

**Landlord Liability for Asbestos Exposure:  
OSHA Regulations**

Exposure to asbestos has long been associated with increased risk of certain forms of cancer, particularly for workers in the asbestos manufacturing industry or in construction jobs involving the use of asbestos materials. More recently, the danger of asbestos in people's homes has also been acknowledged.

Homes built before the mid-1970s often contain asbestos insulation around heating systems, in ceilings and in other areas. Until 1981, asbestos was also widely used in many other building materials, such as vinyl flooring and tiles. Asbestos that has begun to break down and enter the air—for example, when it is disturbed during regular maintenance or renovation work—has the potential to become a significant health problem to tenants.

The EPA uses the term “friable” to describe the culprit—material containing less than 1% asbestos, which can be pulverized or crumbled by hand pressure when dry. Common examples of friable construction materials include acoustic “popcorn” ceilings, heating and air conditioning duct wrap, paper backing of linoleum and wall texturing compounds.

Until quite recently, however, private owners of residential rental property had no obligation to test for the presence of asbestos. A landlord whose tenant developed an asbestos-related disease could successfully defend himself if he could convince the judge or jury that he did not know of the presence of asbestos on his rental property.

Landlords' protection from liability for asbestos exposure all but evaporated on October 1, 1995, when the U.S. Occupational Safety and Health Administration (OSHA) issued a 200-page regulation setting strict workplace standards for the testing, maintenance and disclosure of asbestos. OSHA's regulations require property owners in general industry, construction work and shipyards to install warning labels, train staff and notify people who work in areas that might contain asbestos. In certain situations, owners must actually test for asbestos.

Rental property owners are considered to be part of “general industry” as understood by OSHA, and must adhere to the regulations for general industry in their role as employers of maintenance personnel. This includes large landlords who employ maintenance staff (or managers who do maintenance work) and small-scale landlords who have no employees but who do hire outside contractors for repair and maintenance jobs. OSHA regulations apply to any building constructed before 1981, and apply even if the property owner doesn't plan to remodel or otherwise disturb the structure. Unless the owner rules out the presence of asbestos by having a licensed inspector test the property, it will be presumed that asbestos is present, and the regulations will apply.

**PROPOSITION 65 DISCLOSURES**

Landlords who employ ten or more employees must comply with California's Proposition 65. (Health & Safety Code §§ 25249 and following.) The law does not require you to test for asbestos or other specified harmful chemicals, but if you know that your property contains them, you must inform your tenants. If you're not sure (which is the case for most owners), disclose this, too. You don't have to make any formal disclosures if the property has been tested and has received a clean bill of health.

**a. Levels of OSHA's Protective Requirements**

OSHA protections vary according to the level of asbestos disturbed by the activity being done. For example, workers who are involved in the removal of large amounts of asbestos receive maximum protection, whereas those who merely perform superficial custodial tasks need less.

**• Asbestos exposure in custodial work.**

Employees and contractors whose work involves direct contact with asbestos or materials that are presumed to include it—for example, certain types of floors and ceilings—or who clean in areas near asbestos are subject to OSHA regulations designed for “general industry.” The handyman employee who washes asbestos tiles in the lobby of a pre- 1981 building, or who installs, replaces and tests smoke alarms that are embedded in acoustic-tile ceilings made with asbestos, would fall within this category. The

general industry regulations require the worker to receive two hours of instruction (including appropriate cleaning techniques) and to use special work procedures under the supervision of a trained superior. The general industry standard does not require testing for asbestos. Of course, if it is known that high levels of asbestos are present, even custodial tasks must be performed with appropriately higher levels of protection, such as special masks and clothing.

• **Asbestos exposure in renovation or repair work.** A stricter set of procedures is triggered by any intentional disturbance of asbestos or asbestoscontaining materials (for example, in heating systems or ceilings). This invariably happens when asbestos materials are subject to repair or renovation. At this level of activity, the landowner must test for the presence of asbestos. OSHA's "construction standard" requires exposure assessment (air monitoring for asbestos), sixteen hours of worker training per year, oversight by a specially trained person and respiratory protection in some situations. In addition, employers must conduct medical surveillance of certain employees and maintain specified records for many years. So, for example, a decision to replace that ugly, stained acoustic-tile ceiling would require, first, that the material be tested, followed by worker protection measures that are appropriate to the level of exposure expected by the professional tester.

**b. How OSHA Regulations Affect Tenants**

You may still be wondering what OSHA's workplace regulations for asbestos have to do with your obligations to your tenants, who are not, after all, your employees or hired contractors. The answer, simply put, is that once the pesky genie is out of the bottle, you cannot put him back in. When you comply with OSHA's testing and maintenance requirements for your employees or contractors, and your professional tester discovers that asbestos—a health risk—is either airborne or about to become so, you cannot pretend that you do not know that it is present with respect to your tenants as well. The presence of asbestos, regardless of how you found out about it, becomes simply an undisclosed, hidden and

dangerous defect that you are obligated to disclose to tenants.

