

Property Group | March 2009

New York Landlords Face New Indoor Air Quality Notification Requirements

Pursuant to an amendment to New York's Environmental Conservation Law that became effective on December 3, 2008,¹ an owner of commercial or residential property is required to notify current and, under certain circumstances, prospective tenants of indoor air contamination caused by volatile organic compounds ("VOCs")² if (1) the concentrations of contaminants identified in an air quality test exceed Occupational Safety and Health Administration guidelines or New York Department of Health ("NYDOH") guidelines and (2) the owner received the test results from an "issuer".

An issuer is (1) a municipality undertaking an environmental restoration project, (2) a party subject to an order under New York's Superfund or oil spill programs, (3) the New York Department of Environmental Conservation or (4) a "participant" in New York's Brownfield Cleanup Program ("BCP"). It is important to note that "volunteers" in the BCP, as opposed to participants, are not considered issuers. A volunteer is a party that enters the BCP to clean up contamination it did not cause; a participant is a party that enters the BCP to clean up contamination that it did cause.

An owner must provide a tenant with a generic fact sheet prepared by the NYDOH within 15 days of receipt of applicable test results and "timely notice of any public meetings required to be held to discuss such" test results. The NYDOH fact sheets identify specific contaminants of concern and the

reportable detection limits associated with those contaminants, health risks associated with exposure to the contaminants, as well as e-mail addresses and phone numbers where tenants can obtain more information. Upon request, the owner must also provide the tenant with a copy of the test results.

If a subject property has engineering controls in place to mitigate indoor air contamination or if the property is subject to monitoring pursuant to an ongoing remedial program, an owner who receives applicable test results from an issuer must also provide prospective tenants with a NYDOH fact sheet, and, if requested, test results, prior to the execution of a lease. The notice to prospective tenants must include, in at least 12-point type in bold face, the following statement on the first page of the lease: "NOTIFICATION OF TEST RESULTS The Property has been tested for contamination of indoor air: test results and additional information are available upon request."

The new law does not require owners to notify tenants or prospective tenants if the subject test results were provided by a party who is not an issuer. That said, we note that a landlord who possesses test results identifying indoor air contamination, even if obtained from a party who is not an issuer, may have a common law duty to notify affected parties.

¹ ECL § 27-2405 (2008 N.Y. Laws ch. 521).

² Indoor air is often impacted by the vapor intrusion of VOCs from soil and groundwater contamination.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this memorandum, you may contact your regular Shearman & Sterling contact person or any of the following:

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