PRIVATE MARKET DATA: COMMERCIAL LEASING REPORT

2021 IN REVIEW

Covid-19 and the Evolving Commercial Leasing Market

This report draws on recent interviews with seasoned commercial leasing attorneys and data from Practical Guidance's Private Market Data: Commercial Leasing data bank to provide a look back at the 2021 commercial leasing market, assess the continuing impact of COVID-19, and highlight other hot topics in commercial leasing.

Practical Guidance

The data contained in this report is based on Private Market Data: Commercial Leasing, a unique data bank that includes thousands of recently negotiated commercial lease terms from non-public commercial leases and provides up-to-date intelligence about the commercial leasing market.

This report analyzes the data from Private Market Data: Commercial Leasing to spotlight key trends and insights. In addition, this report contains excerpts from interviews with seasoned commercial leasing attorneys addressing the impact COVID-19 had in 2021 on the commercial leasing market and the impact it continues to have as parties move forward.

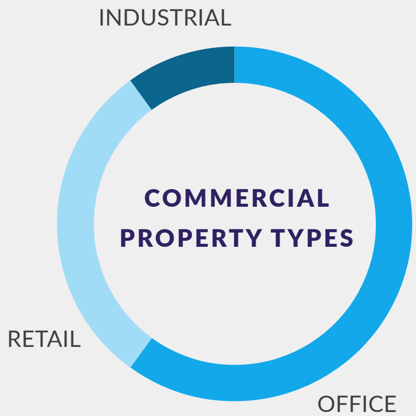
Attorneys can gain access to the most recent data bank, which contains 40+ customizable filters covering highly negotiated provisions, to discover insights on new trends in addition to those discussed in this report and ensure clients receive the most favorable lease terms. To gain access to the most up-to-date data bank, fill out a questionnaire on a recently negotiated commercial lease agreement via Private Market Data: Commercial Leasing.

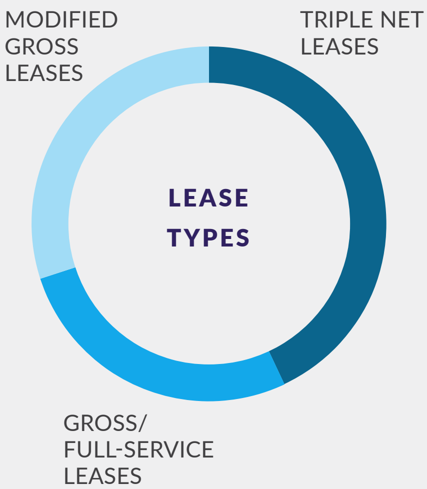
* Complete results in the latest version of Private Market Data: Commercial Leasing may differ from the data contained in this report due to continuous, ongoing updates to the data.

