

Real Estate and Environmental Alert: New York Landlords Now Required to Notify Tenants of Indoor Air Quality, Groundwater and Soil Test Results

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Concern about indoor air contamination has resulted in recent legislative action upping the ante for residential and commercial property owners in New York State. A new law requires owners (including their managing agents or other representatives) to notify tenants within 15 days of receiving any test results that indicate there could be an indoor air issue. If a property owner already possesses such test results, even if a property has reached regulatory closure, the landlord may be required to notify tenants on December 3, 2008, the date the new law takes effect.

Data from testing indoor air, ambient air, and slab air, as well as slab groundwater and slab soil samples, must be disclosed to tenants if the readings exceed numbers set by the New York State Department of Health (DOH) or the Occupational Safety and Health Administration. The tenant notice is to include a fact sheet using a form to be developed by the DOH, which will include at minimum the contaminants of concern, comparison numbers set by the regulatory agencies, health risks associated with exposure to the contaminant and a means to obtain more information on the contaminant. Tenants also must be given "timely notice" of any public meetings required to be held to discuss the test results and upon request must be provided with the test results themselves and any closure letter.

Such information could create concern among tenants even where no significant risk to tenants is likely or test results have not been validated or fully analyzed. For example, slab data could confirm the presence of contamination under a building, but until indoor air itself is tested, regulatory comparison numbers serve only as predictors under extremely conservative assumptions. In addition, indoor air test results are often difficult to interpret because of indoor contributors, such as paint, carpeting, dry-cleaned clothes, cleaning supplies and the like. It is not yet clear whether the DOH will seek to regulate or guide provision by landlords to tenants of other information to put the results into context and, where appropriate, alleviate tenant concerns. Certainly before the law goes into effect in December, landlords will want to have a proactive plan for presenting the required current and future information to tenants.

Finally, for property that either has an engineering control in place to mitigate indoor air contamination or is subject to ongoing monitoring under a regulatory cleanup program, additional requirements apply. Before any lease or rental agreement is signed, the landlord must not only provide broad information on prior indoor air-related test results, but must also place the following notice in the lease in at least 12-point type in bold face on the first page: **"NOTIFICATION OF TEST RESULTS. The property has been tested for contamination of indoor air: test results and additional information are available upon request."**

There are several aspects of the new law that are ambiguous. For example, the law does seem to subject properties that have achieved regulatory closure to this new notification requirement, since in addition to the data, landlords must make available to their tenants a copy of any "closure letter." This raises the troubling specter of landlords being forced to reopen their own regulatory cases through pressure from tenants or their consultants who may not be comfortable relying on an official "No Further Action" status from the state agency. Mintz Levin's Real Estate and Environmental attorneys will be closely tracking the work of New York's Department of Environmental Conservation and DOH over the next several months as they begin to interpret and enforce the new law and refine the rules for its implementation regarding this and other key issues for which the statutory language is less than clear.

Since the requirements of the new law will be effective soon, property owners should now determine whether they have data implicated by these new requirements. We stand ready to assist you in determining whether or not the new requirements apply to your circumstances and, if so, to devise a strategy to comply with these requirements through appropriate notices and lease provisions while at the same time minimizing unnecessary tenant alarm and risk of liability or litigation.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

Jeffrey A. Moerdler
(212) 692-6700
JAMoerdler@mintz.com

Marilyn Newman
(617) 348-1774
MNewman@mintz.com

Susan P. Phillips
(617) 348-1713
SPhillips@mintz.com

David M. Alin
(212) 692-6294
DAlin@mintz.com

Ralph A. Child
(617) 348-3021
RChild@mintz.com

Stephen E. Friedberg
(212) 692-6875
SEFriedberg@mintz.com

Stuart A. Offner
(617) 348-4411
SAOffner@mintz.com

Jeffrey R. Porter
(617) 348-1711
JPorter@mintz.com

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