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Tell Me More: New Landlord Disclosure Requirements in 2013

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Commercial landlords in California will have two new and unusual mandatory disclosures in 2013. The first disclosure goes into effect on July 1, 2013, and addresses whether a property has been inspected for disability access by a Certified Access Specialist (CASp) — and whether the premises passed. The second disclosure concerns historic energy usage at a leased property, and goes into effect on July 1, 2013 (though this is phased in over 18 months, depending on property size).

Landlords should make certain that their leasing attorneys and property managers are prepared to meet these new obligations now, to avoid potential liability down the road.

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Accessibility Disclosure

Commercial landowners in California are well aware of the problem of "professional litigants" who demand monetary compensation from owners and tenants under disability access laws. Until recently, landlords and tenants had exposure to these suits even in newly built structures that had passed all inspections and received certificates of occupancy; such facts did not provide a safe harbor for landlords to bar claims of access restrictions and resulting demands for compensation.

To help landlords, and to help stem the tide of these lawsuits and threatened lawsuits, the California legislature has enacted two related measures. The first addresses the lawsuits themselves, by instituting various disclosure requirements, limiting "stacking" of multiple claims and pre-lawsuit demands for compensation, and adjusting the potential monetary damages. The second measure imposes a new disclosure requirement on commercial landlords by requiring a statement as to whether the leased property has been inspected by a CASp.

Starting on July 1, 2013, Civil Code Section 1938 will require every "commercial property owner or lessor" to state on the lease itself, whether the property has been inspected by a CASp, and if so, whether the CASp did or did not determine whether the property met all applicable construction-related accessibility standards. This statute appears to apply to any commercial lease, and so the CASp inspection disclosure will be required on every lease, from a 400 square foot kiosk to a 400,000 square foot warehouse.

This disclosure is designed, in part, to help landlords because possession of an approved CASp report allows landowners to ask a court to stay disability access lawsuits, and reduces the applicable damages in the event a court rules in the plaintiff's favor. However, this disclosure imposes additional burdens. The first is obtaining the CASp report itself; and if the report shows any failings in the property's access, then the landowner will need to address those (or face questions from a tenant as to why it is being asked to take possession of non-conforming premises).

Past Energy Disclosure

Starting in 2013 landlords will also be required to disclose a non-residential property's energy use data for the

prior 12-month period; the property's operating characteristics; and the property's Energy Star Portfolio Manager ratings. (Note, this requirement also applies to the sale, finance, or re-finance of non-residential properties.) Fortunately, unlike the access disclosure, the energy use disclosure applies only to the lease of an entire building, so commercial landlords will not have to issue energy use reports for each demised space in a multi-tenant building or shopping center.

This disclosure obligation will go into effect in stages over the course of 2013 and 2014, depending on the square footage of the building on the property:

- July 1, 2013, for buildings with more than 50,000 square feet;
- January 1, 2014, for buildings with more than 10,000 square feet, and
- July 1, 2014, for buildings with at least 5,000 square feet.

Timing requirements under the new regulation are strict. Disclosure must occur "no later than 24 hours prior to execution of the lease".

Landlords may want to begin proactive measures now to begin compliance with the energy use disclosure regulation, even though a future sale, lease, finance or refinance may be months away. To accomplish the mandatory disclosure, the landlords will establish an account at the Energy Star Portfolio Manager website, run by the U.S. EPA. Setting up this account will require a variety of information, including the owner's name and address, building address and year of construction, a list of all sources of energy, and a description of the space usage in the building. The Portfolio Manager account must be set up "at least 30 days before disclosure is required." Given that disclosure is required prior to signing a lease, landlords should strongly consider setting up Portfolio Manager accounts now for all of their properties, so that they are prepared to meet the disclosure deadlines promptly when required to do so, rather than rush to comply at the last minute.

The applicable utility(ies) serving the building will input energy use data into the account, and the landlords will authorize those utility(ies) to release the energy use data to third parties. The utilities are to keep and maintain the energy use information in a manner that preserves the confidentiality of utility customers; this includes aggregating accounts if a building has more than one utility account (though this "protection" may be moot in many situations, such as when there is one anchor tenant that is separately metered, and the remaining shops all draw power under the owner's account - in such a case, the anchor's usage will be clear regardless of efforts to preserve confidentiality).

Once disclosure of the initial energy use data and ratings has occurred, the owner has no obligation to update the data going forward, nor to provide additional energy use data (although presumably if a lease falls through and a new one is commenced with a new third party, an updated energy use disclosure will be required). Finally, it is important to note that the regulations explicitly state that they do not modify an owner's duties with respect to any other mandatory disclosures that might be applicable, nor an owner's traditional common law obligations. In other words, a landlord could still be found guilty of fraud under a sales agreement if the owner fails to disclose certain known facts about latent defects in a building's energy envelope or HVAC system, even though the seller made the obligatory energy use disclosures under this new regulation.

Unknowns for the Future

These new regulations create a number of questions:

- Neither regulation identifies penalties for non-compliance or remedies that apply to a prospective tenant if a landlord fails to make a mandatory energy use disclosure or CASp inspection disclosure.
- Neither regulation identify civil penalties or fines, so it is likely that a failure to abide by the regulations (and underlying statute) would be an ordinary statutory misdemeanor from the perspective of state enforcement. For private parties, it is conceivable that a tenant could use non-compliance as an excuse to back out of a transaction, without repercussion. We will have to await court decisions on this issue before the penalties of non-compliance becomes more certain.
- Given the many permutations of how property may be divided and developed, there will be uncertainty (and potentially litigation) over the scope of required disclosure. For example, the energy use regulations speak only to the square footage of "a building" and not the entire square footage built on a given parcel. Taken at face value, this implies that the owner of one parcel that contains multiple buildings under 5,000 square feet each will not need to disclose past energy use for the parcel or any of the individual buildings, even if the aggregate square footage of the buildings is greater than the 5,000 square foot threshold.
- The CASp disclosure requirement is also ambiguous in stating that it applies to a "commercial property owner or lessor". Questions will undoubtedly arise as to whether that phrase includes any non-residential use (such as offices, industrial buildings, warehouses, and the like), or whether it is limited to shopping centers and retail leases. Certainly it would be onerous and wasteful for the law to apply to an agricultural lease, for example, yet such a lease might be considered a "commercial" lease.

We will have to await litigation in the courts or further acts of the legislature before questions such as these can be answered with any certainty.

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