If asbestos is present on your property and can be shown to be the cause of a tenant's illness, you may be found liable on legal theories other than failing to disclose a known hidden defect. For example, the presence of airborne asbestos may be argued as a breach of the implied warranty of habitability, which would give the tenant the opportunity to break the lease and move out without notice, pay less rent, withhold the entire rent or sue to force the landlord to bring the dwelling up to a habitable level.

**There is no escaping OSHA's asbestos regulations under the theory that what you don't know about can't cause legal problems.**

Owners of residential rental property may think that they can escape the clutches of OSHA's asbestos regulations by personally doing minor repair and maintenance and hiring independent contractors (whom they hope will ignore the law) to do the major jobs. This may work for a while, until the first law-abiding contractor, who acknowledges his independent duty to protect his employees, lists asbestos testing as a part of his bid. The results of the tests will, of course, confer knowledge on the part of the owner.

**KEY ASPECTS OF OSHA ASBESTOS REGULATIONS**

Our discussion of the impact of the new OSHA regulations on residential rental property owners is not intended to give you all the necessary information to conduct renovations and otherwise conduct your business safely and within the requirements of the regulations. You'll need to get a copy of the actual regulations for that. (See sidebar, Resources: Asbestos, below.) Briefly, however, you should at least know the following:

**Buildings affected.** The regulations apply to pre- 1981 structures, and if a newer structure is found to contain asbestos, the regulations apply to it as well.

**Where asbestos is likely to be found.** The regulations cover two classes of materials: those that definitely contain asbestos (such as certain kinds of flooring and ceilings), and those that the law presumes to contain asbestos. The second

class is extremely inclusive, describing, among other things, any surfacing material that is “sprayed, troweled on or otherwise applied.” Under this definition, virtually every dwelling must be suspected of containing asbestos.

**What work is covered.** The regulations apply to custodial work and to renovation and repair work. Mere custodial work does not require the stringent training and precautions that are triggered by renovation work. It is not clear at this time how some typical apartment management tasks (such as mopping asbestos tile floors, deep cleaning of a rental unit before a new tenant moves in and routine maintenance of painted surfaces) will be classed. To be on the safe side, it would be wise to assume that these tasks are covered, and to prepare your employees accordingly.

**RESOURCES: ASBESTOS**

For further information on asbestos rules, inspections and control, contact the nearest office of the U.S. Occupational Safety and Health Administration (OSHA) or call 800-321-OSHA (6742).

OSHA has developed interactive computer software called “Asbestos Advisor” that will walk you through questions designed to help identify asbestos in your property and suggest the most sensible solution. It is available through the U.S. Department of Labor’s electronic bulletin board, Labor News, online at [www.osha.gov](http://www.osha.gov).

**c. How Landlords Can Limit Liability for Asbestos**

Limiting your liability for asbestos-related injuries (to tenants and workers alike) begins with your understanding a fundamental point: Unless you perform detailed testing to rule out the presence of asbestos, every pre-1981 structure must be treated as if it does contain asbestos. Acknowledging that you must follow the OSHA procedures for custodial and renovation/repair work should trigger the following actions:

- Get a copy of the OSHA regulations, which explain in detail what we have touched upon here. (See sidebar Resources: Asbestos.)

- Realize that almost any repair and maintenance work you do—no matter how small—may involve asbestos materials. Test for the presence of asbestos in advance for the benefit of workers and tenants.

- Make disclosures to tenants if you learn of the presence of asbestos, even if its presence is not yet a problem. For example, if there is asbestos in the walls but it is not a health problem, point out that it is not likely to pose a danger, and that you will monitor the situation.

- Where possible, don’t disturb asbestos. The conventional wisdom is that unless the asbestos material has begun to break down and enter the air, it is usually best to leave it alone and monitor it. This may mean that it simply may not make economic sense to do certain types of remodeling jobs. Seek an expert’s opinion before taking action.

- If you learn that asbestos material is airborne and a health hazard, seek an expert’s advice on how to remedy the situation. When removal is necessary, hire trained asbestos-removal specialists, and check to make sure the debris is legally disposed of in approved hazardous waste disposal sites.

- Make sure tenants don’t make repairs to or otherwise invade any spaces containing asbestos, such as walls and ceilings. This might even consist of hanging pictures or otherwise making small holes. Absurd as this might seem, remember that you are accomplishing two things with your cautious approach: You are protecting your tenants’ health, and you are making it harder for a lawsuit-happy tenant to file a frivolous claim. Require your tenants to report any deterioration to you. Monitor the asbestos situation as part of regular safety and maintenance procedures. (See Chapter 11, Sections J and K.)