

**BUSINESS AND EMPLOYMENT  
NEWSLETTER**

3RD AND 4TH QUARTER, 2009

**THINGS CHANGE: IS ASSIGNING OR  
SUBLEASING AN OPTION?**

*PART 5 OF 5 IN THE ONGOING SERIES "COMMON LEASE TERMS"*

By Sallye Quinn

Welcome to the last of our common lease terms series. So far, we've brought you articles on the use of personal guarantees, renewal options, maintenance provisions and net rent. This, the last article in our series, addresses when and why a tenant would want to exercise its right to assign or sublet a lease and common concerns of both tenants and landlords when dealing with assignment and subleasing provisions.

To begin with, an assignment occurs when a tenant assigns its entire interest in the lease and the premises to another party. A sublease occurs when the tenant transfers a

portion or the entire lease for less than the entire term of the master lease. One of the most significant differences is that in an assignment, the "new party" ends up in a direct contractual relationship with the landlord. The landlord now looks to the new party to fulfill the responsibilities of the tenant, and the new party can look directly to the landlord under the terms of the lease rather than going through the original tenant. In contrast, in a sublease, there is no direct contractual relationship between the landlord and the subtenant. So, in the event of a default in lease obligations by the landlord, the subtenant cannot enforce those defaults directly with the landlord.

The subtenant must look to the original tenant to do that on its behalf. Similarly, if the subtenant fails to pay rent and the result is ultimately a default under the terms of the master lease, the landlord will not look to the subtenant to cure the breach; rather, it will look to the original tenant, who will then, in turn, look to the subtenant.

In negotiating an assignment and subleasing provision, a tenant will be most concerned with (a) preserving the ability to have an exit strategy if the risk of entering into a lease proves too much for the tenant's business, (b) preserving the right to sell its business or transfer assets to either a third party or a related party, and (c) preserving the


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This publication is provided as a service to our clients and those with whom we do business. We hope that it provides you with useful information. This publication is not intended to nor does it provide legal advice. For the application of the law to your specific facts and circumstances, please call us.

**\*\* EMPLOYER ALERT \*\***


**NEW FEDERAL DISCRIMINATION LAW PROTECTS  
EMPLOYEES' GENETIC INFORMATION AND WASHINGTON  
LAW NOW EXTENDS SPOUSAL BENEFITS TO REGISTERED  
DOMESTIC PARTNERS**



By Amy Robinson

On November 21, 2009, the first new federal discrimination law in 20 years went into effect. The federal Genetic Information Nondiscrimination Act of 2008 (GINA), signed into law by President Bush in 2008 and hailed as the "the first civil rights bill of the new century of the life sciences" by Sen. Ted Kennedy, makes it illegal for employers to discriminate against employees or applicants because of their genetic information. (See <http://www.geneticfairness.org/act.html>.) In effect, GINA makes "genetic information" an additional federally protected characteristic that must not be used as a basis to discriminate, harass, or retaliate against employees. It also imposes privacy protections on such information that employers will need to be prepared to comply with.

The statute includes in the definition of "genetic information" information about an individual's genetic tests and the genetic tests of his/her family members, as well as information about an individual's family medical history (i.e. genetic diseases, disorders, or conditions). The EEOC has a helpful fact sheet on GINA available at <http://www.eeoc.gov/policy/docs/qanda-genetic.html>.

In addition, as a result of the passage of Referendum 71, a voter's initiative formally approving the "Everything But Marriage Bill" (ESSSB 5688), as of December 3, 2009, registered domestic partners are entitled to all of the rights and responsibilities of married couples under state law. That means that employers will want to review their benefits plans, employee handbook, and leave policies to ensure that they are in

compliance with the new law.

We recommend you review your Equal Employment Opportunity (EEO) policies as well as your Anti-Discrimination and/or Anti-Harassment Policies to ensure that protected genetic information is included in the list of protected characteristics and the appropriate leave and benefits entitlements are extended to registered domestic partners. While you are doing so, you may also want to be sure your policies and handbooks address these other recent updates:

- ◆ Sexual Orientation as a protected characteristic under Washington law.
- ◆ Domestic Violence Leave available to all employees in Washington. (See "Employer Alert: Leave for Victims of Domestic Violence," [2nd Quarter 2008](#).)
- ◆ Additional federal Military Family Leave under the FMLA for employers

with 50 or more employees. (See "Employer Alert: New FMLA Rules Effective January 16, 2009," [Fourth Quarter 2008](#).)

