

MODEL LEASE CLAUSE

Tenant Loses Performance Kickout Right in Seven Situations

The following clause was drafted by New York attorney Howard M. Rittberg. Use it when a tenant demands a performance kickout right.

Paragraph a says that the tenant will lose its performance kickout right if the tenant doesn't notify you that it plans to exercise its performance kickout right; if it doesn't stay open continuously and use all of its space; if it doesn't remain fully stocked with "in season" merchandise; and if it doesn't keep its space staffed with trained workers. Paragraph b says that the tenant will lose its performance kickout right if it causes an "event of default" under its

lease. Paragraph c says that the tenant will lose its performance kickout right if it assigns or sublets its space. Paragraph d says the tenant will lose its performance kickout right if it opens a competing store within a certain radius of your center.

You'll need to spell out all of the terms of the tenant's performance kickout right elsewhere in the lease. And be sure to define the terms "Performance Kickout Right" and "Performance Period" elsewhere in the lease before adding this clause.

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

PERFORMANCE KICKOUT RIGHT

Cancellation of Performance Kickout Right. Tenant's Performance Kickout Right shall be forever canceled if:

- a. Tenant fails to:
 - (i) Send Landlord prior written notice of Tenant's intention to exercise its Performance Kickout Right within [*insert #, e.g., 30*] days after the end of the Performance Period;
 - (ii) Remain open and to continuously, actively, and diligently use and occupy 100 percent of the Premises pursuant to the terms and conditions of this Lease and remain open and operating for all of the Shopping Center Hours (as defined in Clause [*insert #*] of this Lease);
 - (iii) Be fully stocked with new, "in season" merchandise in good condition and sold at competitive prices; or
 - (iv) Be fully staffed with trained personnel for efficient service;for the entire Lease Term prior to the Tenant's exercise of the Performance Kickout Right.
- b. Tenant causes an "Event of Default" under Clause [*insert # of "Event of Default" clause*] of this Lease;
- c. Tenant assigns this Lease or sublets any portion or all of the Premises; or
- d. Tenant opens another [*insert trade name of tenant's business*] store within a [*insert #*] mile radius of the Premises.