

Come together

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Co-working spaces are increasing in number and attracting major players as well as start-ups. Rachael Rigamonti and Guy Wilmot offer legal advice for landlords

Renting out desks in a communal office space with shared facilities – referred to as ‘co-working’ – is an increasingly popular choice, with a recent Cushman & Wakefield report revealing a boom in such locations. London now offers more than 800 choices, reflecting growth at a rate of 10% per year, with many of these located in dynamic former warehouses or factories rather than a traditional office floor in a tower block.

Compared to a conventional landlord and tenant relationship, the model allows a high degree of flexibility as agreements are generally short-term, in the order of weeks or month-to-month arrangements; a month’s notice is typical. There are also co-working offerings to suit most budgets, enabling businesses to get operations off the ground without delay or commitment to long-term liabilities.

An added benefit is the sociability of a co-working space – many start-ups and small businesses appreciate the value of being able to collaborate and cooperate with those who have similar values. Large corporations also recognise the advantages of the flexibility for accommodating short-term project teams for comparatively low fixed costs, and the corporate sector has identified the benefits of rubbing shoulders with dynamic start-ups.

Co-working v serviced offices licences or leases

In a traditional serviced office environment, rooms or suites are made available to occupants and the occupant will have exclusive use of that space. In a co-working space, on the other hand, all the available space is likely to be shared, with ‘members’ rather than ‘occupants’ having a right to use a given number of desks or amount of space for a certain number of people and hours over a specified period.

For the property owner or manager, co-working can be more efficient. The number of memberships for a co-working space will exceed the available number of desks on the basis that not everyone will, or indeed can, use the space at the same time.

While short-term arrangements are possible, a business taking a licence or sometimes a lease on serviced offices would traditionally be locked into a longer-term arrangement, with leases lasting typically for at least 3 years, allowing the property owner to keep the tenant on the hook for rent and other liabilities for an extended period. While offering certainty for businesses with an established plan for the immediate future, as well as control over the space and how it is used, it also presents a greater financial risk.

A landlord is keen to pass liabilities on to a tenant, so the latter is always well advised to carry out full due diligence – they need to negotiate the best position possible and be aware of the risks, costs and limitations of their licence or lease.

Co-working tends to offer a simple and clean arrangement with no maintenance obligations for occupiers, as well as low or no legal costs when compared to negotiating a lease

The cost to the tenant of taking a lease may ultimately amount to less on a per-desk-space basis when compared with a co-working membership arrangement, but they need to balance this with the significant investment of time and money at the outset, both in terms of negotiating a bespoke lease arrangement as well as the administrative burden of sorting telephone lines, utilities, internet, contractors and so on. There is also the ongoing responsibility for the building's upkeep, which will divert the user's attention from their core business.

Co-working tends to offer a simple and clean arrangement with no maintenance obligations for occupiers, as well as low or no legal costs when compared to negotiating a lease. Although there is no reason that the arrangement cannot last a long time, its flexibility prevents a user paying for space and facilities that are not required at particular times.

Pitfalls to bear in mind

Typically, an agreement, entitling a member to non-exclusive rights to use an amount of space with specified benefits will be drafted in favour of the provider, with little or no room for amendment. Occupiers should tread carefully, keeping an eye out for hidden charges and unfavourable terms in the small print; however, reputable providers should provide variable pricing structures based on a range of additional services on the basis of a no-hidden-costs policy.

Ultimately, there is little security, and this is unattractive to a business that requires a consistent base from which to work or the need to brand or mark their working spaces.

Approaching agreements as an owner

Operating a co-working space entails much more hands-on management, and more developed businesses may need more permanent use of space. Members may expect a programme of events, for instance, such as evening socials, talks and presentations.

The long-term income stream generated by offering co-working space is perhaps less certain than a long lease to a tenant with a good covenant strength. This will be a particular issue where a lender is involved.

A robust co-working agreement prevents any user gaining security of tenure, which would reduce the market value of the property and restrict what the owner could do with it. To avoid this, such an agreement by its very nature should not allocate any particular area to a user. Where a lender is involved it will likely require strict control over the form of agreement and any ability to vary it, so as to minimise the risk of inadvertently granting security of tenure.

Where the landlord itself has a lease, that document will need to cater for such flexibility of use. A sophisticated arrangement can allow the superior landlord to share in the risk of occupancy levels, with a turnover rent system based on the income generated.

Planning law

Mostly occupiers will all fall under the same use class in planning law, authorised by the original permission. However, there will sometimes be occupiers of parts that have a different use, so an owner will need to consider whether the existing permission is wide enough to cover this.

If this is not the case, options include applying for temporary permission where the use is likely to be controversial, or even relying on permitted development rights should they be applicable ? they are now very wide, even more so than they were a few years ago, so ought always be checked. If the property is new and the owner's business model is for shared use space then flexibility should be sought in the planning application to minimise the need for variations as far as possible.

Confidentiality and data protection

An attractive co-working environment will usually contain considerable space for occupants to interact directly. As there may be no defined space set aside for individual businesses, the risks of information or data being disclosed by one member to another are greater than in a traditional office.

While many members' businesses would be more than happy to share some information about their technology, operations and intellectual property with others ? indeed, this is seen as one of the key benefits of these kinds of arrangements ? there will usually be other information such as trade secrets or sensitive intellectual property that they wish to keep confidential.

Issues

Personally identifiable information held by members about employees, customers and so on will be subject to data protection regulations. This means that members who hold personal information, which is likely to be most of them, will be subject to, among other things, a duty to keep personal information secure and not disclose it without the consent of the data subject.

Sharing physical space could lead to the unwitting disclosure of personal data

An operator of a co-working space should be aware of these obligations. The risk is that, as with confidential information, sharing physical space could lead to the unwitting disclosure of personal data.

To an extent, this can be dealt with in the terms of use or membership agreement for the co-working space. One relatively straightforward step is for these to include a requirement that members respect the confidentiality of information that relates to other members and to their staff, customers, guests and so on. The relevant term could start with a presumption that information is confidential unless it is not intended to be or it is in the public domain.

There are challenges with using confidentiality clauses in the membership agreement. Obligations are not binding unless confidential information is specifically subject to them and identifiable as such. Including a confidentiality term in the agreement is one way to impose this obligation, but the information does still have to meet the identifiable benchmark.

Purely as a matter of good practice, policies and guidelines for a co-working space should encourage members to use non-disclosure and other confidentiality agreements before communicating particularly sensitive information to each other. Nonetheless, these agreements can be difficult to enforce.

Online and offline security

Steps should be taken by the owner to ensure any IT infrastructure provided is secure. In particular, the wifi provided should meet the highest level of security standards consistent with a useable system. Generally, co-working providers avoid offering shared equipment, which presents an inherent security risk, and instead operate on the basis of bring your own device. Guidelines and policies should emphasise the importance of members ensuring that they do not leave devices on the premises and that any such devices are password-protected.

The very nature of a co-working space discourages the use of paper filing and records as the space is generally not available. Accordingly, the membership rules or guidelines should discourage paper filing and instead promote secure electronic filing.

To the extent that a member errs in leaving sensitive paper materials in a co-working space, confidentiality terms in the membership or user agreement should help protect it. Members should also be encouraged to remove sensitive information from whiteboards and other shared collaborative resources.

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Further information

- Related competencies include [Data management](#) , [Landlord and tenant](#) , [Leasing/letting](#) , [Planning](#) .
- This feature is taken from the RICS *Property journal* (November 2016).