- ◆ Unpaid Military Family Leave up to 15 days for employees of all Washington employers so long as they regularly work at least 20 hours per week, pursuant to state law (RCW 49.77). See helpful guidance at <http://www.lni.wa.gov/WorkplaceRights/files/FamilyLeave/Leaveformilitaryspouses.pdf>.
- ◆ Pregnancy Disability Leave for employers with 8 or more employees in Washington. (See "Family/Medical Leave Update For Employers," [Third Quarter 2007](#).)

### **SALLYE QUINN HAS BEEN ADMITTED AS A PARTNER OF BARRON SMITH DAUGERT, PLLC**

Barron Smith Daugert has asked and Sallye Quinn has accepted our offer to be a partner of the law firm effective October 1, 2009. Sallye joined the firm as an associate in 2003. She came to us from the firm Hawley Troxell in Boise, Idaho.

Sallye characterizes those qualities most important to the law firm. She is a smart, practical and careful lawyer. She cares deeply about her family and her community. She balances a busy and demanding practice with her family and her community. Whether Sallye is representing a client, volunteering at her children's school or serving on the Whatcom Literacy Council Board, she brings her unique focus and compassion.



We could not be more delighted that Sallye has accepted the firm's offer of partnership. This firm will be a better place for it – both the firm itself and for its clients.

Sallye focuses her practice in real estate, business formations and transactions, and creditors' rights.

## ASSIGNING OR SUBLEASING—CONTINUED

ability to take advantage of an upswing in the market if the opportunity arises to assign or sublease for a profit.

Similarly, the landlord will also be concerned with preserving the value of the premises in the event of an upswing in the market that makes the lease very valuable. But unlike the tenant, the landlord will be most concerned with preserving its right to control the use of the space and with assuring itself that the new occupant of the space is credit-worthy.

These concerns often result in a significant amount of negotiation between landlord and tenant over the fine print in assignment and subleasing provisions. In general, lease provisions regarding assignment and subleasing will state that any attempted assignment or sublease is invalid without the prior consent of the landlord. The real negotiation starts

when the parties begin discussing whether the landlord's consent can be withheld in the landlord's "sole and absolute discretion" or, as is more common, whether the landlord's consent "may not be unreasonably withheld." For example, in a situation where the landlord feels the need to strictly control the type of tenant in the space, such as a retail shopping center where getting the right mix of tenants is crucial to the overall profitability of the project, the landlord will want absolute control.

In rare cases, such as a ground lease or lease with an anchor tenant on land that is governed by comprehensive covenants, conditions and restrictions, the lease will often allow the tenant to assign and sublease freely, without the landlord's approval. Note that if the parties fail to make any mention of

assignment and subleasing, the tenant can freely assign and sublease.

In looking to the tenant's concerns of an exit strategy and preserving the right to sell its business and transfer assets, the tenant will want to make sure the lease contains some key elements.

First, in addressing the ability to preserve an exit strategy, the tenant will want to ensure that the landlord either allows unrestricted assignment and subleasing or that the consent cannot be unreasonably withheld. This is especially important when the tenant is starting a new business or is increasing the size of its location because, in those instances, the tenant will be unsure whether it can actually weather the risk of the new lease and increased premises. If the lease proves too costly, the tenant will need the ability to go out and find another party to help relieve the burden of the lease.

In the context of a possible sale of a business or the assets, often the tenant's location is crucial to the value of the business. In those instances, if the tenant wants to sell, it is likely that a buyer will only be interested in a purchase if it can be assured that it will be able to maintain the same location. As a result, the tenant will want to make sure that the possibility of assignment or subleasing exists, and that the lease does not leave landlord consent up to the landlord's sole and absolute discretion.

In any situation where the landlord is deciding whether to grant consent, the landlord will want to focus on the intended use of the premises by the new tenant or the subtenant. What if, for example, in a shopping center lease the new tenant proposes a use that conflicts



### AMY ROBINSON NAMED WASHINGTON LAW & POLITICS RISING STAR FOR 2009

For those of you who do not have the pleasure of regularly reading Washington Law & Politics, a pretty interesting publication, our own Amy Robinson has been named as one of its 2009 Rising Stars. This recognition is given to less than 2.5% of the lawyers in the state who have practiced less than ten years or who are under the age of 40. Washington Law & Politics looks for those attorneys who have attained an honor or achievement or credential, peer recognition or professional competence. These characteristics certainly describe Amy.

