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Upcoming Industry Events

New England Food Show | February 26-28, 2017 | Boston Convention & Exhibition Center

MRA Awards Dinner | February 27, 2017 | Seaport Hotel

Bisnow Restaurant Development Summit | Thursday, March 9, 2017 | District Hall
Michael Rosen and Adam Barnosky will be moderating panels at this event.

25th Annual Restaurant Trends Seminar | Monday, April 24, 2017 | Seaport World Trade Center- Amphitheater
Hosted by RIW's Hospitality & Retail Services Group and The Boston Restaurant Group
For more information visit rtseminar.com.

Tenant Estoppel Certificates in Restaurant Leasing



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What is a Tenant Estoppel Certificate?

Usually, an estoppel certificate is requested by either the landlord or tenant whenever it is selling or refinancing property. In either case, the effect of the estoppel certificate is to bind the executing party to certain statements of fact and representations relative to the lease for the benefit of a prospective third party lender or purchaser who is relying on this information in making decisions about the property. The word "estop" simply means to prevent, stop or prohibit, and an "estoppel" certificate is basically a certification by either the landlord or the tenant that prohibits such party from taking a position contrary to what is stated in the certifi-

This article will focus on tenant estoppel certificates requested by landlords and give tenants some practical pointers on what to look for in leases and estoppel certificates.

Tenant Estoppel Certificates in Restaurant Leasing (cont.)

What to look for in the Lease? Lease Provisions Pertaining to Tenant Estoppel Certificates.

Most restaurant leases will have a provision requiring the tenant to provide a tenant estoppel certificate to the landlord and/or its prospective lenders or purchasers upon request, however, the details of what is to be included in the actual tenant estoppel certificate can vary from landlord to landlord and lease to lease.

The reason most leases contain such a provision is that for a project to be financeable, the landlord must be able to provide proof of cash flow to the prospective lender or purchaser. The tenant estoppel certificate is an important way that landlords provide this “proof” as they assist lenders and purchasers in understanding the economics, and confirming the value, of the lease.

When negotiating a lease tenants should pay particular attention to the estoppel certificate section. The estoppel certificate section should require the tenant’s direct execution of a certificate (as opposed to allowing the landlord to sign as attorney-in-fact if tenant fails to sign), set forth what facts or representations are to be included in the certificate, the time period within which the certificate is to be delivered, and the consequences for the tenant’s failure to deliver the estoppel certificate within the requested time period.

There are several approaches to tenant estoppel certificates commonly used in leases. Leases most frequently contain language that sets forth an itemized list of the facts and representations that the estoppel certificate should include. An alternative to the itemized list is a simple lease requirement that the tenant sign an estoppel certificate in a form requested by the landlord. If the lease contains this language the tenant will want to make sure that the landlord’s request must be reasonable. This “reasonably requested” language permits the tenant to contend that any fact or representation requested is not “reasonable” if the tenant does agree with a particular request contained in the estoppel certificate. A third alternative is the requirement to execute an estoppel certificate in accordance with a form attached to the lease. It is important that this form be reviewed and negotiated at the time the lease is executed as the tenant will be bound to execute it upon request in accordance with the lease. A problem for landlords with this third approach is that when the form is being negotiated, the lender or purchaser is not usually a participant in the negotiations and may still require tenants to sign their own form of tenant estoppel certificate.

What is in a Tenant Estoppel Certificate?

As mentioned above, landlords need tenant estoppel certificates in order to confirm certain basic facts about a lease to a third party prospective lender or purchaser in connection with their diligence in financing or purchasing a property owned by the landlord. While those facts will vary from landlord to landlord or lease to lease some typically requested facts include: (i) confirmation of the commencement date and termination date of the lease, (ii) confirmation of the amount of rent payable under the lease, (iii) confirmation of the date through which rent has been paid, (iv) confirmation of whether there are any remaining options to extend the lease, (v) confirmation that the lease is in full force and effect and unmodified; (vi) confirmation of the amount of any security deposit posted with the landlord by the tenant, (vii) confirmation that no rent has been prepaid, (viii) confirmation of the date through which rents have been paid, (ix) acknowledgement that there are no outstanding rent concessions not stated in the lease, (x) acknowledgement that there are no options to purchase the leased premises, (xi) acknowledgement that there are no options to lease additional space in the landlord’s building; (xii) acknowledgement that there are no outstanding landlord construction obligations, (xiii) acknowledgement that there are no offsets or claims against the landlord, and (xiv) acknowledgement that no defaults exist under the lease.

