

# Data Center Lease Considerations

A Practical Guidance® Article by Jeannine Bishop and Kelly Kuschel,  
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While data center leases need to include most of the standard provisions of typical warehouse or manufacturing facilities' leases, special attention should be given to their unique operational needs and special investments for the site. When leasing a data center building it is essential, among other things, to ensure the lease will address a high level of security, protect the privacy of both the tenant and the premises, and provide for continuity of operations throughout the lease term.

Below we highlight several key considerations for negotiating a lease for a data center.

## Security and Privacy

Data centers house sensitive information, necessitating heightened security measures to protect data and restrict unauthorized access, including from landlords and their agents. These concerns flow throughout the lease, including in the maintenance, construction, signage, landlord access,

and confidentiality provisions of the lease. Further, the tenants themselves often do not want their identity disclosed to the public and will sometimes have very specific requirements as to allowing any third parties to know their identity.

Tenants may also seek to restrict the landlord's ability to transfer the property to competitors, ensuring that their data remains secure. These can be points of contention given that the restrictions are not common in other lease types or where tenants do not have leverage. Careful consideration should be given to including these provisions and confirming they meet internal requirements for the tenant as well.

## Maintenance

When structuring maintenance responsibilities under a data center lease, parties should consider several distinct models that allocate control, cost, and risk differently.

One common approach is for the landlord to maintain everything other than the tenant's property. While this structure can be more costly, it is generally cleaner from a risk allocation perspective. The tenant may prefer this arrangement if it lacks experience operating a data center day-to-day, as the landlord assumes responsibility for facility management and related services (either directly or through a service provider). However, negotiating for the right to substitute the operator can sometimes be challenging if this is an extra revenue stream for landlord. The substitution right can be critical if there are habitual maintenance problems or if a new landlord with less experience takes over the lease and maintenance responsibilities. In such scenarios, the tenant may not want that landlord to provide

the full suite of services and may wish to amend the lease accordingly. If this right is not negotiated prior to the lease execution, the termination right for maintenance could prove costly.

Alternatively, the landlord may maintain the building structure, systems, and common areas, while the tenant is responsible for maintaining the premises and its personal property. This arrangement is typical in many traditional single tenant leases outside of the data center space. It gives the tenant flexibility to hire the same data center operating services provider across multiple sites or use its own in-house team, thereby allowing greater control over operations. In some cases, the tenant is responsible for the maintenance of the premises, but hires a landlord affiliate to actually run the day-to-day activities. If a landlord affiliate agrees to provide these services themselves, or through an affiliate, the tenant will not want to be liable for the landlord's affiliate's failures of performing the tenant's maintenance obligations under the lease. In such a case, the relationship between the operating services agreement, service level agreements, and the lease, as well as risk allocation, must be coordinated so that the actions of a landlord's affiliate (or any operator providing these services) do not create unintended liability for the tenant. As with the full-service leases, tenants should negotiate for rights to substitute the operating services provider if issues arise.

Due to the critical nature of the security and privacy concerns of data center operations, some tenants often assume more maintenance responsibilities than in traditional leases. Thus, a third model places nearly all maintenance and operational obligations on the tenant, with the landlord retaining only limited rights thereafter. This structure is often preferred by tenants who want to prevent landlord access to the property after the shell is built and who possess experience running data center operations or have an agreement with a specific operator for all their sites. From a liability perspective, this approach is straightforward, as the tenant has full control of the site and liability for the site. Depending on the length of the lease term, accountants may raise the risk of consolidation on the tenant's balance sheet. [WSJ website link](#).

Selecting the optimal maintenance arrangement depends on the tenant's operational capabilities, risk tolerance, and desire for control over the premises. Each structure presents trade-offs regarding cost, flexibility, risk, and the ability to adapt to issues that may arise during the lease term. Careful negotiation of these provisions can help both parties achieve their objectives and minimize operational disruptions throughout the life of the lease.

## Utilities

The same concerns that can arise when assessing the purchase of land for data center development are also present in leasing data centers, including notably availability of utilities, particularly water, electricity, and fiber (as we have previously discussed on our [Data Center Bytes](#) blog).

Depending on the stage of development, the lease may need to address whether landlord or tenant will be taking responsibility for negotiating with utility providers for bringing the utilities to the site or for rates on the utilities to be consumed at the premises. This ensures that the necessary infrastructure is in place to support data center operations.

