

12 Ways to Cut Risk of Indoor Air Quality Problems

Indoor air quality (IAQ) problems are showing up in office buildings and shopping centers around the country. IAQ problems vary widely and can arise from something you do, or something a tenant does. For instance, a faulty HVAC system may circulate contaminated air through the building or center. Or new carpeting installed by a tenant may emit toxic fumes. When a problem like one of these occurs, tenants or their employees may sue you for their real or perceived injuries or for other damage related to the problem.

Will your lease help you prevent a situation like this from developing or protect you if it does? Not if it's like the typical lease. Most leases don't address IAQ problems directly. And many of those that do don't cover all the issues.

We'll give you a checklist of protections you can add when preparing a lease. This checklist includes ways you can cut your risk of an IAQ lawsuit, delegate many IAQ obligations to the tenant, and monitor and manage IAQ in the tenant's space. There's also Model Lease Language you can use to implement many of these protections.

Typical IAQ Lawsuits

Many different situations can lead to IAQ lawsuits by tenants, their employees, or others who use the building or center. For example, if a tenant discovers an IAQ problem in its space, the tenant may sue you, claiming that you violated the lease because the space wasn't in good condition.

Or if people in your building or center become sick from an IAQ problem, they may claim it resulted from "sick building syndrome" and sue you for damages. For example, employees of an office building tenant are currently involved in a class action lawsuit against a building owner. The employees claim that they suffered the effects of poor air quality caused by "sick building syndrome" in the building [Klocke v. A & D Limited Partnership].

Some IAQ problems you may get sued for could be your fault. For example, if you don't maintain the HVAC system, it could end up polluting the entire building and making the building's occupants sick.

But tenants may also cause problems for which you could get sued. A building owner is a prime target of a "sick building syndrome" lawsuit, even if a tenant caused the IAQ problem, points out attorney Jeffrey A. Margolis, a New York City commercial leasing specialist. That's because many tenants' employees would rather sue you than the tenant to avoid workers' compensation limits on claims against their employer or to avoid creating bad relations with their employer.

Even more nerve-racking, your insurance may not cover

you if there's an IAQ problem. Look at what happened to a Florida owner: An office tenant's employees sued the owner, claiming that air contaminants from a poorly designed air-conditioning system caused them to suffer from illnesses related to "sick building syndrome." The employees tried to settle with the owner's insurance company, but the insurance company refused to settle, claiming that the owner's insurance policy didn't cover pollution. The insurance company then sued the owner, claiming that it had no duty to cover the owner for these claims. The owner responded that the pollution exclusion in its policy didn't apply because the owner wasn't the "polluter." But the court ruled that the insurance policy was clear—the insurer had no duty to cover or defend the owner [West American Ins. Co. v. Band & Desenberg].

Cut Risk of Lawsuit

Include the following lease provisions that cut your risk of an indoor air quality lawsuit:

Tenant Takes Space 'As Is'

Try to get the tenant to agree in the lease to take the space "as is"—that is, with any existing defects or problems, advises Robert Infelise, a partner in the Los Angeles law firm of Cox, Castle & Nicholson. By requiring a commercial tenant to take space "as is," the tenant can't make a claim that any IAQ problems existed at the time the lease was signed, explains Jeffrey Masters, a partner in the same law firm.

To do this, Margolis suggests, ask your attorney about including the following language in the lease:

Model Lease Language

Tenant has fully investigated the condition of the Premises or waived its right to do so and is fully familiar with the physical condition of the Premises and every part thereof, including, without limitation, the indoor air quality (IAQ) generally, and the HVAC system, and Tenant accepts the same "as is."

Compromise strategy. The tenant may agree to accept the space "as is" only if testing is done first to determine if there are any IAQ problems in the space, says Infelise. If you agree to this testing, try to get the tenant to pay for it—or at least split it with you, adds Masters.

No Representations or Warranties

Say in the lease that you've made no express or implied promises in legal terms, "representations" in the lease as to the condition of the space or building, says Kenneth M. Block, a partner in the New York City law firm of Brown Raysman & Millstein. In other words, you're not promising

that no IAQ problems exist in the space or with any of the building systems such as the HVAC at the time the lease is signed or that none will appear during the lease term, says Margolis. That protects you against a tenant's claim that you violated an express or implied promise in the lease about the air quality of the tenant's space or the building.

Model Lease Language

Landlord has made no express representations or warranties and disclaims any implied representations or warranties relating to the condition of the [Building/Center], Premises, or any part thereof, including, without limitation, the building systems (including the HVAC system), the IAQ within the [Building/Center], and the environmental condition of the [Building/Center]. Landlord shall not be liable for any latent or patent defects therein.

Compromise strategy. A savvy tenant will probably object to this language—it will insist on some sort of representation that the space and building systems are in decent condition. If you're forced to give in on this point, say in the lease only that no IAQ problems exist in the space and building systems as of the date you sign the lease and only to the best of your knowledge, says Margolis. Also, try to limit what the tenant is entitled to if you violate this representation, says Christine Hubbard, a partner in the Annapolis, Md., law firm of Mulrenin & Hubbard, P.A. Allow the tenant to get only "injunctive relief," she says. That's a legal term meaning that you have to correct the problem but won't owe money to the tenant.