While Amy's "stardom" is not new information for any of us at Barron Smith Daugert, we do want to share this exciting news with you. She has just finished her tenure as the President of the Washington Women Law-

yers where she instituted a mentoring program for young women lawyers and served as an exceptional representative for issues involving women and the law throughout the state. She did this all while providing excellent representation to her clients. We are also grateful for her continued involvement with the Whatcom County pro bono program, Law Advocates. For those of you who have the pleasure of knowing Amy, we think you will agree that this is such an appropriate recognition — she certainly is a star in every sense of the word.

Congratulations, Amy.



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## ASSIGNING OR SUBLEASING—CONTINUED

with an exclusivity right the landlord has already given to another tenant? In addition, the landlord will want to ensure that the new party is credit-worthy. That being said, unless specifically negotiated, the original tenant, whether in the context of an assignment or a sublease, is not typically relieved from its obligations under the original lease. The same is true for guarantors of the original lease. So, in some instances, the landlord can significantly benefit from an assignment because it now has not just one party to pursue in the event of default, but two.

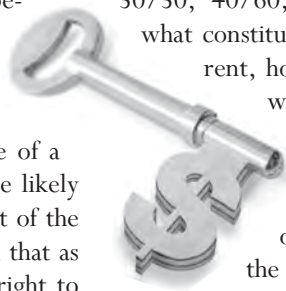
With regard to taking advantage of a market upswing, both parties are likely to feel entitled to make the most of the situation. The landlord will feel that as the property owner, it has the right to benefit from any increased value in the property. The tenant will feel that since it took the risk of the original lease and

the possibility of a downturn as well as an upturn in the market, it should benefit. Given these conflicting beliefs, it is no surprise that there is much negotiation surrounding this issue with the result that the parties may agree to “split the baby.” Often, when a tenant is able to assign its lease for a profit or sublease for a higher base rent (“bonus” or “excess” rent), the landlord and tenant will agree that they each share in the profit in some fashion, i.e. 50/50, 40/60, 30/70. In defining

what constitutes “bonus” or “excess” rent, however, the tenant will want to make sure that such rent is net of expenses it incurred to find the assignee or subtenant. As such, the tenant should include provisions that allow it to recoup amounts spent on brokerage fees, free rent concessions, construction costs and legal fees. Additionally, the

landlord may wish to negotiate for the ability to terminate the underlying lease and contract directly with the third party that is willing to pay a higher rent. Such provisions are termed the landlord’s “recapture” right.

Lastly, lease provisions regarding assignment and subleasing can often span full pages simply defining what, in fact, constitutes an actual assignment or sublease. These provisions are often defined as “transfer” provisions. In order to avoid loopholes, the landlord will want to clarify that certain situations that do not look like assignments or subleases in fact are transfers requiring landlord consent. For example, a corporate tenant may sell all of its shares or equitable interest to a third party. The tenant entity has not changed, but control of the tenant has. As such, most leases will provide that a transfer triggering the obligation to obtain landlord consent includes situations where the



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## PROTECTING YOURSELF FROM IDENTITY THEFT

We recently received an email containing advice from a corporate attorney and a police officer about how to protect yourself from identity theft. Unlike many other “chain”-type emails, this one contains a lot of useful, practical advice, and we’d like to pass it along to you!

1. Do not sign the back of your credit card. Instead, write “Photo ID Required.”
2. When writing checks to your credit card company, do not put your entire account number on the “for” line. Instead, just list the last four numbers, which is enough for your credit card company to identify your account. That way, any one else handling your check won’t have access to your full account number.
3. Don’t list your home address on your checks – use a P.O. Box number, or your work address. Use your work phone number instead of your home number as well. And NEVER have your Social Security number printed on your checks – you can always write it yourself if it is ever needed.
4. Make copies of everything in your wallet, front and back, and keep the copies in a safe place. If your wallet is lost or stolen, you will want to know all of your account numbers, as well as what number to call to cancel your credit cards, debit cards, and checks.
5. If your wallet or any other personal information is stolen, immediately file a police report in the proper jurisdiction. Even if your possessions are never found, this proves to your credit providers that you acted diligently to protect your information.
6. If you even suspect that your personal information has been obtained, call 1-800-ID-THEFT to notify all three credit agencies (Experian, Equifax, and Trans Union), as well as the Social Security Administration.

## USEFUL RESOURCES ABOUT H1N1 AND PANDEMIC FLU AT WORK

By Amy Robinson

We hope that you have remained relatively unaffected by the H1N1/Swine Flu epidemic and that the winter flu season passes by us all without serious or significant effect. Nonetheless, given the nationwide concern with pandemic flu, we want to alert you to a few resources from the federal government that might be useful to you as you prepare for and insulate your business from the effects of such an incident.

