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## New EPA Guidance Clarifies Tenants' Defenses

By [Natalie Dolce](#) | San Francisco



Buchalter Nemer shareholder, Jeffrey Kirshenbaum

SAN FRANCISCO-The newly issued guidance by the U.S. Environmental Protection Agency suggests that prudent long-term tenants of commercial and **industrial** properties should conduct **environmental due diligence** before entering into a lease. So says law firm Buchalter Nemer.

Firm shareholder **Jeffrey Kirshenbaum**, who is based in the San Francisco office, explains that “lenders who are looking to a tenant’s interest in a lease as security for a loan should ensure that the loan documents require the borrower-tenant to provide all legally required notices, cooperate with environmental authorities, and take reasonable steps with respect to hazardous substance releases.”

The liability of “innocent” tenants under environmental laws is limited, but real, says Kirshenbaum. “A tenant may become liable for historical environmental problems either by controlling the property to such an extent that it is deemed a “de facto owner,” or by exercising a level of control over the remediation of the hazardous substances at issue to such a great extent that the tenant becomes an “operator” under

CERCLA, and, by extension, California law.”

The risk is particularly acute for ground lease tenants and for tenants in sale-leaseback transactions, he says. “When deciding whether a tenant is a ‘de facto owner’ courts look for indicia of ownership, and long-term leases which effectively turn over control of the property to the tenant have been held to satisfy this test.”

He adds that an “innocent” tenant also may become liable as an “operator” if it exacerbates the contamination.

The newly issued guidance is applied by the USEPA on a site-specific basis, but it nevertheless provides useful information to ground lease and sale-leaseback tenants on how to protect themselves from liability for historical contamination, explains Kirshenbaum.

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Natalie Dolce, editor of the West Coast region for GlobeSt.com and Real Estate Forum, is responsible for coverage of news and information pertaining to that vital real estate region. Prior to moving out to the Southern California office, Natalie was Northeast bureau chief, covering New York City for GlobeSt.com. Dolce’s background includes a stint at InStyle Magazine, and as managing editor with New York Press, an alternative weekly New York City paper. In her career, she has also covered a variety of beats Arthur Frommer’s Budget Travel magazine, FashionLedge.com, Co-Ed magazine, and has also freelanced for a number of publications including MSNBC.com and Museums New York magazine. [Contact Natalie Dolce](#).

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