Data Overview

PROPERTY AND LEASE TYPE

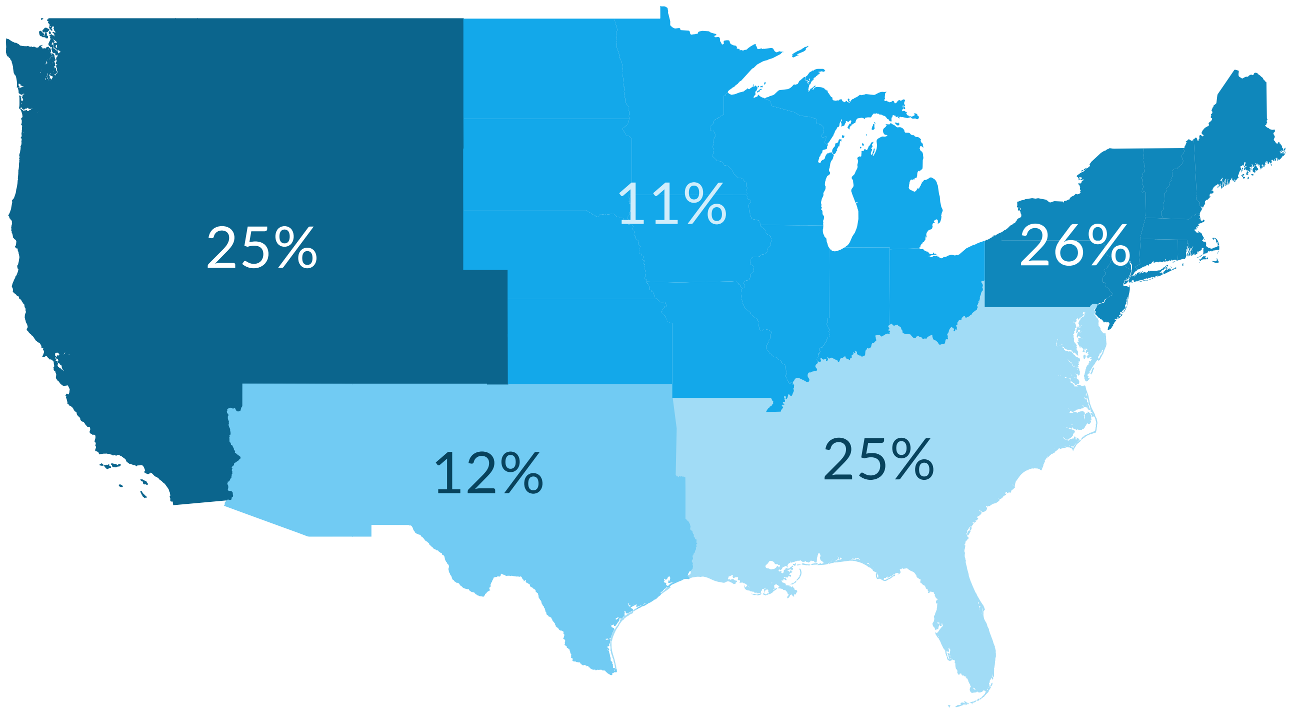
A variety of commercial property types are represented in this data. The majority are office leases (60%), followed by retail (30%) and industrial (10%). Lease types are split among triple net leases (43%), modified gross leases (27%), and gross or full-service leases (30%).





LOCATION

The leased properties in the data bank from Private Market Data: Commercial Leasing are spread across the country. Twenty-six percent of leased properties are located in the northeast, 25% in the west, 25% in the southeast, 12% in the southwest, and 11% in the midwest.



+ The most-represented states in the data are CA, NY, TX, and FL

Covid-19 and the Landlord-Tenant Relationship

When we spoke with leasing experts in the spring of 2021, many mentioned that landlords and tenants were largely working together to navigate COVID-19 disruptions and uncertainties. When we asked our experts what they were seeing at the end of 2021, a shift emerged. While COVID-19 is still top of mind for most, it may not be shaping landlord-tenant interactions in the same ways as earlier in the pandemic. For the full text of these interviews, click here.

As for exactly how it is shaping the leasing market now, there is no simple answer. This is perhaps not a surprise given that different regions and leasing sectors have been impacted by and dealt with COVID-19 in disparate ways. So although one expert reports that COVID-19 discussions have largely receded in her leasing practice, others are still seeing ongoing adjustments, especially in the face of the Omicron variant. There is a general sense, however, that some landlords have become decidedly less willing to accommodate tenants who are facing COVID-19-triggered disruptions to their business. This is not to say that accommodations are no longer being made, but they may be less generous in certain markets and sectors.

EXPERT INSIGHTS

> I have honestly not heard much at all about COVID when reviewing leases on either the landlord or tenant side. And frankly, I am not seeing a lot of changes to lease agreements reflecting COVID-related provisions. Other than some shorter terms and easier exits, the last dozen leases I have reviewed have not really had many COVID-specific terms in them.
>
> **ELIZABETH G. SCHULTZ-HORBUS**
> BROUSE MCDOWELL, AKRON, OHIO

> Two months ago, everyone was hoping that we would be sweeping COVID issues under the rug. Clearly things have changed dramatically since then, and it's clear this is something that both landlords and tenants will need to contend with, probably for some time to come.
>
> **ERIC MENKES**
> DUVAL AND STACHENFELD, NEW YORK, NEW YORK