Tenant Estoppel Certificates in Restaurant Leasing (cont.)

A tenant should also be cautious in allowing unqualified statements or representations about the lease terms in estoppel certificates, even if at first they appear harmless. For example, tenants will want to try to limit “to tenant’s knowledge” a statement that the landlord and tenant are not in default under the lease because of the possibility of existing defaults that have not yet come to light. The lender or purchaser may reject such a qualified statement on the basis that the tenant could perform due diligence to verify the facts. In practice, however, such due diligence is nearly impossible in the time frame typically required in the lease for delivery of the estoppel certificate. An important example of rights that a restaurant tenant may be relinquishing by stating that there are no defaults under the lease relates to the landlord’s calculation and billing of common area maintenance charges. An unqualified statement in the estoppel certificate could mean that the tenant is giving up rights to audit the calculation of these charges. This is a particular dilemma in leases in which monthly expense charges are paid based on estimates and then later reconciled when records are available.

Furthermore, a tenant should be watchful for additional items added to the list set forth in the estoppel certificate which are not customary or were not negotiated in the lease or provisions in the estoppel certificate that may contradict terms of the lease or attempt to modify or change terms of the lease. Some of these types of provisions include: (i) an acknowledgement that the landlord has completed all improvements required to be made by the landlord to the leased premises, (ii) an acknowledgement that the tenant has received all tenant improvement allowances or credits under the lease, (iii) the tenant will provide the lender an additional cure period to remedy landlord defaults, (iv) the tenant will simultaneously send the lender copies of all notices sent to the landlord, and (v) the tenant will not modify the lease without the lender’s prior written consent.

What should you do before you execute a Tenant’s Estoppel Certificate?

Before executing and delivering any estoppel certificate requested by a landlord, a tenant should at a minimum:

- Pull out the lease and all amendments and confirm that the estoppel certificate properly references the lease and all amendments.
- Compare the requested estoppel certificate against any list of facts contained in the lease or any form of estoppel certificate attached to the lease. If the requested estoppel certificate is broader, limit it; and
- Verify the requested factual statements and confirm that each of the representations contained in the estoppel certificate are true and correct.

If you have any doubt concerning any fact or representation you are asked in the estoppel certificate you should contact your attorney before delivering it to your landlord because lenders or purchasers will seek to enforce an estoppel certificate against you if you later attempt to take positions contrary to what you stated in the certificate after the date of the certificate.

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4 Ways Contractors Can “Stay Out of the Weeds” When Building a Cannabis Facility or Retail Store



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With passage of the Massachusetts Medical Marijuana Initiative in 2012 and the more recent Regulation and Taxation of Marijuana Act of 2016 which legalized recreational marijuana. Massachusetts is on its way to becoming the east-coast hub for the marijuana industry. As growers and dispensaries scramble to become operational and seek experienced contractors to build their facilities and retail stores, now is the time for building professionals to address the unique challenges posed by the construction of cannabis facilities. Here are four basic tips to help contractors approach these projects:

1. Confirm Financing Is In Place Before Signing the Contract.

The primary risk that a contractor undertakes when performing any construction project is that it will not be paid for its work. These risks increase for cannabis projects because the federal government prohibits federally insured banks from lending money to cannabis-related businesses. Contractors must take care to ensure that adequate resources are available and dedicated to fund the construction project and should include provisions in their contracts requiring owners to provide proof of funds.

2. Understand Any Specialized Equipment Needs.

It is estimated that nearly half of the hard costs on a cannabis construction project are accounted for by HVAC and electrical costs given the heating, humidity, air-exchange, room pressurization, climate, exhaust, and lighting demands required by the production and storage process. Given the impact that such systems and controls can have on the facility's construction and operational budget and bottom-line, Contractors must keep abreast of the latest technological developments in order to ensure that the equipment selected is appropriate. In addition, contractors must make sure that any warranty obligations they are providing to the project owner are consistent with the product warranty from the equipment manufacturers.

3. Meet the Local Building Authorities and Involve them Early and Often.

Cannabis facilities are more likely to face community opposition than many other types of businesses. Local zoning, planning, and building authorities will feel increased pressure to make sure that these facilities are built according to code and consistent with license and permit requirements. Contractors should expect little flexibility in this regard. Reaching out early to the local municipal authorities, building officials, and fire departments and even community groups to introduce the project and keeping them involved at each stage of construction may help avoid problems and delays as the project progresses.

