

Template Premises Lease Guidance

Things you need to know and actions you need to take

The template lease

The template lease has been developed by BMA Law to cover a situation where a GP practice is taking lease of a specific part of a larger building, such as a floor or unit. Where you are taking lease of a whole building, the template lease will be different to take account of this fact. However, the core principles provided for in the agreed template, including those referred to in this note, will be read across.

Practical point

It is important to note that the agreed lease is a **template only**. All GP practices must seek their own legal and professional advice to ensure that the terms are right for them and, crucially, that the template is adapted to suit their specific requirements and needs.

Grace period

In order to encourage GP practices to engage with NHS PS with a view to entering into a lease, NHS England and NHS PS have made certain commitments, which GP practices will be able to take advantage of if they enter into a lease before the 30th November 2017 (the so called 'grace period'). These commitments cover:

- Reimbursing a contractor's full SDLT (stamp duty land tax) liability and reasonable legal costs (up to £1000 + VAT) when they enter into a lease within this 'grace period'
- Meeting any additional sums payable on top of the rent where the landlord elects to charge VAT.
- Providing transitional funding to support practices who were historically subsidised.
- Maintaining reimbursements during any period between a contractor serving notice to break a lease (or them receiving such a notice) and the date that the lease finally ends.

Rent and Shared rent

It has been agreed that the rent and any shared area rent will reflect those sums that are reimbursable.

Practical point

Before entering into a lease, you must ensure that the proposed starting rent and, where applicable, shared area rent is approved by NHS England (or their agent) as being fully reimbursable.

Rent reviews

The process for handling rent reviews has been considered carefully. Under the template lease, the first rent review will occur after the fifth anniversary of the lease start date for stamp duty reasons. Thereafter, it will occur every three years.

This frequency has been agreed by NHS England, despite the fact that the Cost Directions state a three-year rent review frequency.

Practical points

You should get specific and express approval from NHS England before entering into the lease that they approve the frequency of rent reviews.

The rent review process ensures that rents can go both up and down in order to reflect the sums that are reimbursable. In its simplest format, the process is as follows:

- GP practices and NHS PS will provisionally agree the revised rent; it will then be referred to NHS England (or their agent) who will confirm whether it is capable of reimbursement.
- Crucially, no rent review memorandum documenting the provisional revised rent agreement will need to be signed at this stage.
- If NHS England (or their agent) agree that the revised rent is capable of reimbursement, then the provisionally agreed rent will become the revised rent.
- However, if NHS England (or their agent) believe that the provisionally-agreed rent is too high, then NHS PS may, at their own cost, challenge NHS England's decision via the NHSLA (NHS Litigation Authority).
- The decision of NHSLA will be final and binding on both NHS PS and NHS England, and will identify the revised rent payable.

Practical point

At the point of rents being reviewed, you should follow the process provided for in the lease. In order to avoid the provisionally agreed rent being binding before NHS England agree the revised rents, never sign a rent review memorandum until you have ascertained the amount that is capable of reimbursement. Seek professional advice from a solicitor or surveyor.

Break clause ('last man/woman standing')

The template lease ensures that you are able to serve notice to break your lease should you lose your core contract.

However, giving notice to terminate does not break your lease straight away. Depending on your practice (and in particular whether or not you are a sole practitioner), you may be required to give up to five months' notice. This is to enable NHS PS and NHS England to find an alternative provider, in order to ensure continued service from the premises.

Given this length of time, NHS England have agreed (irrespective of when a practice's core contract ends) to honour a practice's reimbursement from the point notice is served until the lease comes to an end.

Practical point

If you are set to lose your core contract (whether voluntarily or otherwise) and are not appealing against a decision to terminate your core contract, you must notify NHS PS that you wish to terminate your lease as soon as possible.

Service charges

The template lease provides for the fact that:

- Any services have to be reasonably and properly carried out.
- Any service charges must be reasonably and properly incurred.
- The provision and invoicing of services must be transparent. To this regard, NHS PS have committed to establishing a pro forma invoice, which clearly identifies those items which are and are not reimbursable, and guidance for reading it.
- GP practices may dispute the charges if they feel that they are unreasonable. Where such disputes cannot be resolved with NHS PS, these disputes will be settled by an independent surveyor.

