

Why Is This Tenant Different from Other Tenants?

Representing a Tenant with a Kosher Business

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© 2008 American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written permission of the publisher. Contact ABA Copyrights & Contracts, copyright@abanet.org, or via fax at (312) 988-6030 for permission.

Kosher foods represent a growing segment of the food industry. The annual U.S. market for kosher food products has been estimated at approximately \$100 billion. Jeffrey Hyde, *Marketing to Ethnic Segments: Kosher Products*, Value-Added Marketing, Penn State College of Agricultural Sciences, Cooperative Extension, Department of Agricultural Economics and Rural Sociology, Dec. 2006, at 1, available at <http://farmmanagement.aers.psu.edu/FMDOcs/pubs/MarketingtoEthnicSegments.pdf>. Although much of the growth in kosher food is at the manufacturing level, many communities are home to retail businesses that produce kosher products on-site or that sell only kosher products. These businesses are seldom operated by large national or regional chains. The tenant is often a local small business.

Tenants who deal in kosher food products have special leasing needs. The typical shopping center lease dictates when the tenant must be open for business, what can be sold, and when and how it can be sold. The lease terms govern every aspect of the tenant's business. These terms affect every tenant; they affect the kosher merchant even more.

The tenant often has little or no experience with commercial leases. Even after reading a proposed lease, the tenant may not realize the effect the lease will have on the tenant's business. Similarly, an attorney who is unfamiliar with the special requirements of a kosher business also may not anticipate the effect. Failure to anticipate the tenant's needs can be costly. In an extreme case, the tenant might be forced to choose between violating the lease and violating the standards that allow the products to remain kosher.

This article will discuss some of the special leasing needs of the kosher business. As with any lease, the tenant's lawyer must be alert to any terms that could interfere with the

tenant's operation and find out what other needs the client may have. For the kosher operation, the lawyer should give special attention to the use clause, the operating covenant, any relocation rights, and the landlord's rights of access and inspection.

This article focuses on lease provisions for a kosher bakery in a neighborhood strip shopping center in a Midwestern city with a small Orthodox Jewish community. Some of these lease provisions have been modified for this article. Other lease provisions that concern every tenant are no less important (for example, assignment and subletting, insurance and risk allocation, and cost pass-throughs), but those topics are beyond the scope of this article.

Kosher Operations

Many people have misconceptions about what makes food kosher or nonkosher. Generally:

Kosher foods are those prepared according to the rules of *Kashrut*, the dietary laws of Judaism. . . . Contrary to popular belief, certified kosher food products are not blessed by a rabbi. Instead, the certification process involves an examination of the food ingredients as well as the production or preparation process. In addition, kosher food production facilities must be inspected periodically to ensure that approved production procedures are being maintained.

Id. at 1.

The laws of kashrut are compiled from various tractates of the Talmud, an entire title in the Shulchan Arukh (the principal codification of Jewish religious law), and centuries of rabbinic responsa, and they comprise biblical law and rabbinic safeguards. The requirements of kashrut have the force of law for producers, sellers, and consumers of kosher products.

The requirements and prohibitions are far too complex to summarize in a brief article but they include complete absence of prohibited animals (such as pork, shellfish, insects), strict segregation of milk products from all red meat and poultry, slaughter of animals under strict rituals, special handling of meat and poultry (including post-slaughter inspection of red meat, rinsing and salting of meat and poultry to remove all blood, and packaging and sealing to maintain a reliable chain of custody), and inspection of fruits and vegetables to make sure they are free from insects. Separate utensils and production areas are required for meat and dairy, and all production and packaging areas must be free of non-kosher foods or ingredients and utensils used with non-kosher food or ingredients. Most or all production and retail activities must cease on Sabbath and certain other holidays. Additional special requirements apply during Passover. Mastering the requirements themselves takes years of intensive study of the original sources in the original Hebrew and Aramaic.

In practice, the certifying agency will establish standards and procedures for the businesses it supervises and will have the final word on what is and is not acceptable. The author knows of at least one situation in which a business lost its certification because its attorney, based on his study of an English language summary, advised the business to take certain actions in defiance of the certifying agency.

