PERSPECTIVES

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Commercial Lease Alert for Landlords and Small Business Owners

Landlords now have additional disclosure requirements relating to accessibility of commercial property as a result of a new California statute (Civil Code § 1938) and a new San Francisco Ordinance (Administrative Code Chapter 38). The San Francisco Ordinance goes further by requiring revisions to leases and lease amendments

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for smaller commercial properties. Failure to abide by the new laws could result in liability to the tenants and potentially termination of the lease.

State Law

Under the new California statute, all commercial property leases entered into on or after July 1, 2013 must disclose to the tenant whether the property has been inspected by a Certified Access Specialist (CASp). A CASp is an individual with sufficient experience and who has passed the State's Candidate Certification Examination and received CASp certification.[1] If the CASp did inspect the property, then the landlord must also disclose to the tenant whether or not the property was determined to meet all applicable construction related access standards pursuant to a report prepared in compliance with Civil Code § 55.53. The statue applies to all commercial property, not just "Public Accommodations" as defined under the Federal American with Disabilities Act (ADA).

The statute, however, does not provide for any specific penalties for failure to include the required language, or a specific requirement that it be inspected. Rather, the landlord merely has to state whether or not it was inspected and then provide additional information if the answer is yes.

The risk to landlords is that failure to provide the requisite disclosure could potentially result in a tenant, who is sued by an employee or customer for failing to comply with disability access laws, suit against the landlord alleging negligent failure to disclose, the remedy for which is termination of the lease. Landlords should make sure that

Denis Kenny

"Swimmers ready, on your marks, beep, beep [sounds of electric starter horn]. . ." These words will ring familiar to those of you who grew up swimming competitively. This has become my mantra for the past two summers since moving my family to the "bridge and tunnel" city of Walnut Creek. More about that move in a minute.

By way of background, I grew up in Redding, California where the summers were an inferno; no joke. As one notable example to demonstrate I am not embellishing (or "embroidering" as my late-Irish Grandmother used to say about those who told

any new lease include the required disclosure in the lease and specifically state who is responsible for accessibility compliance.

San Francisco Ordinance

The new San Francisco ordinance is designed to help protect small businesses by requiring landlords to either make sure that public restrooms, ground floor entrances and exits are accessible or give the tenant notice that the property may not currently meet all applicable access standards. The work or the disclosures must be provided to tenants or prospective tenants before they enter into a new lease or before an amendment to an existing lease is entered into, which will allow them to evaluate their risk in advance. The ordinance only applies to leases for space used as a "Public Accommodation," as defined under the ADA, and that is 7,500 or less in square footage.[2]

If the space to be leased falls under the ordinance, then the landlord must give the existing or prospective tenant the following prior to entering into the new lease or amendment: (i) a written Disability Access Obligations Notice that must be signed by both the landlord and tenant, and (ii) a copy of the Small Business Commission's Access Information Notice pamphlet, in the tenant's requested language.

In addition to these disclosure requirements, the landlord must *either* (1) make the alterations necessary to ensure that the existing public restrooms, ground floor entrances and ingress/egress are accessible, *or* (2) include in the Disability Access Obligations Notice prescribed language disclosing that the property may not meet all

"tall-tales"), during the summer of 1987, the temperature in Redding topped 100F for thirty straight days, 10 of which topped 110F. And to make matters worse, I was working a summer job (after graduating high school and preparing to begin my first year at Cal) doing "grunt" labor on a construction site where the foreperson refused to start the day any earlier than 7:30am (while other crews started at 5-5:30am to avoid the stifling afternoon heat) because he was "not a morning person." After that grueling summer, (during which the foreperson spent his workdays in the comfort of his air conditioned job-site trailer and I ended up losing 10 pounds), I decided that I wanted to buy the construction company just so I could fire the foreperson! In any event, the point is, I am well familiar with summertime heat. But my familiarity with swimming has primarily been as a means

applicable construction-related accessibility standards.

Regardless of the option chosen by the landlord, the landlord must specify in the lease or amendment whether the landlord or the tenant is responsible for making and paying for any alterations regarding disability access. Additionally, the landlord must state in the lease, or amendment, that both the tenant and the landlord shall use reasonable efforts to notify the other if either of them make alterations that might impact accessibility.