4. Pay Careful Attention to Indemnification Provisions.

Contractors should never expose themselves to liability for risks which they do not control or for which they do not have insurance coverage. Given the uncertain federal landscape concerning the production and sale of cannabis, contractors should specifically seek indemnification from the owner for any claims or losses related to the use of the project as a cannabis related facility. For example:

“To the fullest extent permitted by law the Owner shall indemnify and hold harmless the Contractor and all subcontractors from and against any claims, losses, injuries, fines, penalties or consequential delays arising out of or related to or resulting from the intended use of the Project as a medical marijuana facility.”

4 Ways Contractors Can “Stay Out of the Weeds” When Building a Cannabis Facility or Retail Store

In addition, it is reasonable for a contractor to request a written representation from the Owner that it is in full compliance with all state and local regulations, by-laws, ordinances, and/or other laws regarding the design, construction, or operation of a medical marijuana facility. Any additional work or delays caused by the Owner’s failure to be in compliance should entitle the Contractor to a change order. Contractors should be aware of the related federal law and policy applicable to the production, distribution and sale of marijuana before taking on these projects.

With a multi-billion dollar cannabis production and sale industry set to explode in Massachusetts, contractors must understand and address the risks associated with constructing these facilities and retail stores. Specific risk-shifting contractual provisions designed to properly address and apportion these risks is a critical first step to avoiding potential pitfalls.

*Bradley Croft is the Chair of RIW’s Construction Law practice group.
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RIW Expands Liquor Licensing, Zoning & Permitting Services for Restaurant & Hospitality Clients



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RIW’s Hospitality & Retail Services Group recently welcomed Attorney Adam Barnosky to the firm, adding Adam’s extensive experience representing clients seeking licenses before towns, boards, authorities and commissions throughout Massachusetts.

Adam has represented fast-casual restaurants, fine-dining establishments, national hotel chains, bars, country clubs, package stores, and performing arts venues with all facets of hospitality licensing and permitting including:

Liquor Licensing:

- New Liquor License Procurement
- Liquor License Transfers
- Applications & Regulatory Compliance
- Community Outreach
- Appearances before Local Boards and Licensing Authorities
- Navigating Hurdles in Complex License Ownership Structures
- Liquor License Violations (Local & ABCC)

Zoning/Permits:

- Zoning Appeals
- Sign Permits
- Entertainment Licensing
- Take Out & Catering Licenses
- Seating Increases
- Outdoor Seating Permits
- Alteration of Premises
- Health Permits
- Façade Review

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FLSA ALERT: Federal Court Issues Injunction Preventing Implementation of FLSA Salary Increase



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On May 21, 2016, the US Department of Labor (DOL) issued new overtime regulations that increased the salary threshold for certain exempt employees, increasing it from \$455 per week (or \$23,660 per year) to \$913 per week (or \$47,476 per year). These changes were to be effective on December 1, 2016.

However, on November 22, 2016, the U.S. District Court in Sherman, Texas issued an order enjoining the DOL from implementing the new regulations until the Court renders a final decision on the DOL's authority to promulgate these regulations.

In October 2016, twenty-one states filed an emergency motion for a preliminary injunction to stop the rule changes. The states argued that the DOL had no authority to create a salary minimum for exempt employees. The states' case was consolidated with another lawsuit filed by the U.S. Chamber of Commerce and other business groups seeking similar relief.

In granting the injunction, the court preliminarily agreed with the states that the DOL did not have the authority to implement rules that would in effect render millions of employees ineligible for an exemption without regard to their duties. The court granted the injunction in order to maintain the status quo until it made a final decision on the issue.

What does this mean to employers?

Until the court issues a final ruling, employers do not currently need to comply with the new overtime regulations. Accordingly, employers who have not yet implemented any changes can continue to delay implementation for now.

However, many employers have already implemented changes in order to comply. If so, employers should strongly consider staying the course with their implementation plans. Otherwise, taking away pay increases and/or reclassifying employees will not only lead to loss of morale, it could also encourage wage and hour complaints.

In any event, employers should use this opportunity to assess whether their pay practices are in compliance with federal and state law, and make changes where necessary to correct any issues that are uncovered.

