



# Break rights and break conditions

## *Frequently Asked Questions*

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### What is a break right?

A break right entitles the benefitting party to bring the lease to an end before the contractual term expiry date of the lease.

Break rights can be in favour of either the landlord or tenant, or both. The inclusion of a break right in a lease is a matter for commercial negotiation.

### What form might a break right take?

There are two core types of break right: (i) fixed and (ii) rolling.

A fixed break right entitles the tenant (or landlord) to terminate the lease only on a fixed date or dates, e.g. the fifth and tenth anniversaries of term commencement by serving not less than [X] months' prior written notice. If the deadline for serving notice is missed, or the break conditions (see below) are not strictly complied with in the case of a notice served by a tenant, then the lease will continue until the end of the contractual term of the lease (or the next fixed break date, if there is one).

A rolling break right entitles the tenant (or landlord) to terminate the lease at any time after a certain point, e.g. with effect from any time after the fifth anniversary of term commencement by serving not less than [X] months' prior written notice. This gives the benefitting party greater flexibility and another bite at the cherry if an original attempt to break the lease was to fail for any reason.

### Are there any key differences in intra-NHS leases?

Tenants often occupy healthcare premises for the purposes of providing specific services pursuant to a specific service contract. It is therefore reasonably common in intra-NHS leases for the tenant to have a break right that is linked to service contract expiry or termination. This break right is often mutual, in order that a landlord can bring the outgoing tenant's lease to an end on service contract expiry/termination in order that it can let the premises to a replacement service provider.

We would normally recommend that a lease is granted for the longest possible length of the service contract, e.g. if the contract is for five years with an option to extend for two further years, the lease is granted for seven years with appropriate break rights on service contract termination. This is to save costs in renewing the lease at the end of year five.

Private landlords are generally less willing to accept service contract-linked break rights in favour of a tenant, in which case the tenant (as outgoing service provider) would need to seek to assign the lease to the replacement provider in the event that the original tenant's service contract was terminated or expired.

## What conditions might a landlord seek to impose on a tenant's right to break?

Tenant's break rights are often conditional on the tenant doing certain things on or before the break date. Strict compliance with any such conditions is required in order to successfully exercise a break right.

The most common break conditions are:

1. Rent payments being up to date at the break date
2. Vacant possession of the premises being given on the break date (or the tenant giving up occupation free of subsisting underleases or third party occupiers).

As the break date will often fall part way through a quarter, tenants should generally pay the full quarter's rent on the preceding quarter day, notwithstanding that part of the quarter falls after the break date. Failure to do so is likely to jeopardise compliance with condition (1). A clause will then need to be included in the lease requiring the landlord to refund the tenant for rents paid in advance in respect of the period after the break date (calculated on a daily basis). A rent payment condition may also include other rents (such as service charge or insurance rent), and care should be taken to ensure that any such payments are paid in full if they have fallen due on or before the break date.

With respect to condition (2), we can advise on what is needed in order to deliver vacant possession or give up occupation.

## Is material compliance with the tenant's covenants an acceptable break condition?

Landlords will sometimes try to include material compliance with the tenant's covenants as a break condition. This should be resisted in the strongest possible terms. Whilst the tenant will need to comply with its obligations in the lease (and reach a dilapidations settlement if it fails to do so), this should not be a condition of the successful exercise of the break right. Including such a condition can make the break inexercisable, and at the very least it removes any certainty around whether the break will be successful and takes matters out of the tenant's control.

## Are break penalties common?

It is rare to see these in intra-NHS leases, but they are sometimes imposed by private landlords. For example, the landlord may seek a penalty payment of six months' rent as a condition of the tenant exercising its break right. Whether such a clause is included is a matter for commercial negotiation.

It is important to note that if the payment of a break penalty is a condition of the exercise of a tenant's break right, the lease should provide for the return of that penalty payment if the exercise of the break right is unsuccessful for another reason (e.g. non-compliance with another break condition). We can ensure your organisation is fully protected in these circumstances by the inclusion of appropriate drafting.

## What is required when serving a break notice?

A break notice needs to be served within the specified timescales (e.g. at least six months prior to the break date) and by the methods permitted by the lease, and the lease will also expressly or impliedly contain provisions on when notices are deemed to be served. The lease may also prescribe the form in which the break notice must be prepared. It

is crucial to ensure that you confirm the identity of the party on whom the notice is to be served and their correct address for service, either of which may have changed since the lease was granted.

Break clauses are interpreted strictly, and any non-compliance with the provisions of the break clause, however minor, is likely to render the exercise of the break right ineffective. You should therefore take legal advice and arrange for your solicitor to serve break notices on your organisation's behalf.

## How does the Landlord and Tenant Act 1954 affect break rights?

If the lease is within the security of tenure provisions of the Landlord and Tenant Act 1954, then break rights in favour of the landlord should be treated with care. If the landlord wishes to exercise a break right, it will need to both serve a break notice in the required manner and also serve a section 25 notice proving one of the specified statutory grounds (e.g. landlord's own use or redevelopment) in order to bring the lease to an end.

Tenants may bring leases to an end by correctly serving a break notice (and complying with any break conditions) whether the lease is inside or outside of the 1954 Act. There are no additional service requirements as a result of the 1954 Act.

*Please do contact us if you would like assistance with negotiating break clauses or advice on serving break notices or compliance with break conditions.*



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