Since there are no specific penalties for noncompliance, enforcement will be carried out by civil lawsuits filed by tenants.

Please contact Brandon Smith at bds@sfcounsel.com for more information about these laws.

- Written by Brandon Smith

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[1] A description of the CASp program and a list of CASp can be found at http://www.dgs.ca.gov/dsa/Programs/programCert/casp.aspx

[2] The new ordinance went into effect January 1, 2013 for spaces 5001-7,500 square feet and went into effect on June 1, 2013 for spaces 5,000 feet or less.

to an end to (1) avoid heat exhaustion; and (2) get to and from the tow ropes on my friends' ski boats which I "borrowed" on as many days and hours I could fit in at the lakes and rivers near Redding including Lake Shasta, Whiskeytown Lake, Lake Almanor and the Sacramento and Trinity Rivers. I had no clue what anyone saw in the swim team or swim racing.

The heat of summer and the various watersports I enjoyed became a mostly distant memory after I ventured to Berkeley for undergrad and USF Law School after that. I ended up remaining in my native San Francisco for the next 20-plus years, most of which was spent in the West of Twin Peaks fog-belt. Two kids later (Ryan, age 10 and Hailey, age 8), my wife, Lynne, and I decided to move to the East Bay to be closer to both of our families and our 10 nieces and nephews. Having our

Recommended Bases for Employer Annual Self Audits

Every year, our clients ring in the New Year with new goals, new successes, and new challenges. What they may not anticipate, however, are the many new relevant laws and amendments to laws that come into effect once the clock strikes midnight. For our employer clients in California, 2013 has brought a bundle of new legal requirements that are important to consider, presenting issues arising from noncompliance. While some of these new laws are outlined below, we highly recommend seeking attorney advice for further details and clarification on updates in the law, best practices to make sure contracts are compliant, and to update your employee handbook (or prepare one if you don't have it already).

What Employers Must Now Put in Writing

Commission Agreements

As of January 1, 2013, employment contracts involving commissions are required to be in writing under California Labor Code § 2751. This written contract must detail the method utilized to compute and pay the commissions and must be signed by both parties. For purposes of this section, "commissions" do not include (1) short-term productivity bonuses, (2) temporary, variable incentive payments that increase payment under the written contract, and (3) bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed.

nephews. Having our families close by has been tremendously rewarding. And, though we both miss the City and will always leave a piece of our hearts here, I can truly say having a summer of sun and water fun has been incredible. Not only do I get to see the bright, warm, cylindrical orb that is the sun- -which I did not even know existed on most San Francisco summer days in the "Sunset"- - I enjoy temperatures mostly in the 80's and 90's. So we have the best of both worlds and, in the process, my kids have taken to the swim team at our neighborhood pool. This brings me back to where we started: I am now the Announcer for swim meets (which is my job of choice for the 10 "volunteer" jobs which each swim team family must do every swim season (which runs from May 15-August 15). Other jobs include set up and take down of the computer and electrical timing system, timekeeping

If you currently have employees that are paid on a commission basis and you do not yet have a written contract, now is the time to get the agreement in writing, sign it, and further obtain a written, signed acknowledgement form from your employee(s). If the agreement is already in writing, it may be wise to have an attorney review it to ensure compliance with the new law.

Wage Notice Statements

Another change that went into effect on January 1, 2013, is the amendment to Labor Code § 2810.5. The amendment requires employers to provide written notice to all "non-exempt" employees at the time of hire regarding certain employment-related information, including rate of pay, employer's intent to claim allowances, designated payday, the name of the employer (including any "doing business as" names), address and telephone number of the employer, and the employer's workers' compensation insurance carrier information. For those of you unsure about which of your employees are "non-exempt," the distinction between "non-exempt" and "exempt" employees is fact and law-intensive and warrants a separate article altogether. So, when in doubt, an employer is best off having all employees receive and sign Wage Notice Statements at the time of hire and, of course, contact our office, or another competent employment law practitioner, for guidance and advice.