## Interruption of Services

Because data centers cannot afford interruptions in utility services, lease agreements should include detailed provisions regarding service interruptions and force majeure events. Tenants typically seek options such as self-help, compensation, and termination rights for service disruptions, while landlords aim to define their liability clearly. Given that landlords tend to have less responsibility for maintenance and utilities in data center leases, the gap between the two parties can be bridged, and is easier to bridge, when the lease is considered in its entirety. Incorporating redundancies into the building and site design for interruptions can also mitigate risks.

## Casualty

While all real estate is deemed unique, developed data centers are usually specifically zoned, permitted, and with special additional utilities brought to the site, making them difficult to replace. As such, a tenant may be more concerned than is typical about the casualty provision.

For instance, a tenant may want to negotiate the right to reconstruct after a casualty at any point in the lease even where the landlord notifies the tenant that the landlord does not intend to reconstruct the data center and even where the tenant has to pay out of pocket for some of the costs for the reconstruction. This differs from typical office leases where business interruption insurance helps address the costs of a casualty and alternative office space is generally more plentiful.

## Environmental Concerns

Similar to concerns an owner might have, as with any real estate project, securing the necessary environmental

permits and conducting Phase I and Phase II Environmental Studies are crucial steps during the lease negotiation and diligence period.

Careful consideration should be given to the existing conditions of the property, whether construction would be feasible and whether remediation is necessary prior to commencing construction and negotiating a clear allocation of responsibility for preexisting and future contamination.

## Work Letters and Special Equipment

For data centers in development, work letter negotiations can be extensive. Tenants may prefer limited landlord involvement in planning improvements due to security concerns if the tenant is managing the construction, while some others are looking for turnkey data centers where landlords take on the majority of the work or require the landlord to deliver the building shell for the tenant to fit out the space.

Further, another consideration when addressing construction provisions is special improvements or equipment. Lease negotiations should address the installation and maintenance of special equipment, such as chillers or generators, to meet operational needs.

## Defaults

Given the significant investments in data center infrastructure, tenants may request extended cure periods for defaults and additional notices before being placed in default. Termination rights for landlords under data center leases, even for defaults, are a major negotiation point to be addressed. In the event of a landlord default, tenants will want very clear self-help rights in order to quickly address any issues that might impact continuity of operations.

## Memorandum of Lease and Subordination and Non-Disturbance Agreements

As with non-data center leases for either long terms or with significant tenant investments, a tenant will desire to have the right to record a memorandum of lease and have protective non-disturbance provisions, and data center leases are no exception. These documents notify lenders and other parties of the lease's existence and protect tenants in foreclosure scenarios. While landlords and lenders typically agree on the general concept of these protections, the specific terms require negotiation.

By addressing the key considerations set forth above, both landlords and tenants can establish a lease agreement that supports the unique needs of data center operations.

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Leader of the firm's real estate practice, Jeannine T. Bishop advises clients on the acquisition, development, financing, and leasing of commercial properties, including office, self-storage, data center, retail, industrial, warehouse, and distressed assets. She manages the acquisition and sale of multiple-property portfolios of all sizes, assists with real estate aspects of corporate acquisitions and mergers, and handles the real estate aspects of energy transactions. She has in-depth knowledge of the self-storage industry as well as in the development and leasing of data centers. She also serves as real estate lead on the firm's retail and ecommerce industry team.

Jeannine counsels public and private companies, including real estate investment trusts (REITs), private equity, retailers, pension trusts, and corporate clients. She advises on day-to-day real estate matters, including operations and expansion/contraction of space, acts as local counsel for real estate financing matters, and assists with all real estate aspects of large complex mergers and/or strategic expansion of companies into new areas nationwide. In addition, her practice includes representing clients in the leasing of office and warehouse space as well as counseling clients in the energy space with respect to real estate aspects of pipelines, hydropower, and easement matters. Jeannine has also represented telecommunications companies during the site development process and landlords leasing to telecommunication providers. In addition, Jeannine provides an advisory role to clients in assessing the overall transaction strategy and review of property management matters.

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Kelly Kuschel focuses his practice on real estate asset disposition, acquisition, leasing and financing. He represents real estate investment trusts (REITs) and private equity funds in the disposition of multi-property portfolios of storage properties and energy companies in multistate acquisitions and financings of real estate, as well as life sciences and healthcare companies. Kelly manages complex and large deal structures with teams across various practice areas. As part of the data centers team, he focuses on real estate acquisitions, leasing, and financing within the data center sector.

In addition to representing traditional real estate clients in leasing and dispositions, Kelly represents landlords and tenants in lease negotiations, including for headquarters and life sciences spaces, and advises companies on the legal aspects of mergers and acquisitions and other corporate transactions involving real estate.

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