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REAL ESTATE

Business Advisory

OSHA REGULATIONS ON ASBESTOS

In 1995 the Occupational Safety and Health Administration ("OSHA") promulgated regulations on asbestos that affect many "building owners" (hereinafter defined). While a building owner is often subject to OSHA regulations in its capacity as an employer, this was the first time that OSHA regulations regulated a building owner as an owner. Although these regulations, which govern "general industry", as defined in the OSHA regulations, were first published over a decade ago, they have been amended as recently as 2005.

One of the regulations, commonly referred to as the "communications rule", obligates both employers and "building owners" to inform certain employees of the presence and location of asbestos containing materials ("ACM") in many work areas. The largest segment of employees who must receive notice are those that perform general housekeeping and/or maintenance activities. Only those work areas that contain either actual ACM or presumed asbestos containing materials ("PACM") are affected by the communications rule.

The communications rule may affect a business even if it does not own legal title to property. A "building owner" is defined by the regulations as "the legal entity, **including a lessee**, which exercises control over management and record keeping functions relating to a building and/or facility in which

activities covered by [the asbestos rules] take place." Thus, many tenants and property managers could be considered building owners for purposes of the OSHA asbestos regulations. On the other hand, the definition probably does not cover legal entities that hold bare legal title to property. For example, a ground lessor probably would not be defined as a "building owner," and probably would not have any obligations under the asbestos regulations.

Pursuant to the applicable regulations, OSHA **presumes** that buildings constructed prior to 1981 have ACM to the extent that they contain either thermal system insulation or surfacing material. Thermal system insulation means insulation applied to pipes, fittings, boilers, breaching, tanks, ducts or other structural components to prevent heat loss or gain. Surfacing material means material that was sprayed, troweled-on or otherwise applied to surfaces, such as acoustical plaster on ceilings. It is important to note that asphalt and vinyl flooring material installed prior to 1981 are PACM.

The communications rule created several requirements for building owners. Building owners **must determine** the presence, location and quantity of PACM in the work areas of their buildings. They **must inform** their tenants of the presence and location of any ACM or PACM in

areas that the tenant's employees perform maintenance or housekeeping activities. They also **must maintain** records of that information and give those records to successive owners.

OSHA also regulates a building owner during asbestos-related construction activity. **Before any such activity begins**, a building owner must notify the following persons of the presence, location and quantity of ACM or PACM: (i) prospective employers bidding for work whose employees may work in or adjacent to areas containing such materials; (ii) the building owner's employees who will work in or adjacent to those areas; (iii) on multi-employer sites, all employers whose employees will work in or adjacent to those areas; and (iv) tenants who may be affected or who may be in affected areas. Thus construction or remodeling by or for a tenant may trigger a variety of due diligence and/or notification requirements.

Building owners are also required to post signs in mechanical rooms and areas in which employees reasonably can be expected to enter if the room or area contains either ACM or PACM. Generally, a sign must identify the material which is present, its location and the appropriate work practices that, if followed, will ensure that the material will not be disturbed.

Building owners can avoid the communications rule concerning PACM by having certain tests



performed by qualified persons. Building records may not be used to rebut the presumption of ACM.

A building owner must exercise “due diligence” in complying with the communication rule. Due diligence is not defined in the communication rule. The rule does not specifically require a building owner to physically survey its buildings to determine the presence, location and quantity of ACM or PACM. Other methods may be allowed, as long as the due diligence requirement is met. However, if any asbestos survey is performed and ACM or PACM is identified, a failure to properly manage

the material and/or communicate its presence may increase the potential liability of a building owner, not just for possible OSHA violations, but also for a toxic tort suit for exposure to asbestos.

Depending on the provisions of its leases, a building owner may be able to demand that its tenants inform the building owner of any ACM or PACM in their work areas. However, a building owner would not be able to shift liability either for a violation or in any litigation regarding asbestos contamination. Every building owner should maintain and update its own records concerning ACM and PACM.

As a reminder, this Advisory is meant to draw your attention to issues and is not intended to replace legal counseling.

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