A great resource to use to comply with this section, published by the Division of Labor Standards Enforcement, can be found here: http://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf.

itself, "stroke and turn" (the unenviable job of disqualifying swimmers for technically flubbed strokes and turns) and running the apparel booth, snack bar and BBQ, to name just a few. Each meet has around 60-80 events and lasts anywhere from 3 to 8 hours. Yet the total amount of racing time for any one entrant (ranging from ages 4 up to age 18 for about 2-4 races each swimmer per meet) is only about 2-3 minutes! Needless to say, it is a tremendous time commitment and takes up most of our weekends for a very small amount of actual racing.

I would have thought people were crazy had I heard what the "swim team" entailed before my family jumped into it (no pun intended). But I have to say, I have never seen so many fit children so excited about exercise and being together as a team. The older kids truly care for the younger ones and assist in coaching

Revised Forms

Revised Form I-9 to Be Used for All New Hires and Re-Verifications

United States Citizenship and Immigration Services (USCIS) recently issued a revised Employment Eligibility form (Form I-9) and made it a requirement for employers to begin using it as of May 7, 2013. USCIS has made clear that prior versions of the Form I-9 can no longer be used by employers.

This new form, used to verify the identity and eligibility of new hires to work in the United States and to re-verify the employment eligibility of current employees, and the instructions thereto can be found here: http://www.uscis.gov/files/form/i-9.pdf.

NewRules Regarding Maintenance of Employee Records

Access to Employment Records

Along with the New Year came new rights for employees, both current and former. Under Labor Code § 1198.5, even former employees now have the right to a copy of, or to inspect, their personnel records within thirty days of the receipt of the employee's request. Specifically, this right includes records related to the employee's performance, including any grievances concerning the employee. Further, to ensure these records don't go "missing," the Legislature included maintenance requirements for employers in the new law. Specifically, employers are required to maintain

and getting them to and from the starting blocks. The snack bar is always a hit with a wide selection of candy, snow cones and other goodies for the kids and BBQ for the parents. And though the amount of racing time during events is fleeting, each team member practices about 1-2 hours almost every day of the summer season, with options for additional one-on-one training. So, instead of searching for various summer "camps" or leaving the kids with too much idle time (as an idle mind truly is the devil's playground), our summer schedule is relatively structured while leaving plenty of hours for other activities. It really makes me wish I would have been exposed to this kind of swimming when I was young since my 8 year old daughter is now giving me lessons on the various swim "strokes" (and I can safely say, I am like a fish out of water despite her amazing tutelage).

What does all of this have

employment records for three years after the termination of employment. Employers that do not comply with this law may be required to pay the employee $750 per violation, plus attendant attorneys' fees, costs and penalties.

Continued Health Care Benefits During Pregnancy Leave

Just before the start of 2013, the Fair Employment and Housing Commission (FEHC) issued several revised regulations that will heavily affect many California employers' policies with regard to pregnancy leave. One such revision clarifies the requirements for employers to provide employee health care benefits both during pregnancy disability leave (PDL) and during family medical leaves under the California Family Rights Act (CFRA) or the Family and Medical Leave Act (FMLA). Thus, there is now a potential requirement for employers to provide up to 29 ⅓ weeks of healthcare benefits during both leave periods.

Please contact Denis Kenny at dsk@sfcounsel.com, Ryan Stahl at rws@sfcounsel.com or Negin Yazdani at nny@sfcounsel.com for more information about these laws or any other employment-related questions you may have.

- Written by Negin Yazdani

Coming Up with A Brand Name

to do with my "Partner Notes" or the law? The answer is, not much. But it gives you a sense for what makes me tick- - family and exercise being two significant components in my life. The goal is to obtain and remain able to have a perspective about what is and is not important in life. My job as a lawyer does not end when the clocks strikes 5 or 6 or 7 p.m. or whenever the standard workday and workweek ends. I end up thinking about my work, answering emails, reading cases and the like throughout a 24/7 week. But I do so with the perspective that I need to remain physically fit to be mentally fit. I currently exercise (a mix of running, lifting weights and playing basketball) about 4-5 days a week unless I'm in trial. My exercise time is usually in the early morning hours (5-7am) and sometimes during the weekday afternoons (as I work through lunch and get a quick run in like I'm

When you hear the word “apple,” what image immediately comes to mind? The pomaceous fruit of the apple tree or the logo of a multinational corporation that sells popular consumer electronics? While to some, this is a silly question because the word “apple” has a dictionary definition that refers to the fruit, for many, the answer is Apple, Inc.’s name and logo. This is due to the extensive time, creative efforts, and money spent by Apple to create a quality and popular brand that people immediately associate with its products.