> Back through the initial several months of dealing with COVID, we saw landlords and tenants working together as much as possible to salvage the deal in the hopes of better days ahead. Almost two years into the pandemic has changed that perspective. There is no longer an acute sense of financial uncertainty arising out of the pandemic, and more of a sense that this will be an endemic situation that all tenants will need to adjust to, if they haven't already. Thus, we have seen that landlords are less open to COVID-specific concessions, and that the landlord-tenant workout conversation plays out much more like it would have pre-COVID.
>
> **DAN SUCKERMAN**
> LOWENSTEIN SANDLER, NEW YORK AND NEW JERSEY

> The long and the short of it is (in my experience) that landlords are much more reluctant to make adjustments to existing leases now than in 2020/early 2021. However, there remains a lack of uniformity as each deal truly is different.
>
> **MICHAEL KENT**
> KENT BEATTY & GORDON, NEW YORK, NEW YORK

> We have seen a willingness to cooperate in addressing pandemic-related uncertainties. When the balance of power in leasing relationships shifts, both sides have an opportunity to re-prioritize the aspects of the transaction that are most important to them and find compromises to get those important concessions. For tenants, that might be certain types of buildouts, contraction options or stronger force majeure provisions, or for landlords, additional operating expense pass-throughs, letters of credit, or operating covenants. And going forward I expect that to continue while landlords and tenants adjust to new leasing market forces.
>
> **RITA FEIKEMA**
> HONIGMAN LLP, CHICAGO, ILLINOIS

+ Some landlords, have shifted their focus from accommodating tenants in the short-term to protecting their interests against future disruptions.

> COVID was a primary concern for much of 2021. However, as the delta variant subsided, so did the overall concern for COVID and COVID disruptions to leases. In fact, landlords have become less willing to allow tenants to add provisions for future lock-down contingencies in their leases. It remains to be seen whether the omicron surge will change this thinking.
>
> **DAVID BLATTNER**
> BECKER & POLIAKOFF, FORT LAUDERDALE, FLORIDA

Beth Bernstein Connors and Samuel Walker from Blank Rome in New York City have also seen this shift, but not in all sectors:

> We certainly saw landlords and tenants working together throughout 2020 and early 2021 to deal with disruptions and uncertainties caused by COVID-19 and its variants. But as we move into 2022, we see landlords becoming less amenable to building rent abatements or deferrals into new leases, even in instances where government mandates force them to close for business, as landlords start to treat this as a typical exercise in risk allocation, with the burden shifted onto the tenant since this is a now foreseeable hazard of doing business.... Landlords are adding pandemic/epidemic language into force majeure provisions to allow for delays in performance caused by such occurrences, but such provisions expressly carve out rent and other payment obligations so would not excuse rent payments. We are seeing this nationwide.
>
> [However,] in certain sectors (such as food and beverage and fitness, which continue to be materially adversely impacted by the pandemic), some abatements and deferrals are still being provided. And at this point, many landlords will still agree to give an extension of an initial free rent period (or deferral arrangements) in the event permitting offices close or a government order shuts down construction as a result of COVID-19 or a variant, delaying a tenant's initial build out.
>
> **BETH BERNSTEIN CONNORS AND SAMUEL WALKER**
> BLANK ROME, NEW YORK, NEW YORK

And what about reports that more landlords and tenants are becoming partners through management agreements and other mechanisms where the landlord becomes an owner of the business? Although our experts have seen some evidence of this, it is by no means a common or an easy fix.

