MILLER STARR REGALIA

NOVEMBER 13, 2016

Legal Update: New California Law Regarding Disclosure Of Disability Access Compliance In Commercial Real Property Leases

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Beginning January 1, 2017, revisions to current California law will expand the disclosure requirements and the responsibilities of landlords and rights of tenants regarding the compliance of commercial real property with disability access laws. We encourage all of our existing and prospective clients to discuss the new law with us if they are planning to enter into a new lease of California commercial real estate on or after January 1, 2017, whether as landlord or as tenant.

Current Law

Presently, California Civil Code Section 1938 requires commercial landlords to state in every lease executed on or after July 1, 2013, whether the property being leased has been inspected by a Certified Access Specialist (CASp) and, if so, whether or not the property meets all applicable construction-related accessibility standards.

What is CASp Certification?

Places of public accommodation – including most California businesses open to the public – must comply with federal and state laws governing accessibility to persons with disabilities. Failure to comply with these standards can expose landlords and tenants to expensive and burdensome lawsuits by individuals with disabilities who experience hardship as a result of the non-compliance. These types of lawsuits are particularly prevalent in California because of state laws that allow private individuals to sue for substantial damages in addition to the injunctive relief (meaning court orders to correct the violations) available under the federal Americans with Disabilities Act. The damages ordinarily include minimum statutory damages of $4,000 per incident, per plaintiff.

California's CASp program provides a system under which landlords and tenants may have their commercial properties inspected for violations of disability access requirements by a licensed CASp and certified as compliant if found to be so by the CASp. If the CASp finds a property to be non-compliant, then the landlord or tenant may remedy any violations found to exist. Although the CASp program is voluntary, by undertaking a CASp inspection landlords and tenants are entitled to certain protections if sued for disability access violations. For example, minimum statutory damages can be greatly reduced and the defendant may ask for a stay of the lawsuit pending a mediation session with the court. This can greatly reduce the overall cost and burden of litigation.

The New Law

Effective January 1, 2017, the State of California has expanded Civil Code Section 1938 in several ways:

1. If the property being leased has been CASp inspected and, to the knowledge of the landlord the property has not been altered since the inspection in a way that impacts accessibility compliance (meaning the report remains accurate), then the landlord must provide the tenant with a copy of the CASp report prior to execution of the lease. The tenant must first, however, agree to keep the report confidential except as necessary to complete the necessary repairs and corrections that the tenant agrees to make.

2. The new law creates a presumption that any repairs and modifications needed to correct identified violations are the responsibility of the landlord, unless the parties agree otherwise.

3. If the landlord does not give the prospective tenant an opportunity to review any existing CASp report at least 48 hours prior to execution of the lease, then the prospective tenant may rescind the lease for 72 hours *after* the lease is signed.

4. If the property has been CASp inspected and found to be compliant, then the landlord must provide a copy of the CASp compliance certificate obtained from the inspector and a copy of the report within 7 days after execution of the lease.

5. If a CASp compliance certificate has not been issued for the property, then the lease must include the following language:

"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."

Landlord Considerations

Full compliance with access disability laws is important both from a legal and social perspective. The CASp program was designed to encourage compliance by providing benefits in litigation. The changes to Section 1938 can, however, create strategic issues for landlords who are in the process of negotiating a commercial lease.

- To begin, the inspection report is only the first step necessary for landlords and tenants to avail themselves of the protections offered by Section 1938, ultimately, all necessary corrections will need to be made to obtain the litigation defense benefits.

- A "clean" CASp certificate can make the property more desirable in a competitive market. Conversely, obtaining the report can have an adverse effect on marketability prior to completion of the necessary corrections. Therefore, care must be taken in deciding whether or not to undertake a CASp inspection if lease negotiations are likely to occur in the near future.

- Although the new law allows the parties to negotiate the responsibility for repairs, that responsibility is initially presumed to rest with the landlord, and the law requires the landlord to advise the tenant accordingly. Tenants might attempt to use the legal presumption to their advantage in negotiations. Regardless, the outcome of the negotiation is a matter of bargaining leverage and adds to the time and expense of lease negotiations. Of course, if the landlord chooses to forego the CASp inspection based upon these strategic considerations, the landlord will lose the benefits of the CASp program unless the tenant agrees to assume responsibility for the report and any necessary repairs.

Tenant Considerations

The new law creates strategic concerns for the tenant as well. For example:

- Because the allocation of responsibility for repairs is negotiable, a tenant lacking bargaining power may end up with the responsibility to correct any violations. A tenant might therefore want to consider whether or not it wants to obtain a report on its own.

- Accepting delivery of property in its "as-is, with all faults" condition might result in the tenant later becoming responsible for corrections if a CASp inspection is conducted during the lease term after a lawsuit is filed. It might be more beneficial from a lease negotiation standpoint for the tenant to know what will be required and to negotiate responsibility for corrections before entering into the lease.

- Since the tenant will also likely be named in any disability access lawsuits, the tenant similarly stands to benefit from the advantages of a "clean" CASp certificate.

- If the tenant has bargaining power with the landlord, the tenant might want to bring disability access issues into the forefront before signing the lease.

What to Do Next?

The language required in new commercial leases is only the tip of the iceberg. There are significant cost and liability considerations that will affect leasing strategy for both landlords and tenants. Miller Starr Regalia leasing attorneys are happy to discuss the requirements with you, either generally or with regard to a specific commercial leasing opportunity. Please feel free to contact the authors of this client alert or any one of our other leasing attorneys for more information.

For more information regarding this legal update, please contact David Kanel at david.kanel@msrlegal.com or Kevin Corbett at kevin.corbett@msrlegal.com.

Miller Starr Regalia
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