Paul Hastings
StayCurrent
A CLIENT ALERT FROM PAUL HASTINGS

New York State To Require Notification To Tenants Regarding Indoor Air Issues

BY DAVID J. FREEMAN AND JESSE HINEY

On September 4, 2008 Governor Paterson signed legislation obligating landlords to disclose to existing and prospective tenants, in certain specific circumstances, test results that indicate exceedances of New York State Department of Health ("**DOH**") or U.S. Occupational Safety and Health Administration ("**OSHA**") guidelines for indoor air quality. The law is set to become effective on December 4, 2008. Failure to comply with the notification provisions subjects landlords to penalties of up to $500 per violation, per day.

Affected landlords are those who are, or receive test results from,

- parties subject to a DEC consent order;
- "participants" conducting cleanup pursuant to a Brownfield Cleanup Agreement; or
- a municipality subject to a contract pursuant to the Environmental Restoration Program;

or who receive sampling results directly from the Department of Environmental Conservation.

The law requires any affected landlord with test results indicating levels of contaminants in excess of DOH or OSHA guidelines for indoor air quality to:

1. provide a fact sheet (generic fact sheets are to be developed by DOH) identifying the contaminant of concern and a means to obtain more information, as well as timely notice of any required public meetings to be held to discuss such results; and

2. provide, upon request, the test results and any closure letter within 15 days of receipt of such results.

The same notice requirements are applicable to landlords at sites that implement engineering controls or are being monitored as part of a remedial program to address prospective impacts to vapor intrusion. In addition, these locations must include, on the first page of any lease or rental agreement, the following language in 12 -point bold face type, **"NOTIFICATION OF TEST RESULTS THE PROPERTY HAS BEEN TESTED FOR CONTAMINATION OF INDOOR AIR: TEST RESULTS AND ADDITIONAL INFORMATION ARE AVAILABLE UPON REQUEST".**

Notably, the "test results" subject to notification include not only tests of indoor air itself, but also subslab air, ambient air, subslab

groundwater and subslab soil samples. How landlords are to make a determination of whether such samples "indicate exceedences" of the relevant guidelines is not made clear. This ambiguity is fertile ground for future controversy and potential litigation.

DOH and OSHA have guidelines relating to indoor air quality for a broad spectrum of toxic and hazardous substances. OSHA standards, geared to occupational exposures, are relatively unlikely to be implicated by these new requirements. The main impact of the law is undoubtedly going to be on testing for tetrachoroethylene (PCE) and trichloroethylene (TCE), for which DOH issued guidelines in 2006.

The legislation does not distinguish between the types and uses of rented space. Tenants would receive the same notice whether they were occupying a 15th floor of a multi-tenant, high-rise apartment; renting a single family home; or themselves operating a dry cleaning facility.

The legislation does not expressly require that landlords take action to remediate or otherwise address the identified air quality issues. However, it can be expected that adverse publicity, the impact on marketability of the tenant space, lease provisions and/or the threat of personal injury litigation will in many cases force landlords quickly to address the contamination problems for which disclosure is required.

More generally, this new law, in combination with regular indoor air testing required by "green building" legislation in various jurisdictions and certification and re-certification obligations under the Leadership in Engineering and Environmental Design (LEED) standards, is likely to increase attention paid to the quality of indoor air in commercial and residential buildings.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

New York

David J. Freeman
212-318-6555
davidfreeman@paulhastings.com

Jesse Hiney
212-318-6578
jessehiney@paulhastings.com