> We've seen a lot of creativity in deal terms, ranging from very little or no base rent/percentage rent deals, to JV type structures between landlords and tenants (with both parties sharing in the risk and the upside).... [T]hese types of deals depend on the applicable landlord's financing arrangements and whether their lenders will allow such structures.
>
> **BETH BERNSTEIN CONNORS AND SAMUEL WALKER**
> BLANK ROME, NEW YORK, NEW YORK

For their part, neither Kent nor Menkes has seen much of this:

> Most landlords have no interest in this complication. It's not their business and they don't want to have to start with a management company.
>
> **MICHAEL KENT**
> KENT BEATTY & GORDON, NEW YORK, NEW YORK

> Although I predicted we'd see more of this, I haven't. I suspect most property owners want to keep to the business they know—which is managing real estate rather than restaurants.
>
> **ERIC MENKES**
> DUVAL AND STACHENFELD, NEW YORK, NEW YORK

COVID-19 and Lease Provisions: Accommodating Tenant Needs?

While parties may not be overhauling leases to address COVID-19 as they did in early 2021, our experts have seen landlords employ some level of accommodations to attract and retain tenants.

These accommodations include short-term leases—Schultz-Horbus says she has seen "very few 10+ year leases." Menkes is also seeing shorter lease terms but points out that "this is of course a trend that began before COVID and was then accelerated by COVID."

In his New York City practice, Kent finds that most landlords "still like the security of longer term leases and often don't want to go to the bother and expense of getting a tenant in short-term."

As an alternative to a short-term lease some landlords are offering early termination, rights of first offer/ refusal on adjacent space, and other rights (both with and without strings attached).

EXPERT INSIGHTS

> Our clients have gotten expansion and contraction options, ROFRs, and termination options that I would have been surprised to see before the pandemic. These options give them more confidence in entering into longer term leases, knowing that they will have options to make their space accommodate their post-pandemic workforce.
>
> **RITA FEIKEMA**
> HONIGMAN LLP, CHICAGO, ILLINOIS

> More leases are definitely being written with early tenant termination rights. But I wouldn't characterize them as generous. The tenant typically must reimburse the landlord for the unamortized leasing costs (such as brokerage commission, free rent, TI allowance and work.
>
> **ERIC MENKES**
> DUVAL AND STACHENFELD, NEW YORK, NEW YORK

> Landlords (nationwide and particularly in retail) are currently much more willing to enter into shorter term (i.e., 5-7 year) leases than pre-COVID or, alternatively, are allowing for early termination rights, which aren't necessarily tied to a gross sales threshold.
>
> **BETH BERNSTEIN CONNORS AND SAMUEL WALKER**
> BLANK ROME, NEW YORK, NEW YORK

> Nationwide, we have also seen an emphasis on expansion optionality (ROFOs or ROFRs, for example) that tenants are seeking and landlords are willing to give.
>
> **DAN SUCKERMAN**
> LOWENSTEIN SANDLER, NEW YORK AND NEW JERSEY

Not all landlords are open to all accommodations, however.

Kent reports seeing little in the way of generous exit options or expansion options for additional space.

