

PUBLICATION

What Should You do When Your Landlord Asks You to Sign an "Estoppel Certificate"?

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Summary: Estoppel certificates seem routine, but they present liability risks to tenants. Any estoppel certificate that your landlord asks you to sign needs to be carefully reviewed and limited to factual matters that can't be determined by simply reviewing the lease.

Estoppel certificates are serious business. Unfortunately, requests for estoppel certificates seem so routine that tenants sometimes miss their significance. This article will introduce you to estoppel certificates and give you practical pointers on how to deal with them. The box accompanying this article includes a checklist for responding to an estoppel request.

What is an estoppel certificate, and why do landlords ask for them from their tenants?

If you are a tenant, take a look at your lease and you will probably see a provision requiring you to complete and return an "estoppel certificate" at your landlord's request. Typically, the lease provision looks like this:

At any time and from time to time, within 10 days after Landlord requests the same, Tenant will execute, acknowledge, and deliver to Landlord, or to any other party as may be designated by Landlord, a certificate in the form of Exhibit A with respect to the matters set forth thereon and such other matters relating to the Lease or the status of performance of obligations of the parties hereunder as may be reasonably requested by Landlord.

Your lease may say that if you don't complete the requested estoppel certificate and return it by a certain deadline, your landlord may complete it for you as your agent. Or your lease may say that your failure to timely return the estoppel certificate is deemed to be an admission that everything set out in the requested estoppel certificate is true. Your lease even may say that if you fail to deliver your estoppel certificate in a timely manner, you will pay a significant per diem monetary penalty or you will be liable for all damages incurred by the landlord as a result of your failure to timely return the estoppel certificate.

Landlords need tenant estoppel certificates in order to confirm certain basic facts about a lease. Those facts include (i) the term of the lease, (ii) the amount of rent payable under the lease, (iii) the date through which rent has been paid, (iv) any options to renew the lease, and (v) whether any defaults exist under the lease. Why do landlords want them? Usually because someone else – a new lender or a prospective buyer of the property – has demanded that the landlord get them from the tenants on the property. Lenders and buyers need tenant estoppel certificates in order to understand the economics of the lease – such as the rent stream and whether the tenant has a right to terminate the lease – and to determine the potential exposures they face if they become the owner of the property by either purchasing it or foreclosing a mortgage.

What should you as a tenant be willing to confirm in an estoppel certificate?

As a general rule, a tenant will want to limit your estoppel certificate to those facts that cannot be determined through a review of the lease. Some of the tenant assurances customarily seen in estoppel certificates include the following:

- The date through which rent has been paid

- Whether any event has occurred that constitutes a default under the lease
- Whether there have been any oral or written amendments to the lease
- Whether the tenant or landlord has notified the other that it is in breach of the lease in some respect
- Whether there are any outstanding rent concessions not stated in the lease
- Whether the tenant has any defenses to performing its obligations under the lease
- Whether the tenant has assigned the lease or sublet the premises
- Whether the tenant uses hazardous substances at the premises or has violated any environmental laws
- Whether the tenant has paid a security deposit

What provisions in a landlord's estoppel certificate should you object to?

An estoppel certificate should not be used as a substitute for the buyer's or lender's review of the lease itself. So, as a general rule, you should object to any statement in an estoppel certificate that can be determined simply by reading the lease. For example, you should object to statements in an estoppel certificate asking you to list all options to expand the leased premises or to terminate the lease prior to the expiration of its term. The lender or buyer asking for the estoppel certificate can determine those rights simply by reading the lease. You also should object to any item that would expand your duties, modify lease terms or limit your rights under the lease.

What should you attempt to add to the landlord's estoppel certificate?

Try to include the following provisions in any estoppel certificate your landlord asks you to sign:

- Include a sentence stating that in the event of any conflict between a provision in the estoppel certificate and a provision in the lease, the provision in the lease trumps the conflicting provision in the estoppel certificate.
- Qualify all statements of fact by the actual knowledge of the individual who is most likely to have direct knowledge of the issues set forth in the certificate (e.g., the manager of the store or warehouse that is the subject of the estoppel certificate), but also make it clear whether or not that individual has made an independent investigation.
- Include a sentence stating that any inaccurate statement in the certificate will not prevent you from taking a contrary position in the future, but will not subject you to damages or liability for the inaccuracy absent fraud.
- If the estoppel certificate asks you to confirm that any obligations of the landlord to make improvements or alterations to the premises have been completed and accepted by you, then make it clear that your acceptance is subject to any warranties in the lease.

Potential liability to a tenant who executes a defective estoppel certificate

Prospective lenders and prospective purchasers of the premises will use what you tell them in your estoppel certificate to confirm the value of your lease. Before delivering any estoppel certificate requested by your landlord, make sure that each of the representations contained in it is true and correct in all respects and contact your attorney if you have any doubt concerning any representation you are asked to make.

Checklist for reviewing an estoppel certificate:

Pull your lease and see what time period it gives you to respond to your landlord's request for an estoppel certificate. Confirm that deadline with your landlord.

Verify the factual statements in the estoppel certificate with the employee who manages the space, your risk manager or other individual most likely to know.

Confirm that the estoppel certificate references all amendments to your lease.

Carefully compare the requested estoppel certificate against any form of estoppel certificate attached to your lease. If the requested certificate is broader than the one attached to the lease, you need to limit it.