Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Rise of Shared Work Spaces: Tips For The Unwary

By **Attorneys with Mintz Levin Cohn Ferris Glovsky and Popeo PC**


Jennifer Sacco Smith


Geoffrey H. Smith

Law360, New York (December 14, 2016, 2:38 PM EST) -- Co-working centers and shared office space arrangements have exploded onto the commercial real estate scene recently and offer attractive alternatives for many small businesses, early stage start-ups, incubators and freelancers to more traditional long-term office leases or work-from-home arrangements.

The co-working model likely owes its meteoric rise to a shift in the workforce landscape at home and abroad. As more of the global workforce trends away from the traditional 9-5 office job and becomes increasingly independent, the co-working model has risen up to meet its evolving needs.

The shared working space model allows businesses and individuals to utilize spaces as small as a single desk or lab bench, and as large as a suite of offices and conference rooms, on a flexible monthly, daily or even hourly basis for a claimed fraction of the cost they might otherwise incur to secure long term leased space directly from a property owner. The model fosters a community environment many freelancers were missing when working from home or on the road, and allows workers to utilize office space whenever needed and in multiple locations around the globe. Many members enjoy the networking and collaboration opportunities these close quarters with other businesses provide, and the largely open space plans allow for more socializing. Some co-working providers offer social and networking events within their spaces to encourage a sense of community and because people in coworking spaces are looking for more than just a place to work.

In the past, office suite giant, Regus with 3,000 business centers in 120 countries, dominated the shared executive suite business with its office centers focusing on privacy and security and their idea of what a typical corporate office should look and feel like. What Regus originally offered for so long, however, didn't fit the experience of what users are now looking for — the enhanced social experience, networking opportunities, local community support and learning related benefits. Early entries in the race to provide these alternative arrangements have quickly become household names, like WeWork, WorkBar, and locally, the Cambridge Innovation Center. More are joining the race every day. WeWork lists office locations on its website in 19 different US cities (many with multiple locations within such city) and 15 international locations and they boast over 40,000 current members. As of early 2016, WeWork had reportedly signed more than 70 direct office leases totaling more than 4.63 million square feet of space. 3.55 million square feet of that space reportedly secured since 2014, making WeWork, by some estimates, the largest tenant of newly leased office space in the United States over the last two years. Additionally, a WeWork founder recently indicated he expects WeWork will expand to an astounding 1,000 locations in the years to come.

As cutting edge as this phenomenon sounds, these spaces have often been secured by the co-working providers in much more traditional ways through long term leases with property owners. The service providers then build out their spaces for shared use by their members, often including communal amenities such as lounges, kitchens, conference rooms and access to shared printers and copiers. The fees derived from members allow service providers to cover the cost of leasing their spaces and providing amenities to members and they in-turn retain the profits. This model has proved extremely profitable over the last few years. The Wall Street Journal, for example, recently reported WeWork had achieved a $17 billion valuation.

As more commercial office building owners, shared work space providers and end users join the expanding world of shared work spaces, each should be mindful of some high level concerns raised by the new model.

Property Owner Concerns

- Property owners typically want to retain some control over who is coming and going in their building and who their tenants are, not only out of an interest in maintaining security and a creditworthy tenant roster, but also to achieve the right tenant mix ideally suited to their building. To secure these interests, landlords will often reserve consent rights over subleases or assignments by tenants to third parties. Many leases simply restrict "subleasing and assignment," and it is possible co-working membership agreements or licenses granted to co-working providers by tenants could skirt the technical definition of a "sublease" or "assignment" and leave landlords without approval rights over these arrangements they may want to retain. Landlords should take care to ensure their leases identify all possible transfers by tenants broadly enough to cover co-working arrangements so they retain approval rights over them.

- Landlords will want to review and approve basic forms of membership agreements proposed by their tenants to confirm they contain requisite insurance and indemnification provisions and restrictions against disturbing other tenants in the building.

- Most landlords take the position that increases in rental rates in the market should inure to their benefit and that if a tenant is subleasing for profit, that profit should be shared with the landlord. To accomplish this, many landlords require tenants to forfeit all or a portion of any sublease profit to the landlord. Landlords may want to seek similar profit sharing arrangements with respect to co-working arrangements and memberships.

Shared Work Space Provider Concerns

- The shared work space providers have enjoyed an explosion of business, but it remains to be seen whether the model can survive economic downturns that might jeopardize their ability to meet long-term fixed rent obligations. The providers need to be careful to manage smart growth in line with demand and should look for terms in their leases that provide them with flexibility to adjust to changes in the market such as early termination rights, subleasing and assignment rights, or the option to relinquish space or expand into additional space if needed.

- Co-working providers signing leases need to be sure they have the flexibility they need to run their businesses without excessive landlord restrictions. Providers should pay careful attention to their direct leases with property owners to be sure the restrictions on transfers and permitted use allow them to operate without overly burdensome restrictions. If licensing space or granting memberships without consent could be deemed a tenant default, aside from the possibility of facing a termination of the lease, the provider could be restricted in its ability to further sublease or assign or to extend the term of their lease while such default is continuing.

- It would behoove a co-working provider to negotiate the shared work space as a specifically permitted use. Providers should also ensure that they are not burdened by notice and approval requirements of landlords each time a new shared user comes into the space. The parties could consider a monthly report rather than a per user notice to the landlord. Moreover, providers need to understand the shared profit provisions of their leases with landlords (as discussed above) and determine whether those terms need to be negotiated out for shared user transfers (likely), or whether the provider budgeted to share profits on a per user basis.

Member/End User Concerns

- While the close quarters and largely open space plan nature of co-working centers has advantages in terms of collaborative opportunities, the same close quarters raise concerns about protecting the end user's proprietary work product, confidential information and intellectual property from potential competitors working just one desk away. End users will want to be sure to review their membership agreements carefully to be sure they contain proper protections and clearly define whether the space they are using is private or will be easily accessible to others.

- End users may also want to consider separate confidentiality agreements as between the user and the landlord but also between the user and other users of the shared space. End users will also want to be diligent about protecting intellectual property and maintaining the confidentiality of valuable information by implementing policies and procedures to be complied with by the employees of the user and be sure that they support those goals in the shared space. Employees should sign confidentiality agreements when they start, but it may be good to take time to remind employees of their obligations now and periodically in the future.

- End users will want to be sure their membership agreements have been duly approved by the ultimate owner of the building or their lenders to guard against unexpected termination for lack of such consent.

- While the flexible arrangements allow small businesses and individuals the ability to work when they want, these membership agreements are not unlike gym memberships and convey no interest in real property whatsoever. This means the memberships may be subject to termination with limited or no notice. End users should be careful to consider their objectives before agreeing to such arrangements. If a particular location or space is important to that user, they may want to consider more traditional arrangements offering more secure rights in the space, though perhaps lesser flexibility – a key factor that likely drove the end user to the shared workspace model in the first place.

While the co-working model presents an exciting new alternative for the modern workforce and its office space needs, how these arrangements will be treated by the courts should disputes arise remains largely untested and landlords, co-working providers and end users would be well advised to consult an attorney early in the process to explore these and other potential areas of concern.

Jennifer Sacco Smith and Geoffrey H. Smith are associates with Mintz Levin Cohn Ferris Glovsky and Popeo PC in Boston.