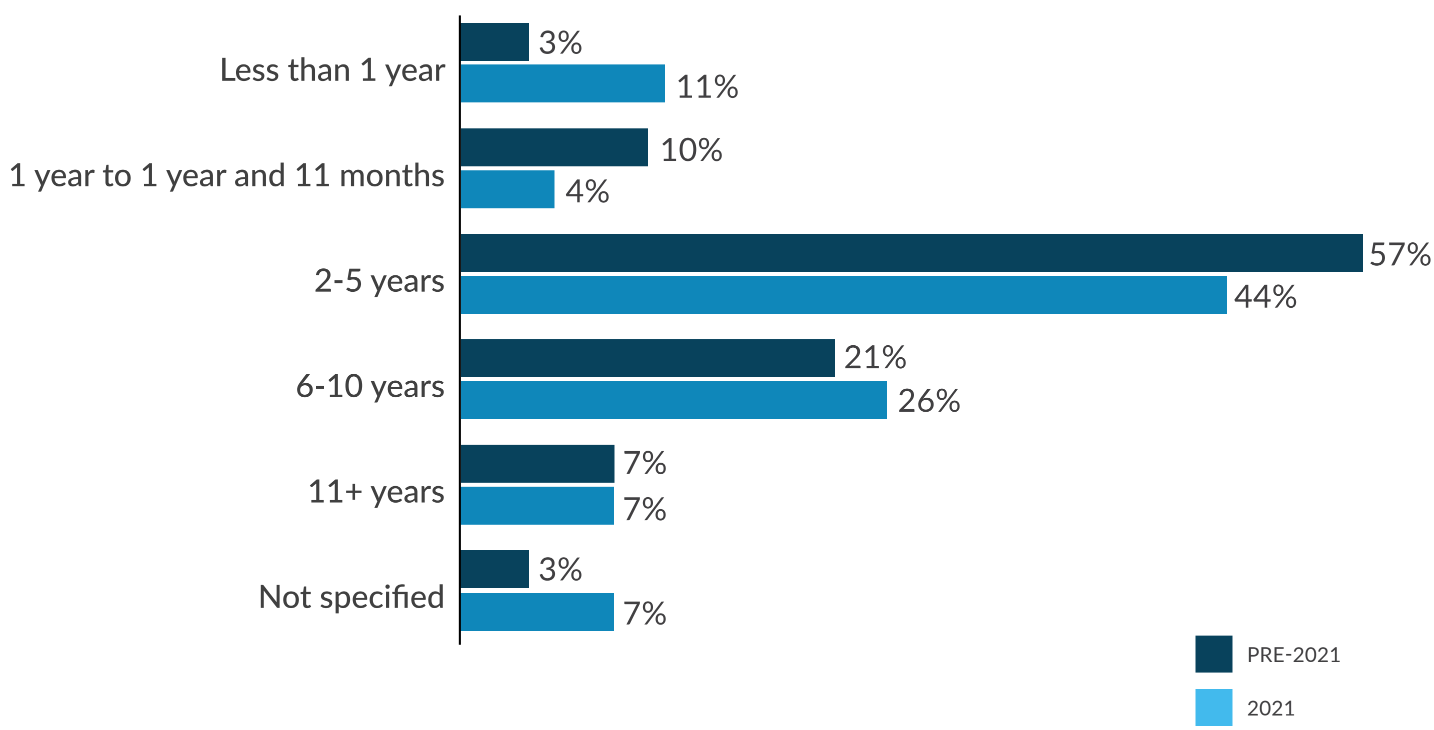
Schultz-Horbus, Kent, and Menkes have seen landlords grant short-term licenses of vacant, fully furnished space (while waiting for long-term tenants), with Kent reporting that he has "seen a few short-term 'pop-ups.' It's often easier to re-let when the space is functioning." Although in Menkes' practice, "this generally happens as an accommodation to a tenant that is committed to lease space in a building. It's not something landlords offer to parties they don't have a relationship with."

ACCOMMODATING TENANT NEEDS – THE DATA

Term Length

Data from Private Market Data: Commercial Leasing shows a rise in tenant-friendly trends, as some of our experts are seeing in practice. Take term length as an example: Out of all pre-2021 leases, only 3% had a lease term of less than one year. In 2021, this percentage went up to 11%.

