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## Commercial Lease Alert: New Access Law Disclosure Requirements In Leases Effective January 1, 2017

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Friday, December 23, 2016

Under current California law, commercial real property owners are required to state in every lease agreement whether the property leased has undergone inspection by a Certified Access Specialist (“CASp”) and, if so, whether the property has or has not been determined to meet all applicable construction-related accessibility standards. [*California Civil Code Section 1938*]. Effective immediately, additional commercial lease accessibility disclosures are required.

**Here are the important points commercial landlords need to know and the action that must be taken to comply with this updated California accessibility law:**

- California law does NOT require commercial landlords to obtain a CASp report. In deciding whether to obtain a CASp report, a number of factors need to be considered and consultation with counsel is advisable.
- If (a) a CASp inspection report has been obtained for the purpose of compliance with construction-related accessibility standards, and (b) to the best of the applicable landlord’s knowledge, there have been no modifications/alterations completed prior to the date of the lease which impacted compliance with accessibility standards, the landlord is required to deliver to tenants a copy of the available CASp report at least 48 hours prior to lease execution. The landlord may condition delivery of the CASp report upon the agreement of tenant to maintain the confidentiality of the report. *If a tenant is not provided with an applicable inspection certificate or report, the tenant may rescind the lease agreement within 72 hours after lease execution.* \*\*\*\***PRACTICE TIP:** It is advisable to consult with counsel to determine whether any accessibility survey, including those conducted by prior owners or other tenants, is a CASp report subject to disclosure. Accessibility surveys are done for multiple purposes, including compliance with the ADA, state law, valuation, and/or estimating construction cost, and disclosure may waive any applicable attorney client and/or work product privilege attached to the survey.
- If a landlord has obtained a pertinent CASp inspection report which indicates that the premises meet applicable construction-related accessibility standards, the landlord must also provide to the tenant within 7 days following execution of the lease, a copy of the current disability access inspection certificate **and any other inspection report not previously provided.** \*\*\*\***PRACTICE TIP:** If this requirement is applicable, it is advisable to include in the applicable lease agreements an acknowledgement stating that the tenant has received that inspection certificate and/or report, and an agreement by the receiving tenant to keep the contents of that CASp report confidential. However, it is unlikely that a confidentiality provision would prevent disclosure in any subsequent access lawsuit, and landlords should also be aware that CASp inspections may have been conducted by prior owners or other tenants who may not be bound by confidentiality provisions.
- If (a) a commercial property has not undergone an applicable CASp inspection, or (b) the property has been altered or modified between the date of inspection and the date of the lease or rental agreement, a landlord is required to inform the tenant of its right to request a CASp inspection pursuant to California Civil Code Section 1938(e). \*\*\*\***PRACTICE TIP:** If this requirement is applicable, the applicable lease agreement should include the sample provision provided under “Recommendations” below.



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- Although a landlord cannot prohibit a CASp inspection from being performed, a landlord can restrict a tenant from obtaining a CASp inspection prior to the landlord's approval of the scope and timing of such inspection. Landlords should consider restricting the scope of the survey to the area being considered for leasing by the tenant.
- Making any repairs or modifications to correct violations of construction-related accessibility standards noted in a CASp report are presumed to be the responsibility of the property owner unless otherwise mutually agreed by the landlord and the tenant. Landlords should carefully consider these potential costs before performing, or consenting to, any CASp inspection of the property.

## **Recommendations**

- In order to comply with these new legal requirements, we recommend in all commercial leases for which the landlord has obtained a CASp inspection report for the purpose of compliance with construction-related accessibility standards, a sample provision be included similar to the following:

CASp Disclosure Information. It is acknowledged that California law requires building owners to disclose to prospective tenants any inspection reports obtained from a certified access specialist ("CASp") regarding compliance of the subject property with the applicable construction-related accessibility standards under state law prior to the execution of a lease agreement (see California Civil Code Section 1938, "CASp Disclosure Requirements"). Tenant hereby acknowledges receipt of the documents required to be delivered by Landlord in order to comply with the CASp Disclosure Requirements applicable to the Project (the "CASp Information"). Tenant acknowledges and agrees that the CASp Information is provided for the sole purpose of complying with the CASp Disclosure Requirements and shall not be deemed or construed as a representation or warranty under this Lease and may not be relied upon as a representation of current or future compliance with the applicable construction-related accessibility standards under state law. Tenant further covenants and agrees to keep the CASp Information strictly confidential and shall not disclose anything contained therein to any other parties without the express written consent of Landlord.

- If a landlord has not obtained a CASp inspection report for the purpose of compliance with construction-related accessibility standards, or modifications/alterations have been performed after the date of such report, the following is a sample provision for addition to a commercial lease:

Required Accessibility Disclosure. Landlord hereby advises Tenant that the Project has not undergone an inspection by a certified access specialist, and except to the extent expressly set forth in this Lease, Landlord shall have no liability or responsibility to make any repairs or modifications to the Premises or the Project in order to comply with accessibility standards. The following disclosure is hereby made pursuant to applicable California law:

"A Certified Access Specialist (CASp) can inspect the subject premises and determine whether the subject premises comply with all of the applicable construction-related accessibility standards under state law. Although state law does not require a CASp inspection of the subject premises, the commercial property owner or lessor may not prohibit the lessee or tenant from obtaining a CASp inspection of the subject premises for the occupancy or potential occupancy of the lessee or tenant, if requested by the lessee or tenant. The parties shall mutually agree on the arrangements for the time and manner of the CASp inspection, the payment of the fee for the CASp inspection, and the cost of making any repairs necessary to correct violations of construction-related accessibility standards within the premises." [Cal. Civ. Code Section 1938(e)]. Any CASp inspection shall be conducted in compliance with reasonable rules in effect at the Building with regard to such inspections and shall be subject to Landlord's prior written consent.

- The lease provisions referenced above are sample provisions only, and represent a possible format for addressing this new legal requirement. Actual lease language will vary based upon individual needs and concerns, and it is advisable to consult with counsel to confirm the appropriate terms for your lease documents, and also to advise as to whether a CASp inspection report is subject to disclosure requirements. Counsel should also advise with regard to the proper scope and specificity of Landlord's building rules and regulations, including the guidelines and requirements referenced in the sample provisions above with regard to conducting CASp inspections.
- Landlords and owners of property in San Francisco should note that the notice required pursuant to California Civil Code Section 1938(e) is in addition to the notice required to be provided to small business tenants under Chapter 38 of the San Francisco Administrative Code. Accordingly, all leases of 5,000 square feet or less for space in the City of San Francisco must contain a separate Disability Access Obligations Notice.

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