In addition to this, NHS England have agreed to provide transitional funding to any practice for whom services have historically been (in whole or part) supported.

Furthermore, the DoH (Department of Health) have facilitated the establishment of an 'Efficiency Committee'. This committee will be made up of representatives from the DoH, NHS PS and the BMA who will meet at intervals throughout the year. It will discuss concerns, with a view to influencing policies in order to better the way in which NHS PS provide services throughout its GP premises portfolio.

Practical points

Ensure you have a clear understanding of the state of repair and condition of the property, the wider building in which it is located, and all communal areas. Using this information, you and your advisers can gauge:

- the appropriateness of including or excluding items within the service charge provisions
- whether any items of disrepair or older plant and machinery should be addressed by NHS PS at their sole cost. This could include the roof, roof coverings, walls, foundations, the exterior, heating or air conditioning systems, and lifts.

Seek details from NHS PS of past and future service charge information.

If there is a concern that service charges will or could be high (or may escalate), then you should consider negotiating a financial cap on the service charge.

If there are items that you will not use (for instance, lift maintenance when you are located on the ground floor) then consider negotiating the exclusion of these costs from what you will be required to pay/contribute towards.

Repair obligations

The template lease allows for a schedule of condition to be attached to the lease itself. A schedule of condition is used to ensure that GP practices are not be responsible for either historic items of disrepair, or snagging items, depending on whether the premises are old or new. It will do this via wording in the lease which will specifically identify that a GP practice's repair and maintenance obligations do not extend to cover those items of disrepair or snagging items identified in the schedule.

Practical points

Before you sign off on the lease, it is your responsibility not only to i) request that the lease has a schedule of condition or a snagging list attached, but ii) to instruct a surveyor to prepare it.

Consider any plant or machinery located within the premises or wider building. This could include lifts, air conditioning units and heating systems. It is crucial to ensure that these are in a good condition.

If there are items of disrepair identified within the schedule, consider whether there should be an express agreement with NHS PS that they bear the full cost of repair (so as to not form part of the service charge).

VAT

Although the Cost Directions (2013 edition) do allow for the reimbursement of VAT (Schedule 2 Part 2 4 (b) (iii)), there has been some concern that mid-term elections (i.e. elections to charge VAT arising mid-way through your lease term) are being challenged as being reimbursable.

To mitigate this uncertainty, for all those leases entered into before the end of the grace period, as referred to above:

- Where NHS PS are the freehold owner, NHS PS have agreed that their ability to charge VAT will be subject to you being able to secure reimbursement.
- Where NHS PS are themselves a tenant and are subletting to you, NHS England will categorically reimburse any VAT chargeable on sums payable under the lease.

Practical points

Where NHS England will be picking up the cost of VAT, you should seek specific and express commitment from NHS England at the outset.

Security of tenure & a contractual right to renew

As part of the negotiations over the circumstances when the lease could be broken before the end of the term, which resulted in a mutual ability to end the lease where a practices' core contract comes to an end, the template is drafted outside of the protection of the Landlord and Tenant Act 1954 (see our back to basics guide for details on what this means). In recognition of the fact that a practice may want to continue in occupation after the expiry of their lease term (which can be negotiated to be a term up to 30 years), a contractual right to renew has been agreed.

Practical points

- Specific circumstances may apply which would mean that it is deemed inappropriate for you not to benefit from the protection of the Landlord and Tenant Act. Speak with your legal advisers so you are clear of the consequences either way.
- If there is a contractual right to renew be aware that specific and proactive action must be taken, by serving notices no more than 12 months and no less than 6 months, before the end of the lease to invoke your right to renew.
- Take proper advice on the contractual right to renew as there may well be formalities in terms of registering the right to renew at the Land Registry.

Reimbursement of SDLT and reasonable legal costs

NHS England have categorically committed to fund any SDLT (stamp duty land tax) payable by the practice on the grant of the new lease - as well as their reasonable legal costs (up to £1000 + VAT) during the grace period referred to in point 2 above.

Practical point

As with the commitment to VAT, the commitment on SDLT is time-limited and lasts until the 30th November 2017.