



Asbestos abatement: New regulatory requirements on New York's building owners

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As you may know, the N.Y. Dept. of Labor amended those parts of the Industrial Code Rule 56 relating to asbestos abatement. These amendments became effective on Sept. 5, 2006. Many of the changes merely brought N.Y. up-to-speed with the more stringent federal regulations. At least one change is truly a "new" requirement.

Air sampling on an asbestos abatement project may no longer be performed by the asbestos abatement contractor involved in the project. It is now the owner's responsibility to hire a third party asbestos air sampling specialist to conduct the mandatory project air sampling. The third party specialist must be "completely independent" of all asbestos abatement contractors involved with the project.

The idea behind the rule is clear. The Dept. of Labor wants an expert, independent of the contractor actually performing the work, to certify that the abatement project is being performed in compliance with state and federal air quality mandates. This will ensure that the job is done right.

The reason for the change is the potential for a conflict of interest should the asbestos contractor hire the air sampling firm. Under the new rule, asbestos contractors will not bear the risk of this potential conflict of interest. Instead, the owner is obligated to hire the independent air sampling contractor. Management costs and effort on the part of the owner are increased.

The Dept. of Labor has recognized this additional cost. It has passed an additional rule which provides that the project monitor or project designer on the asbestos project, is considered completely independent and may also be retained to perform the air sampling tests.

The Dept. of Labor suggests off-setting this cost by hiring the same contractor to act as the project monitor and the air sampling monitor. That way building contractors can take advantage of the "two-for-one" deal, which the new rule limits.

The new rule makes good sense. The potential for liability associated with a non-compliant abatement may be minimized by having an independent contractor perform the air sampling. In 2003, a jury in N.Y. County awarded a plaintiff over \$45 million after he contracted mesothelioma as a result of asbestos exposure. Though this verdict was somewhat higher than a typical asbestos verdict, the property owner involved was held 17% liable. Compare that to the 1% apportionment of liability which the jury gave to most of the manufacturers of the asbestos containing products the plaintiff came into contact with. (See, *Croteau v. Consolidated Edison Co., et. al*, N.Y. County, March 23, 2007).

As more and more asbestos manufacturers dissolve or become insolvent, the courts have recognized that property owners can be liable under premises liability theory. Consider the explosion of litigation in the lead paint context where property owners have been held liable for decades old paint containing lead.

As a building owner, if you become involved in an asbestos abatement project, be advised that it is your responsibility to hire an independent contractor to perform the air sampling tests. The NYS Dept. of Labor has made this rule mandatory as of Sept. 5, 2006. Having an independent air sampling contractor may save you the costs of dealing with a non-compliant abatement.

If you believe that your property may be a target for liability arising out of asbestos exposure, you may also wish to review past asbestos abatement projects to be sure that the job was done right. Keep close track of any notice of a potential claim which you may have received and be sure to contact your liability insurance carrier immediately regarding any actual or potential claims. Feel free to retain your own counsel specializing in asbestos issues. Remember that the new regulations place new requirements upon building owners. The more aware you are of these new requirements, the better equipped you will be to respond to asbestos on your property.

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