List Tenant Obligations

Try to delegate as much responsibility as possible to the tenant regarding the IAQ of its space by adding the following to the lease:

Require Tenant to Comply with IAQ Laws

There's a good chance that new federal and state laws on IAQ maintenance, monitoring, and remediation will go into effect in the future. Compliance with these laws could be expensive. So make sure the lease makes the tenant responsible for complying with these laws with regard to its space at its expense. Otherwise, it might argue that it's not obligated to do so.

The typical compliance with laws clause in your lease will generally cover these IAQ laws, but it's a good idea to specifically add a reference to them, says Masters. To do this, Masters suggests, add the following language:

Model Lease Language

Tenant shall comply with all current and future federal, state, and local environmental and IAQ laws, regulations, and industry standards, including, without limitation, any restrictions on smoking in the workplace.

Control Tenant's Use

Don't let the tenant's use and operation in the space cause IAQ problems, says Margolis. For example, you don't want a tenant to house a printer that gives off fumes in a room with poor ventilation. So say in the lease that the tenant can't use the space in a way that could cause an IAQ problem or make an existing problem worse. To do this, Margolis and Block suggest including the following use restrictions in the prohibited uses or environmental section of the lease:

Model Lease Language

- The Premises shall not be used for any dangerous, noxious, or offensive trade or business or for any purpose, trade, or business that will adversely affect the IAQ for the Premises or [Building/Center] (including any common areas);
- Tenant will at all times use and operate the Premises in such a manner as to minimize the risk of IAQ problems, "sick-building syndrome," and/or any diagnosable illness that can be identified and attributed directly to contaminants in the [Building/Center];
- Tenant will take all steps necessary to prevent: inadequate ventilation, emission of chemical contaminants from indoor and/or outdoor sources, emission of biological contaminants;
- Tenant will assure adequate ventilation and operation of any HVAC systems and/or office equipment under its control;
- Tenant will not allow any unsafe levels of chemical or biological contaminants (including volatile organic compounds) in the Premises, and will take all steps necessary to prevent the release of such contaminants from adhesives (for example, upholstery, wallpaper, carpet, machinery, supplies, and cleaning agents);
- Tenant will not bring, generate, treat, store, or dispose of any chemicals, materials, or other potential pollution sources without Landlord's prior consent. Notwithstanding the foregoing, the levels of these chemicals, materials, or other potential pollution sources shall not exceed legal limits.

Control Tenant's Alterations and Improvements

Most leases require the tenant to get your approval of its alterations plans. But alterations lease clauses often don't go far enough—they don't make the tenant get your approval of the types of materials that it will use in constructing its alterations, says Hubbard. That means the tenant may use carpeting or paint that cause IAQ problems. Make sure that you require the tenant to get your prior approval to the materials it uses, advises Hubbard. Also, add in the clause that your approval isn't a representation that there are no IAQ problems with these materials, says Block.

Model Lease Language

All materials used in connection with the alteration or refurbishment of the Premises, including, without limitation, paint, carpet, wall, or window coverings, carpet glues, and other chemicals, shall be subject to Landlord's prior written approval. Any such approval shall not be deemed a representation or warranty that the materials so approved are in compliance with laws (including IAQ laws) or that same do not affect the IAQ in the Premises.

PRACTICAL POINTER: Give yourself a right to hire an environmental consultant to review alterations work, says Infelise. This consultant can evaluate the materials and assess their effect on IAQ. You and the tenant can negotiate who will pay the consultant's fee, says Masters.

Tenant's Obligations Survive Lease

Make sure that the lease clearly says that the tenant's lease obligations regarding IAQ will survive the end of the lease. Then, if you discover after the lease ends that the tenant violated its IAQ responsibilities, you can still sue the tenant, Margolis explains.

Get Ability To Manage and Monitor IAQ

It's crucial for you to be able to keep an eye on the IAQ in both the tenant's space and the building. But tenants can make this difficult. So make sure you have the following rights in the lease:

Get Right to Enter Tenant's Space to Inspect

Make sure the lease allows you to enter the tenant's space to conduct tests and correct any IAQ problems that may develop—even if the problem isn't an emergency, says Masters. Most leases give the owner access to the space only if there's an emergency or if it's after business hours. But that's not good enough. A test for an IAQ problem in the space may not give you an accurate reading if it's conducted after business hours, Infelise explains.

Model Lease Language

Landlord shall have the right, but not the obligation, at all times during the Lease Term to inspect the Premises and conduct such tests and investigations (including, without limitation, a Phase I Indoor Air Quality audit) to evaluate the IAQ in the Premises and/or the [Building/Center]. Landlord's entry may be made at any time either during or after Tenant's business hours.

Compromise strategy. The tenant may accept this Model Lease Language only if you agree to first give it reasonable notice before entering the space except in emergencies, says Infelise. And, Masters adds, the tenant may demand a copy of the IAQ test results as well as a rent abatement if it's forced to stay out of part or all of its space during inspection or testing. You'll have to negotiate these points with the tenant. Some tenants will limit the number of inspections to once per year unless you reasonably believe there's an IAQ violation, says Margolis.

