

MODEL LEASE CLAUSE

Set Conditions for Performance Kickout Right/Rent Reduction Right

The following clause was drafted by Dallas attorney T. Andrew Dow and New York attorney Howard M. Rittberg. Use it when a tenant demands a performance kickout right or reduced rent right.

The clause says that the performance kickout right or reduced rent right won't be available to the tenant unless the tenant meets the following conditions: Operates in accordance with its use clause during shopping center hours (par. a); continuously operates while fully stocked and staffed (par. b); occupies its entire space (par. c); uses its best efforts to meet the sales mark (par. d); notifies you that it plans to exercise its performance kickout right or reduced rent right (par. e); and hasn't defaulted, assigned or sublet, or opened a competing business (par. f). You may also want the clause to say that the tenant mustn't have ever reached the minimum sales threshold (par. f, optional iv). You'll have to define "Permitted Use," "Performance Period," and "Minimum Sales Threshold" elsewhere in the lease before adding this clause.

Show this clause to your attorney before putting it in your lease. **CLLI0106**

CONDITIONS FOR [TERMINATION RIGHT/REDUCED RENT RIGHT]

Notwithstanding anything herein to the contrary, Tenant's [*choose one: termination right provided in Clause [insert # of performance kickout clause] hereof ("Performance Kickout Right")/remedy of reduced rent provided in Clause [insert #] hereof ("Reduced Rent Remedy")*] shall not be available to Tenant unless:

- a. Tenant has been operating in accordance with Clause [*insert # of use clause*] hereof and during all of the Shopping Center Hours (as defined in Clause [*insert #*] hereof);
- b. Tenant has continuously operated a store at the Premises that is:
 - (i) Fully stocked with new, "in season" merchandise in good condition and sold at competitive prices; and
 - (ii) Fully staffed with trained personnel for efficient service;
- c. Tenant has been occupying the entire Premises for the Permitted Use;
- d. Tenant has used its best efforts to meet the Minimum Sales Threshold;
- e. Tenant sends Landlord prior written notice of Tenant's intention to exercise the [*Performance Kickout Right/Reduced Rent Remedy*] within [*insert #, e.g., 30*] days after the end of the Performance Period; and
- f. Tenant has not:
 - (i) Caused an Event of Default under the Lease;
 - (ii) Assigned this Lease or sublet any portion or all of the Premises;
 - (iii) Opened another [*insert trade name of tenant's business*] store within a [*insert #*] mile radius of the Premises; or

[*Optional*]

- (iv) Reached the Minimum Sales Threshold at any time during the Lease Term.