

**Mold Assessment and Remediation:
New Licensing Requirements Under Article 32 of the Labor Law**

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As of January 1, 2016, if a purchaser (or seller) would like to conduct an inspection of real property as it relates to mold, they will need to make certain that a licensed mold assessment and licensed mold remediation professional is engaged. Since real estate agents are usually the first professionals engaged by a purchaser or seller of real property, they are customarily the first ones asked about what inspections should be conducted and who they should contact to perform such inspections. Therefore, in light of this new regulation, it is critical for real estate agents to inform their clients as to when inspections should be conducted on a parcel of real property, especially when actively providing referrals to other professionals in the field of inspections. Furthermore, while real estate agents should never provide legal advice to clients, they should be aware of newly enacted laws (as well as existing laws), be able to inform their clients of same and, if necessary, recommend that they discuss the matter with their attorneys.

Some of the most common inspections conducted are engineering (i.e., structural and physical), well-water, termite, radon, lead-based paint, oil tank, asbestos and mold. While it is important that real estate agents recommend to their clients, particularly buyer clients, to have all of the necessary inspections take place prior to signing any contract of sale whenever possible (unless of course, inspection rights are included in the contract of sale), it is also very important for real estate agents to be familiar with the requirements of the law when it comes to conducting such inspections. In addition, it is important to note that not all inspections are required to be conducted by purchasers. There are certain inspections (e.g., the Well-Water Testing Law in Westchester County) that are required to be conducted by the seller of residential real property. Therefore, real estate agents, given their unique position in the real estate transaction (i.e., usually being one of the first parties engaged by a consumer) are usually the ones that can provide invaluable guidance allowing for a smooth and expeditious transaction. It is important for real estate agents to understand that this new mold legislation affects both sellers and purchasers, in that both will need to deal with and address mold issues and have mold inspections conducted.

**Article 32 of the Labor Law:
New Licensing Requirements of
Mold Remediation and Assessment Professionals**

Effective as of January 1, 2016, under Article 32 of the Labor Law, individuals or companies that hold themselves out as mold “remediation” contractors or mold “assessment” contractors must be (1) registered with the Department of Labor; (2) complete training and education courses; and (3) provide minimum work standards when they enter into contractual work for remediation of existing mold. It is unlawful for any person or company to engage, advertise or hold themselves out as a mold assessment contractor, a mold remediation contractor, or even an abatement worker unless they have a valid license issued by the Commissioner of the Department of Labor. Any individuals who do so without a valid license may be subject to a civil penalty.

What's The Difference Between a Mold Assessment Contractor and Mold Remediation Contractor?

When a licensed real estate salesperson or licensed broker recommends a certain mold contractor to a client, whether a purchaser or seller, it is important for the real estate agent to understand the difference between a mold “remediation” contractor and a mold “assessment” contractor. A real estate agent must be sure to inform his or her buyer clients (and seller clients, as the case may be) that they will need to engage a company that is licensed under Article 32 to perform an initial mold assessment inspection so that they are adequately protected. Both the homeowner and prospective purchaser should be made aware that only a licensed mold “assessment” contractor can now be used to determine whether there is mold present in their home and to remediate any such mold issue.

Once the initial assessment is conducted and it is determined that mold exists, a “mold remediation contractor” must then be hired by the homeowner, in most instances (unless the purchaser hires and pays for same by agreement of the parties), to perform the mold remediation and/or abatement as required by the initial assessment. Therefore, it is important for the real estate agent to be able to provide the client with information needed to locate a *licensed* (emphasis added) mold assessment contractor (as it relates to the initial mold inspection or assessment) or mold remediation contractor (after an initial assessment establishes that mold exists). The Department of Labor website offers a link entitled “Licensed Mold Contractors Search Tool” which is very helpful and is located at:

<https://labor.ny.gov/workerprotection/safetyhealth/mold/frequently-asked-questions-licences.shtm>.