LEASE TERMS



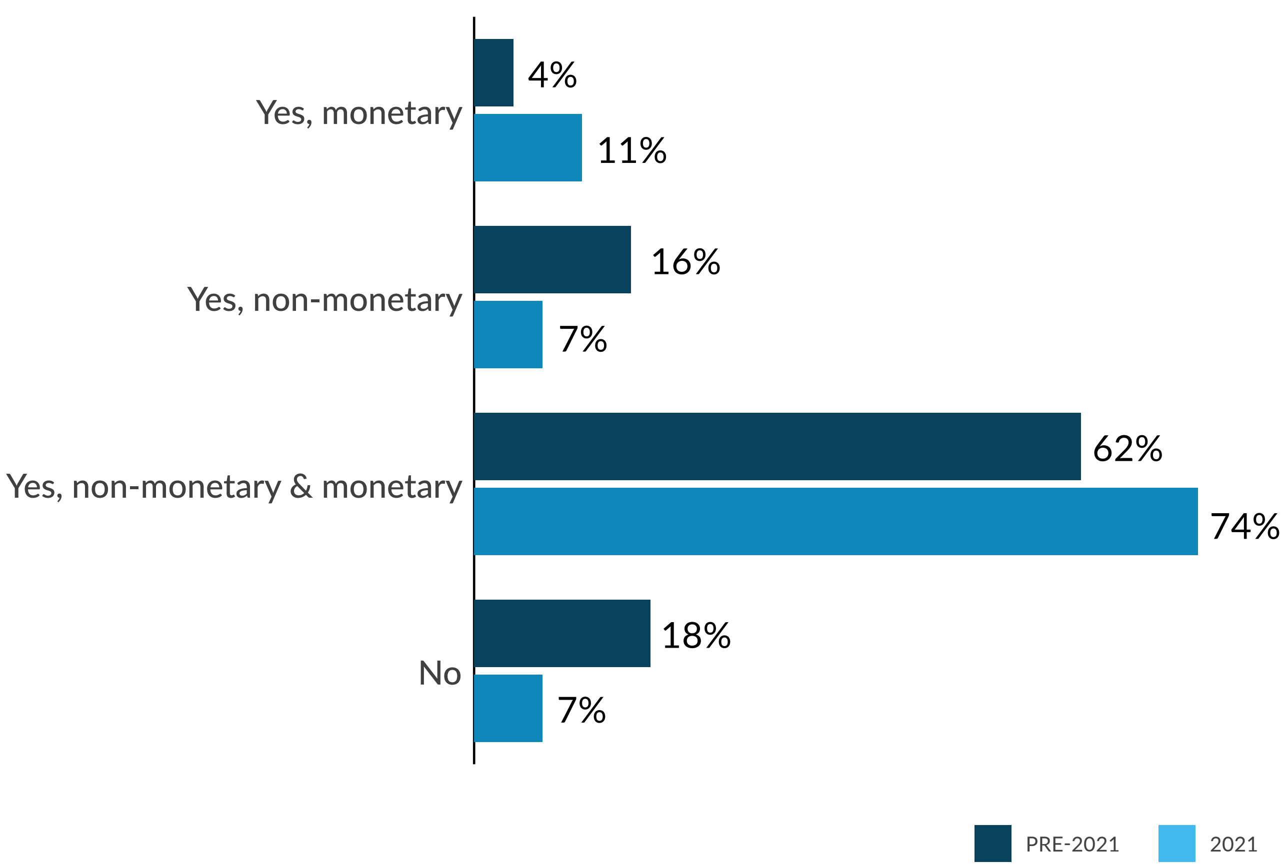
A Deeper Dive into the Data

The following discussion analyzes additional provisions commonly found in commercial leases that may have been impacted by COVID-19 in 2021. As the expert insights make clear, it may not always be easy to pinpoint COVID-19's impact given where we stand – past the initial upheaval but still contending with disruptions and uncertainty. Nevertheless, against an evolving backdrop, parties continue to move forward.

NOTICE AND CURE RIGHTS

Before 2021, 78% of leases granted notice and cure rights for nonmonetary defaults and 66% granted notice and cure rights for monetary defaults. In 2021, the percentage of leases with notice and cure rights for nonmonetary defaults held relatively steady (81%), but the percentage with notice and cure rights for monetary defaults increased by almost 20 points to 85%.

NOTICE AND CURE RIGHTS



Expert Biographies

BETH BERNSTEIN CONNORS is a partner in Blank Rome's New York office. Beth concentrates her practice on commercial real estate matters, focusing on leasing, acquisitions, dispositions, financing, and joint ventures. She represents a broad array of national clients, including owners of retail, office, industrial, and multifamily properties; large and small retail and office tenants; and borrowers of portfolio and single-asset mortgage loans.

Beth has been named a "Best LGBTQ+ Lawyer Under 40," by the National LGBT Bar Association and also a New York Metro "Rising Star" in Real Estate Law, by Super Lawyers.