Marketing researchers have found that an increasing number of customers who do not observe kashrut nonetheless seek out kosher products because of perceived higher quality or purity. Hyde, *supra*, at 2–3. The periodic inspections may be one source of this perception. The frequency and intensity of the inspection will depend on the type of operation conducted at the store. Stores selling nothing but packaged goods produced and packaged elsewhere may need very little in the way of inspection. A butcher shop, by contrast, may have a full-time, on-site supervisor employed by the certification agency. The scope and frequency of inspections also may differ from one certifying agency to another.

Today's food production methods often require the inspection and certification of many products that would not seem to require kashrut certification. Preservatives, natural or artificial flavors, and other additives are often derived from animal sources, triggering concerns about nonkosher species of animals, requirements of kosher slaughter, or restrictions against mixing meat and dairy products. Products that contain no questionable or prohibited ingredients may be prepared on the same production lines as products that do. Even minor changes in methods or ingredients can render a product non-kosher. For these reasons, a tenant that produces or processes any nonpackaged goods must rigorously protect the integrity of its facilities. An event as simple as a contractor bringing non-kosher foods into the premises can render products, implements, or fixtures nonkosher, resulting in major expense to the tenant. Thus, the landlord's right to enter the premises needs to be limited accordingly.

The lease also must reflect special timing concerns. Kosher businesses are often operated by observant Jews, who do not conduct business on certain days. These days include the Jewish Sabbath, which begins approximately 20 minutes before sunset on Friday and ends some 25 hours later, approximately 45 to 90 minutes after sunset on Saturday. The owner also will need to close for business on the first two and last two days of Passover, the two days of Shavuot, the two days of Rosh Hashanah, Yom Kippur, the first two days of Sukkot, and the days of Shemini Atzeret and Simchat Torah. Most of these days begin and end comparably to the time limits of the Jewish Sabbath, although some, such as Yom Kippur, begin earlier in the day.

Use and Operations Clauses

Any lease provision requiring specific days or hours of operation will need to be modified accordingly. If the owner is observant, the tenant will be unable to comply with a requirement to operate on these days. In addition, there is little point in requiring the business to be open during days or hours when the business's target clientele cannot shop. Even if the business targets a mixed clientele, the certifying agency may require the

business to be closed during those days, so that the business will not be operating when the agency's inspector cannot be present. A business that is open when it should be closed also may lose credibility with its observant customers.

The following provision modifies the typical use clause and continuous operations clause. The landlord's standard use clause for this shopping center included operation until 5 p.m. Monday through Saturday. During the winter months, the Friday afternoon hours conflict with the Jewish Sabbath, as do the Saturday hours all year. The tenant also will want the ability to close in sufficient time to get home and prepare for the holy day.

Landlord acknowledges that Tenant intends (but shall not be obligated to) operate the Premises as a kosher facility, certified as such by one or more rabbinic organizations (a "Kashrut Agency"). Notwithstanding any other provision of this Lease: (i) Tenant shall not be obligated to operate the Premises for business, nor to have any of Tenant's contractors perform work in, on or about the Premises, on days or at times when Tenant is prohibited by Orthodox Jewish law from so doing, or when prohibited by the Kashrut Agency; (ii) Tenant is permitted to cease operation three (3) hours before sunset on the afternoon before any day on which Tenant is prohibited by the Orthodox Jewish religion from opening for business at the Premises, and five hours before sunset on the day before Yom Kipper; [*Author's note: these time periods will depend on local traffic conditions, weather, and other factors that may affect how much time the owner and employees will need to close the store, return home, and make the necessary personal preparations. In larger urban areas, significant time may be needed.*] (iii) Landlord will not do anything, and will not permit its contractors to do anything, in the Premises that would jeopardize or impair the Kosher status of the products produced or sold in the Premises, or the sanitation of the Premises or the equipment therein. Without limiting the preceding sentence, (x) Landlord shall instruct its agents, employees and contractors entering or working in the Premises that under no circumstance are any of them to bring or consume any food, beverages, food products or ingredients inside of the Premises, nor to use any of the sinks in the Premises (other than lavatory sinks and janitorial sinks, if any) or food production facilities, counters, display facilities or other trade fixtures or Tenant's Equipment (as defined in section __ below) for any purpose whatsoever; and (y) Landlord and its agents, employees and contractors entering or working in the Premises shall under no circumstances deface or remove any of the mezuzahs (the cases affixed to the interior and exterior doorposts of the Premises and the parchment scrolls contained within those cases) located in the Premises, and if removal of the same is necessary, Landlord shall arrange in advance for their removal and safekeeping by Tenant.