The Mold “Assessment” Contractor

Initially, a licensed mold “assessment” contractor must be hired in order to perform the initial mold assessment (or site inspection) to determine whether or not there is mold at a property. “Mold” is defined under Section 930 as “...indoor mold growth capable of creating toxins that can cause pulmonary, respiratory, neurological or other major illnesses after minimal exposure, as such exposure is defined by the environmental protection agency, centers for disease control and prevention, national institute of health, or other federal, state, or local agency organized to study and/or protect human health.”

Section 930 further defines “mold assessment” as “an inspection or assessment of real property that is designed to discover indoor mold growth, toxic mold growth, conditions that facilitate indoor mold growth and/or indicia of conditions that are likely to facilitate indoor mold growth.”

The new law requires that before the mold assessment contractor performs any inspection on a property or provides any services to a consumer, such “mold assessment licensee” must provide an initial “work analysis of the project.” Once the analysis has been provided and an inspection is completed, the mold assessment licensee must provide a written report to his or her client in compliance with Section 945 of Article 32 of the Labor Law.

Section 945 subsection 1 requires the mold assessment licensee to “...prepare a mold remediation plan that is specific to each remediation project and provide the plan to the client before the remediation begins. The mold remediation plan must specify:

- (a) the rooms or areas where the work will be performed;
- (b) the estimated quantities of materials to be cleaned or removed;
- (c) the methods to be used for each type of remediation in each type of area;
- (d) the personal protection equipment (PPE) to be supplied by licensed remediators for use by licensed abaters;
- (e) the proposed clearance procedures and criteria for each type of remediation in each type of area;
- (f) when the project is a building that is currently occupied, how to properly notify such occupants of such project taking into consideration proper health concerns; the plan must also provide recommendations for notice and posting requirements that are appropriate for the project size, duration and points of entry;
- (g) an estimate of cost and an estimated time frame for completion; and
- (h) when possible, the underlying sources of moisture that may be causing the mold and a recommendation as to the type of contractor who would remedy the source of such moisture.”

Section 945 subsection 2 requires that “[t]he containment specified in the remediation plan must prevent the spread of mold to areas of the building outside the containment under normal conditions of use.” Subsection 3 further requires that if the remediation plan makes mention of a particular “...disinfectant, biocide, or antimicrobial coating [that] will be used on a mold remediation project...” the mold assessment contractor must “indicate a specific product or brand only if it is registered by the United States Environmental Protection Agency for the intended use and [must also indicate] if the use is consistent with the manufacturer's labeling instructions. A decision by a mold assessment licensee to use such products must take into account the potential for *occupant sensitivities*.” This last component requires the mold assessment contractor to take into account any potential negative reactions that the occupants of the home may have to such products. It is important that a client be made aware of this especially if a family member or occupant of the premises has certain allergies or a predisposition to certain “sensitivities.”

The Mold “Remediation” Contractor

Once the licensed mold assessment contractor determines that there is mold at the premises, the law then requires that a separate (emphasis added) mold “remediation” contractor be hired to remove and/or remediate the mold issue. Section 930 defines “mold remediation” as “...conducting the business of removal, cleaning, sanitizing, or surface disinfection of mold, mold containment, and waste handling of mold and materials used to remove mold from surfaces by a business enterprise, including but not limited to, sole proprietorships. Mold remediation for the purposes of this article shall not include remediation of the underlying sources of moisture that may be the cause of mold that requires expertise not specific to acts authorized under this article.”

The law further defines “mold abatement” as “...the act of removal, cleaning, sanitizing, or surface disinfection of mold, mold containment, and waste handling of mold and materials used to remove mold from surfaces by an individual.” Only licensed mold remediation contractors and abatement workers are permitted to engage in mold remediation or abatement. There are, however, certain exceptions to the aforementioned license requirement.

Section 933 (entitled “Exemptions”) provides that “[t]he following persons shall not be required to obtain a license as provided in this title in order to perform mold assessment or remediation:

1. a residential property owner who performs mold inspection, assessment or remediation on his or her own property;
2. a non-residential property owner, or the employee of such owner, who performs mold assessment or remediation on an apartment building owned by that person that has not more than four dwelling units; and
3. an owner or a managing agent or a full-time employee of an owner who performs mold assessment or remediation on commercial property owned by the owner provided, however, that this subdivision shall not apply if the managing agent or employee engages in the business of performing mold assessment or remediation for the public.”