Branding is an important part of building the goodwill and reputation of a product or service. When businesses decide to begin building their brand, one of the first steps is to apply for trademark registration of their name and/or logo in order to build a brand that consumers associate with their trademark and to protect against others who want to copy or steal the “fruits” of their hard work. A trademark registration also protects against others who claim they are the superior user of a mark to maintain exclusive use rights and avoid paying damages for supposedly infringing.

But, in order to start branding, you have to have a name. Coming up with a trademark name is probably the most difficult part of the process. This is because the United States Patent and Trademark Office (“USPTO”), which is the government agency responsible for approving or denying trademark applications, has many hurdles (or requirements) to overcome before they will issue a trademark certificate. And many applications are refused registration because those that apply for them are not aware of, or do not understand, the USPTO’s hazy requirements or how to successfully respond to the issues the USPTO finds during their application process.

doing today after I finish these Partner Notes). My wife is also an avid runner. Between the two of our regular exercise routines, we have instilled an interest and motivation in our children to be physically fit which I think is partly to explain for each of their interests in joining the swim team (along with a host of other sporting teams).

Whatever your passion in life, being able to separate your work from your personal life is an invaluable trait that we should all strive for. As the old saying goes, “don’t sweat the small stuff.” That, of course, is easier said, than done especially for someone like me, who has a terrible time of compartmentalizing. Nonetheless, striving to leave your work at the office, like the start of a swim race, is a solid mantra for reminding you what is really important in life.

So, for all of you, the

So where do you start in choosing a name? How do you find a trademark that the USPTO will actually register, as not to waste time, effort, and money? In coming up with a name, there are two (somewhat complicated) main steps to consider: brainstorming (1) a “distinctive” or strong mark; and (2) one that is unique for the product(s) or service(s) your business will provide. In spending some time exploring these steps on the front end, you will surely save resources, as the USPTO will issue refusals that require time and research-intensive responses and may be impossible to overcome.

As for coming up with a “distinctive” mark, the USPTO likes trademarks that are imaginative or even suggestive of what the business offers, instead of direct. In fact, the USPTO is far more likely to approve a trademark for registration if it does not directly name or describe the product or services you offer. For example, the USPTO would deny an application for the mark, “APPLE,” if the business applying for a trademark sells apples, as it would be unfair to other businesses. However, a business selling electronics would not be barred from using that name, because that is an arbitrary use of the word. Another example of a strong mark is “XEROX,” which has no meaning. The USPTO would find that word to be a fanciful term and likely approve it on that basis.

Also, the USPTO requires that only unique trademarks be registered. The USPTO is very protective over consumers and original ideas of businesses and will not register a trademark when another confusingly similar trademark exists for fear that the consumer will become confused and/or a business will unfairly exploit the goodwill of a competing business. Even an application for a trademark of an English word, when the same word in Spanish already has a

friends, family, colleagues and clients of Scherer Smith & Kenny LLP, let us enjoy this summer and whatever brightness we can create and find in our daily lives.

- Written by Denis Kenny

trademark, will be denied registration. Thus, it is important to do a thorough internet search for your name to see if there are others out there that share your name. It is also extremely important to have an attorney perform an extensive conflicts check to see if another business has a confusingly similar mark in the same or similar class as yours.

If you have any questions regarding trademarks, please contact Brandon Smith at bds@sfcounsel.com or Negin Yazdani at nny@sfcounsel.com.

- *Written by* Negin Yazdani

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Business; Real Estate; Intellectual Property and Employment Law; Litigation and Dispute Resolution; Nonprofit; Estates and Trusts

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