Many kosher businesses also will need the right to remain closed during the entire eight-day festival of Passover. Although work is generally permitted during the third through

sixth days of Passover, additional stringent kashrut requirements apply during the entire eight days. Food that is kosher during the rest of the year is not considered kosher for Passover unless it meets those special additional requirements. These requirements prohibit not only food that contains yeast or other leavening agents, but in practice also prohibit any foods made from, or coming in contact with, certain grains or legumes, unless produced under certain stringent additional restrictions. Grocery stores and butcher shops typically offer foods that are kosher for Passover. Bakeries, restaurants, and other businesses preparing food on the premises often close during Passover rather than incur the expense and disruption of the additional requirements for this relatively brief period.

Notice Provisions

The need to close on Jewish holy days affects other lease provisions in addition to the covenant to operate. The tenant may have no practical opportunity to respond to a notice from the landlord if the last day or days of the response time fall on a day that the tenant cannot conduct business. If the response time is short, the tenant may have no opportunity to respond if one of these days (other than the Sabbath) occurs during any part of the response period.

There are at least three approaches to resolving this problem. One approach is for the lease to list the days in question and to provide additional time to respond if one or more of these days occur during the response time. This approach can be cumbersome. Each of these days begins the afternoon of the preceding day. Moreover, the tenant will want to close well in advance of the beginning of the holy day, for the reasons mentioned above. In addition, the Jewish calendar is both lunar and solar, which means that these days will correspond to different dates each year in the English (Gregorian) calendar. The drafter is left with two cumbersome choices: either list the names of the holy days (as this article does) and leave it to the reader to determine when each day occurs in any given year, or consult a long-term calendar and specify all of the English dates affected during the lease term and any renewal terms. Neither option is entirely satisfactory.

The second, a hybrid approach, is to piggyback off of the use clause:

Notwithstanding any other provision of this Lease, if any notice from Landlord is received on any day or during any period during which Tenant is permitted to close for business under section __, the time otherwise prescribed by this Lease for Tenant to respond to, or to take any action required by, the notice or the time that the notice otherwise becomes effective, will be extended by the number of days during which Tenant is permitted to close.

The third approach is less precise, but simpler to draft and administer, if the landlord is willing. Simply lengthen all of the response times in the lease—whether or not any of the holy days fall within the response time—by two to four days, to make certain that the tenant will have adequate time in all events.

Other Lease Provisions

Timing considerations also affect the landlord's right to relocate the premises. Relocation clauses are unpopular with most tenants but pose special concerns for the kosher tenant. There are costs to prepare the new premises for a kosher operation. In addition, just as a children's or teen's clothing retailer will want to avoid relocating during the back-to-school shopping season, the kosher merchant will want to make sure that the relocation will not impair its seasonal peak sales periods. The move also must be timed so as not to conflict with days that the business cannot operate. The relocation clause in the kosher bakery lease was modified by adding the following limitations:

Notwithstanding anything else in this Lease: (a) [*restrictions concerning the number of relocations, relocation at the beginning or end of the term, and the size and location of the substitute premises*], (b) Tenant shall not be required to relocate within 30 days before or 30 days after Passover, Shavuot, Rosh Hashanah, Sukkoth/Simchat Torah, Hanukah, or Purim, and any relocation shall be completed in sufficient time to permit Tenant to resume full operation (including any necessary recertification by the Kashrut Agency), at least 30 days before any of the foregoing holy days, (c) Landlord, at its own cost, shall improve the substitute Premises to like condition, finish, layout and usefulness for the operation of Tenant's business as the original Premises, and shall promptly reimburse Tenant on demand for all of Tenant's costs incurred in connection with moving Tenant and Tenant's trade fixtures, inventory and other personal property to the substitute Premises, including but not limited to movers, signage, telephone and utility hookups, any necessary inspection or recertification by the Kashrut Agency (including the replacement or restoration to kosher status of Tenant's equipment, if so required by the Kashrut Agency), printing of new labels and stationery, retrofitting (if required) of Tenant's equipment and trade fixtures to fit the substitute Premises, and payroll costs for the time of Tenant's employees incurred as a result of the relocation; (d) Tenant shall not be obligated to pay any Minimum Rent or other charges for the time during which Tenant is closed as a result of such relocation (not to exceed the reasonable time required to move into, improve, recertify and commence operation in the relocated Premises), and shall not be required to commence paying rent in the relocated Premises until Tenant has completed relocation of Tenant's business, provided Tenant diligently pursues such relocation. No relocation shall occur on the Jewish Sabbath or other days on which such activity is prohibited by the requirements of Orthodox Jewish law.

Note that this clause lists the specific holy days to define the peak sales periods, but not the English dates. Relocation, being a rarer event, did not justify creating a list of English dates. Note also that the landlord is required to pay any costs of kashrut recertification in connection with the relocation. Depending on the type of operation, recertification may require one or more inspections; cleaning of the production surfaces, sinks, and other

facilities; cleaning and reheating of ovens, racks, and pans; and the cleaning, heating, or replacement of utensils. The certifying agency typically charges the tenant for its costs in performing these services.

Not all of the lease changes are related to timing needs or kashrut certification. Kosher businesses tend to target a family-oriented market because they cater to a religious clientele. The following clause should be added to restrict the landlord from leasing to businesses that might deter the tenant's customers from shopping at the center:

Landlord agrees not to lease any space in the Shopping Center for, nor to consent (where Landlord has the legal right to withhold such consent) to the use of any space in the Shopping Center for, any adult book store or sexually themed business. For purposes of this provision, an "adult book store" means any store a substantial part of the inventory of which is not available for sale to children under the age of 15 because it explicitly deals with or depicts human sexuality. Landlord acknowledges that due to the family oriented and religiously oriented nature of Tenant's business and clientele, any such use would have an adverse impact on Tenant's business.

Depending on local ordinances, and the bargaining power of the parties, the tenant may want to restrict other nuisance uses, such as head shops, pool halls, or taverns.

Landlords' standard leases often permit only a single sign identifying the business and prohibit logos, nonprofessional signs, and placing anything on the storefront glass. In practice, the kosher consumer will often look for a decal or other certification from the certifying agency before entering the store. The following should be added to the signage clause:

Tenant may display a sign, decal, or other graphic in the front door or front display window of the Premises indicating that products in the Premises are kosher and/or that the same are certified as kosher by the Kashrut Agency, which sign shall be professional in appearance and not hand-lettered, but which may be produced by desk-top publishing or similar means, and may include the logo of the Kashrut Agency.

Although not related to the kosher nature of the store, the following clause should be inserted to accommodate a bakery, modifying lease provisions that prohibit machinery that might increase the electrical use, affect the HVAC system, or affect the insurance rates for the premises:

Landlord acknowledges that Tenant will install and use in the Premises one or more bakery ovens, refrigeration and/or freezers and similar equipment typical of a bakery, and agrees that so doing will not be deemed a violation of this section.

Conclusion

Other types of kosher businesses—butcher shops, caterers, restaurants, or other bakeries, for example—may have additional needs that must be reflected in the lease. The tenant’s lawyer should not assume that the landlord’s lawyer is familiar with the tenant’s business or kashrut needs and should not assume that the tenant is familiar with the lease requirements that might conflict with such needs. As always, the lawyer must be prepared to explore any other special needs that should be reflected in the lease. ■