Get Right to Look at Tenant's Records, Interview Its Employees

You may want or need to investigate to determine if there's an IAQ problem in the building or space. To do a thorough investigation, make sure you have the right in the lease to look at all of the tenant's paperwork that covers IAQ, such as its documents dealing with its maintenance or monitoring of equipment like the HVAC. Also, give yourself the right to interview the tenant's employees about IAQ complaints.

Model Lease Clause

Tenant will cooperate with Landlord and will, at any time, allow Landlord and Landlord's representatives access to any Tenant's records with respect to the Premises for environmental inspection purposes. Tenant will make available its personnel to

respond to interview questions posed by Landlord, Landlord's representatives, or an environmental consultant.

Set Out Reporting Requirements

Require the tenant to notify you of any change in the IAQ in the space—including any release of contaminants into the air. This will help catch a potential IAQ problem in the earliest stages, says Infelise. And require the tenant to comply with any federal, state, or local environmental reporting requirements and give you copies of all its reports. Also, the tenant should give you notice of any complaints of IAQ problems or illness possibly associated with IAQ by employees. (For a detailed discussion of environmental notifications, see "Keep Tabs on Environmental Condition of Space with Notification Requirement," in *Commercial Lease Law Insider*, September 1996, p. 1.)

Get Tenant to Cooperate with IAQ Management Plan

In the near future it's likely that owners will have to follow certain federal, state, and local IAQ laws on maintenance and monitoring of HVAC. For example, you may be required to shut down the HVAC for brief intervals to change filters or check the air quality. So make the tenant agree to cooperate with any plan you implement in your building or center for monitoring or maintenance of HVAC or other IAQ related equipment whether or not it's required by law, says Margolis. To do this, add the following language to the rules and regulations section of the lease:

Model Lease Language

Tenant shall cooperate in all respects with rules and regulations promulgated by Landlord regarding the management of the IAQ in the [Building/Center] and in the development and implementation of an IAQ management plan for the [Building/Center] that integrates monitoring, operations, maintenance, building staff training, and building renovation activities.

Include IAQ Costs in Operating Expenses

It's crucial to be able to pass through all your costs associated with maintaining and monitoring IAQ in your building or center to the tenants as an operating expense (or CAM cost). But many leases don't give you a clear right to do this. And that can lead to a tenant—or its auditor—arguing that you've inflated the operating expenses. To avoid this problem, make sure the operating expense (or CAM cost) definition in the lease includes the following costs, suggests Block: Monitoring, maintaining, and repairing the HVAC; Hiring an environmental consultant to investigate a suspected IAQ problem anywhere in the building or center; and Remedying any IAQ problems in the building or center. This would include encapsulating a problem area, renovating a building system (like HVAC), or even replacing all or part of the system.

To pass through these costs, says Hubbard, include the following language in the definition of operating

expenses/CAM costs:

Model Lease Language

All costs and expenses relating to monitoring and maintaining suitable IAQ in the building and regularly inspecting, monitoring, maintaining, and repairing the building's HVAC system; hiring outside consultants to investigate and identify the sources of any suspected IAQ problems that may be identified; remedying any such problems; modifying, renovating, or encapsulating any portion of the [Building/Center], building systems, or building components reasonably required to continuously and efficiently maintain acceptable IAQ in the [Building/Center], and complying with any and all local, state, and federal laws, rules, regulations, or real estate industry standards relating to IAQ.

Compromise strategy. Most tenants will try to exclude replacement of a building system from the operating expenses (or CAM), arguing that this is a capital expense. You may have to agree to either exclude these expenses, pass through only the expenses that arise from complying with laws, or amortize them, says Margolis.

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Beware of Tenant-Caused IAQ Problems

A tenant's inadvertent actions may cause IAQ problems that could lead to a lawsuit against you. New York attorney Jeffrey A. Margolis tells some IAQ war stories about tenant's errors that may have led to trouble for owners:

- A tenant's delivery trucks idled outside the building near the air-intake shaft. Carbon monoxide emitted by the trucks was drawn into the building. Many people in a building became sick, and the building had to be evacuated.
- A tenant often complained of noise caused by the exhaust system for the parking garage, located below the tenant's space. The garage attendant would respond by turning off the exhaust system whenever the tenant complained. As a result, carbon monoxide seeped into the tenant's space. Several of the tenant's employees became ill from the high carbon monoxide levels.
- A tenant turned off its HVAC system because the HVAC system made the office too cold. This resulted in high levels of carbon dioxide in the office, which caused several of the tenant's employees to complain of fatigue and dizziness.
- To accommodate a new bathroom light fixture, the tenant cut off an air vent in the bathroom. This trapped air contaminants inside the bathroom. ❖

Legal Citations

Klocke v. A & D Limited Partnership: No. C-920586, 90 Ohio App. 3d 317, 629 N.E.2d 49 (Ohio Ct. App. 1993).

West American Ins. Co. v. Band & Desenberg: No. 94-1646-Civ-T-24(C), 925 F. Supp. 758 (U.S. Dist. Ct. Fla. 1996).

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