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Marketing Corner



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All Feedback Matters

Customers may offer suggestions and feedback, complaints, praise, etc., through a variety of mediums such as comment cards, telephone messages, e-mails, social media, etc.

Whatever the vehicle, they should all be reviewed, considered, and if possible and appropriate, responded to.

The same goes for staff ideas, as both groups can be your best source of information for improving operations and guest experience.

RIW Client News

Congratulations to RIW client **Wahlburgers** on their major expansion plan.

Congratulations to RIW client **Jake n Joes** on the grand opening of their Braintree location.

Congratulations to RIW client **Matt O'Neil** on the upcoming opening of his new restaurant **Ledger** in Salem, MA.

Congratulations to RIW client **Briar Group** on the opening of **Glass House** in Cambridge.

Congratulations to RIW clients **John and Laura Wolfe** on the opening of **Brick and Ash** in Newburyport.

Congratulations to RIW clients **Casa Verde, Tres Gatos, and Centre Street Café**, whose ownership team plans to open the **Brass Cat Cafe and Bakery**.

Congratulations to our many friends and clients who were featured in Zagat's "Most Underrated Dining Scene" in Boston.

Congratulations to our many friends and clients on being included in Boston Magazine's Best New Restaurants in 2016.

RIW Events and Participation

Adam Barnosky discussed the new recreational marijuana law and local/state license procurement on a panel at the **NEREJ Cannabis in Commercial Real Estate Summit**. The event was held on February 8, 2017 at the Boston Marriott Newton Hotel. Also in attendance were RIW Attorneys Howie Altholtz, Brad Croft, Michael Rosen, Kevin Freytag, and Joshua Bonneau.



Lou Katz moderated a hospitality industry panel at **Grant Thornton's 1st Annual Food Forum & Post-Holiday Soiree** on January 31, 2017. The panel featured:

- Patrick Lee, Founder, Partner – Grafton Group – Owners of Grafton Street, Temple Bar, Russell House Tavern, Park Restaurant and Bar, State Street Provisions, The Hourly Oyster House
- Suzanne Lomabardi, Chef, Founder, Owner – the plate, Founder – Dancing Deer Baking Company and Tiny Trapeze Confections
- Jamie Mammano, Chef, Founder, Owner - Mistral, Teatro, Sorellina, Moo, and Ostra, and L'Andana
- Timothy Tully, President, Head of Food and Consumer Groups - Tully & Holland

The panel included discussions ranging from restaurant development to financing to new technology in the hospitality industry. Also in attendance were Howie Altholtz, Russ Stein, Stacey Friends, Bill Friedler, Michael Rosen, Gary Bubb, Chris Agostino, Adam Barnosky, and Kevin Freytag.



Lou Katz and Russ Stein moderated a panel discussion focused on Multi-Unit Brands at the **Restaurant, Finance & Development Conference**. The panel included Austin O'Connor, CEO, Briar Group, LLC, Garrett Harker, Proprietor & Partner, Island Creek, and Andy Pforzheimer, CEO & Co-Founder, Barteca Restaurants. The Conference took place in Las Vegas on November 15, 2016. Pictured to the right is a group who attended the dinner that RIW hosted during the Conference.



Chris Litterio, Russ Stein, Michael Rosen, Adam Barnosky, Howie Altholtz, and Mary Boimila attended **Boston Magazine's Taste of Boston** on November 15, 2016 at the Boston Childrens Museum. RIW was a sponsor of this event which featured a selection of restauranteurs from Boston Magazine's Best New Restaurants of 2016.

Chris Agostino moderated a hospitality industry panel at the **New England Real Estate Journal Retail & Restaurant Summit** on November 10, 2016 at the Renaissance Patriot Place Hotel.

Kelly Caralis moderated a hospitality-focused panel discussion at **Boston Magazine's Top New Restaurants** on Tuesday, October 25, 2016 at Boston Magazine. Panelists included Jefferson Macklin of Bar Mezanna, Eric Papachristos of Porto, and Meghann Ward of Tapestry. The panel was an intimate and informative look inside the growing restaurant industry here in Boston.

Attorneys in RIW's Hospitality and Retail Services Group have provided legal services to industry clients for over 30 years. Our attorneys organize seminars, lecture, write articles, participate in trade associations, and serve on Boards of Advisors for retail, food and hospitality industry companies.

For a full description of our Hospitality and Retail Services Group, including a list of representative clients, please visit our website at www.riw.com.

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