As far as the requirements of the mold “remediation” contractor are concerned, Section 935 subsection 2 provides that any mold remediation licensee who intends to perform mold remediation must “...prepare a work plan providing instructions for the remediation efforts to be performed for the mold remediation project...” and must “...provide the work plan to the client before the mold remediation begins.” A copy of the report must also be maintained at the remediation site.

Section 946 provides the minimum work standards required for remediation contractors which are summarized as follows:

1. A mold remediation licensee must prepare a plan and it must fulfill all of the requirements laid out in the plan prepared by the assessment contractor. This plan must be provided to the client before any remediation is commenced.
2. If personal protection equipment (“PPE”) is required for a project, the mold remediation licensee shall provide the specified PPE to all employees who engage in remediation activities and who will, or are anticipated to, disturb or remove mold contamination. Any containment built and required by the assessment contractor’s plan must prevent the spread of mold to areas outside the containment.
3. Signs are required to be posted at all entrances to areas being remediated.

4. No containment structures or materials may be removed from a project site prior to receipt of clearance from the assessment contractor.
5. Certain products may be used *only* (emphasis added) if their use is specified in a mold remediation plan, if they are registered by the United States Environmental Protection Agency for the intended use and if the use is consistent with the manufacturer's labeling instructions. If a plan specifies the use of such a product but does not specify the brand or type of product, a mold remediation licensee may select the brand or type of product to be used. However, as mentioned, the licensee must take into account the potential for occupant sensitivities and possible adverse reactions to chemicals by occupants.

Post-Remediation Clearance is Required

Once a mold remediation project has been completed, Section 947 requires that the mold “assessment” contractor provide another assessment and ultimately, if the mold has been removed, a clearance report. The additional post-remediation assessment must determine whether: “(a) the work area is free from all visible mold; and (b) all work has been completed in compliance with the remediation plan and remediation work plan and meets clearance criteria specified in the plan.” The mold assessment contractor must determine whether or not the mold has been remediated and whether “...it is reasonably certain that the mold will not return from that remediated area.” If the mold has been successfully remediated, then the mold assessment contractor must issue a passed report.

If the mold still exists then the mold assessment licensee must issue a final report and recommend what further steps need to be taken and to also recommend “to the client as to the type of contractor who could remedy the source of the mold or the moisture causing the mold.” The licensee must prepare a “...written final status report to the client and to the remediation licensee and recommend to the client that either a new assessment be conducted, that the remediation plan as originally developed be completed, or the underlying causes of mold be addressed, as appropriate.”

Protecting The Consumer

According to the Department of Labor, the new law is designed to protect consumers by requiring contractors to obtain appropriate training prior to being licensed to perform mold assessment, remediation or abatement services. It is important to note that these protections are also evidenced in Section 936 subsection 2 which deals with potential conflicts and provides that “...no licensee shall perform *both* [emphasis added] the mold assessment and mold remediation on the same property.” Subsection 3 further provides that “[n]o person shall own an interest in both the entity which performs mold assessment services and the entity which performs mold remediation services on the same property.” It is important for the real estate agent to know this and ensure that his or her client is aware of this requirement because two different contractors will need to be engaged.

Real estate professionals, particularly real estate agents who often refer their clients to various inspection companies and other professionals because of their unique (and often early) place in the real estate transaction timeline, need to be aware of the laws that affect their clients. Real estate agents must ensure that if they do recommend their clients to use a specific inspection company, especially if there exists a mold issue, that they are referring their clients to firms or individuals that are appropriately licensed to provide such services or at the very least, make sure that the client is aware of this new requirement and refer the client to discuss same with his or her attorney.

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Legal Column author John Dolgetta, Esq. is the principal of the law firm of Dolgetta Law, PLLC which recently acquired the law practice of Board Counsel, Edward I. Sumber. Mr. Sumber remains “of counsel” to John’s firm and will continue his forty-one year history of representing our Association and its predecessor entities. For information about Dolgetta Law, PLLC, John Dolgetta, Esq. and Edward I. Sumber, Esq., please visit <http://www.dolgettalaw.com>.