*OSHA Addresses Swine Flu Worries.* In light of ongoing concerns about the impact of swine flu on the workplace, OSHA has issued fact sheets to inform employers and workers about ways to reduce their risk of exposure to H1N1 in the workplace. As new information becomes available, OSHA will update their "Workplace Safety and H1N1" website. To obtain the most up-to-date information, visit <http://www.osha.gov/h1n1>.

*U.S. Department of Labor Offers Guidance on Pandemic Flu.* In addition, the Department of Labor has published two guides for employers trying to navigate the flu pandemic in light of employee leave and/or wage and hour laws.

See Pandemic Flu and the Family and Medical Leave Act: Questions and

Answers at

<http://www.dol.gov/whd/healthcare/flu FMLA.pdf>

See Pandemic Flu and the Fair Labor Standards Act: Questions and Answers at

<http://www.dol.gov/whd/healthcare/flu FLSA.pdf>

Here are a few notable bits of information from those resources that you might find of interest:

- ◆ The federal Family Medical Leave Act (FMLA) does not cover leave taken by an employee to avoid exposure to the flu.
- ◆ If there is a school closure, the FMLA doesn't cover leave to care for a healthy child at home.
- ◆ The FMLA may require that leave be allowed in certain instances, but it doesn't require that such leave be paid.
- ◆ If you have to close your operations as a result of a pandemic flu (or other emergency), you don't have to pay your hourly (i.e. non-exempt) employees. The federal Fair Labor Standards Act (FLSA) doesn't require that non-exempt

employees be paid for work they didn't perform. Make sure you have your employees properly classified as exempt or non-exempt.

Of course, just because federal law doesn't require that employers grant such leave or pay hourly workers in the event of a closure, it likewise doesn't prohibit employers from being more generous with allowing leave than the law requires. In general, the published guidance is clear that while certain accommodations and/or mitigating measures may not be required, employers are strongly encouraged to support workers who are ill with the flu and/or caring for an ill family member staying home to minimize the spread of the illness.

In addition, many employers already offer these additional benefits as a way to attract and retain employees and commit such promises to writing in individualized employment agreements and/or employee handbooks and workplace policies. Be sure to consult your own written employment policies to be sure you have appropriately addressed these concerns before an issue arises.

## ASSIGNING OR SUBLEASING—CONTINUED

controlling interest in the tenant is transferred or where a merger or consolidation occurs. As a pushback, the tenant will want to exclude from the definition of "transfer" situations in which a transfer occurs for internal business reasons, but results in no change in control. For instance, the tenant will want to carve out transfers of assets or equitable interests to an

affiliate under the same control as the tenant. In addition, a tenant may want to exclude from the definition of transfer a situation where the assets or equitable interest are sold, but the new tenant continues to operate the same business and has a substantially similar net worth as the original tenant. In that instance, there would appear to be little to no risk to the landlord. How-

ever, as one might imagine, there is often significant negotiation in how net worth is determined.

We hope that you have enjoyed our series on common commercial lease terms. We have received positive feedback on this series and hope that if you have any leasing concerns, you will look to us to help you through those matters.

To read past issues of our Newsletter, visit our website at:  
[www.barronsmithlaw.com](http://www.barronsmithlaw.com) and click on "Links and Resources."

## A PERSONAL NOTE FROM THE DEPARTMENT:

By Kirsten Barron

Happy Holidays!!

There is something about this time of year that is deeply satisfying. It is a time for closure, for wrapping up loose ends and taking care of the last details of the year – at least those that we deem important. It is also a time of new beginnings and planning for the coming year. In short, it is a time of year rich in opportunities, both for completion of old visions and plans and for creation of new ones. Most importantly, I feel in myself and many of those around me a great sense of gratitude. This season is especially for gratitude.

This may be the time to clean up the corporate record book, evaluate the year's results or maybe even just put your children's new school picture in the photo album (I wonder to whom I am speaking?). This is a great time to acknowledge your employees and business colleagues and their part in your results this year. And, for those of us without five year plans, this is an ideal time to get a jump on plans for the coming year.

I wish each of you a very happy holiday and that you are able to relish the opportunities of the season and make the absolute best of the abundance of it all!! On behalf of all of us at Barron Smith Daugert, I want to say thank you – thank you for the opportunity to work with you and be a part of your lives, thank you for providing us meaningful work and thank you for making it a lot of fun!



*Kirsten Barron*

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