportunities for individuals, particularly for underrepresented groups?
  - Does the decision positively or negatively impact employee development, mentorship, sponsorship, or DEIA (Diversity, Equity, Inclusion, and Accessibility) efforts?

# **HYBRID ARRANGEMENT** – EMPLOYMENT CONSIDERATIONS

- Many of the same compliance issues for remote work can be present if hybrid employees work from home in one state, and also work in an office across state lines.
- For workers with disabilities in hybrid environments, denying a request for remote work as a reasonable accommodation to an in-office worker, or a request for fully remote work to a hybrid worker, poses a greater risk of a disability discrimination claim under the Americans with Disabilities Act (ADA).
  - The EEOC's post-pandemic guidance remains a great resource when considering accommodations. Available at: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

# **NEGOTIATING A NEW LEASE - MAXIMIZING YOUR FLEXIBILITY WITH RESPECT TO SPACE USAGE**

- Early termination rights
- Contraction rights
- Expansion rights (ROFO, ROFR, Expansion Right)
  - ROFO=Right of First Option: Landlord must negotiate with the holder of the ROFO first, before offering available space to other parties
  - ROFR=Right of First Refusal: After negotiating an acceptable deal for available space with another party, Landlord must give holder of ROFR the right to match those terms and lease the space
  - Expansion Right: Tenant has option to notify landlord at any time that it will take available space at predetermined rental rate (which might be “market rent,” in which case lease will provide mechanism for parties to come to an agreement on what the market rate is)
- Assignment section – reduce landlord discretion in approving/denying assignments and subleases
- Permitted use – make as expansive as possible

**Consider creating flexibility through your buildout – discuss with your architect**



# The transatlantic law firm close to home

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