DAN SUCKERMAN is a partner with Lowenstein Sandler and is based in New York/New Jersey. Dan represents a broad range of clients in diverse commercial real estate transactions, including acquisitions, leasing, financing, joint venture agreements, and matters relating to asset management. His practice is national in scope and crosses all asset classes, which keeps him on top of commercial real estate trends.

Much of Dan's practice focuses on commercial leasing, covering both landlord and tenant clients, and office (with a particular focus on New York City), retail, and industrial. Dan also devotes considerable time to acquisitions and dispositions, with significant experience in multifamily, industrial, self-storage, and retail.

DAVID BLATTNER is a shareholder in the Ft. Lauderdale, Florida office of Becker & Poliakoff. David has over 25 years of experience in complex real estate transactions and concentrates on acquisitions as well as the financing and development of large-scale shopping centers, office buildings and executive parks, marinas, warehouses, flex projects, hotels, single-family and multifamily residential developments, and condominiums. David represents a wide range of clients throughout Florida, the U.S., Canada, South America, and Asia. His clients include developers, multinational corporations, domestic corporations, banks and other financial institutions, condominium and homeowner's associations, property management companies, and both landlords and tenants.

ELIZABETH G. SCHULTZ-HORBUS (formerly Elizabeth G. Schultz Yeargin) is a partner in the Akron, Ohio office of Brouse McDowell. Libby is co-chair of Brouse's Business Transactions & Corporate Counseling Practice Group and also a member of the firm's Business Restructuring, Bankruptcy, and Commercial Law and Real Estate practice groups. Her practice focuses on transactional work and she most enjoys serving as outside general counsel and trusted advisor to businesses of varying size, scope, and industry. Libby has professional and personal experience in real estate and enjoys working with clients in real estate sales and acquisitions, both residential and commercial. She also assists clients with residential and commercial leasing, property management arrangements, easements, and other title-related issues.

ERIC MENKES is the co-chair of the leasing department at Duval & Stachenfeld in New York City. He is familiar with virtually all aspects of commercial leasing, representing both landlords and tenants in office, retail, ground lease, industrial, triple-net, and sublease transactions. Eric has particular expertise in retail leasing, representing shopping center and street retail owners, as well as national and international retailers.

Eric regularly lectures at International Council of Shopping Center law conferences and has spoken before the Real Property Law Section of the New York State Bar Association. He is former counsel and Chairman of the Board and Counsel for Miracle House of New York, a not-for-profit housing agency.

MICHAEL KENT is a partner in Kent, Beatty & Gordon and is based in New York City. Michael heads the firm's real estate practice, handling commercial and residential real estate matters, including conveyances, leasing, zoning and land use, financing and construction. He is a frequent lecturer and writer on real estate law.

Michael's practice also includes commercial litigation and arbitration, business counseling and advice, and entertainment law. He serves on the Advisory Board of Directors of Customers Bancorp whose subsidiary, Customer Bank, is an $11 billion state-chartered full service bank with branches and offices throughout the northeast. Michael also served as the Village Justice of Thomaston in Great Neck, New York for more than a decade, and as an adjunct professor of litigation studies at Long Island University and Mercy College.

RITA FEIKEMA is of counsel with Honigman LLP and is based in Chicago. Rita has represented landlords and tenants, buyers and sellers, lenders and borrowers, and joint venturers in a range of transactional real estate matters, including office, ground, retail and industrial leases, other types of occupancy agreements and construction contracts.

Rita also has prior cross-disciplinary experience in mergers and acquisitions, private equity, debt finance, statutory risk and compliance, and cross-border transactions.

SAMUEL WALKER is a co-chair of Blank Rome's Real Estate Practice Group and is based in New York City. Sam maintains a national practice in the area of real estate and has extensive experience in advising tenants in national and regional leasing roll-out programs. He has successfully completed over 200 leases in the past four years.

Sam's clients include private equity funds, public companies, real estate investment funds, financial institutions, developers, and landlords and tenants. Sam counsels clients in the following areas: commercial leasing; sales, acquisitions, and development; financing; equity investments and joint ventures; and workouts and restructuring.