

KANE KESSLER, P.C.

1350 Avenue of the Americas

New York, N.Y. 10019

(212) 541-6222

Fax (212) 541-9799

Direct dial (212) 519-5154

drothfeld@kanekessler.com

CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED MEMORANDUM

DATE: August 28, 2015

TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Human Resources Directors and Controllers

FROM: Kane Kessler, P.C.
Labor and Employment Law Department

RE: New York City Passes New Cooling Tower Regulations in Response to the Largest Outbreak of Legionnaire's Disease in the City's History

On August 18, 2015, the New York City Council passed on an expedited basis Local Law No. 77, which sets new registration, testing and maintenance rules for owners of cooling towers located within the City (the "Regulations"). The Regulations amend New York City's building and health codes and was passed in the wake of the recent outbreak of Legionnaires' Disease in the Bronx that has resulted in 12 fatalities.¹ An individual may contract Legionnaires' Disease when he or she breathes in a mist or vapor containing the bacteria, such as from water droplets sprayed by cooling towers that have not properly been cleaned. The bacteria do not spread from person to person, but when contracted, Legionnaires' Disease has a fatality rate ranging between 5% and 30%.

30-Day Registration Requirement (Due by September 17, 2015)

The Regulations have an immediate registration deadline of 30 days from the date of the Regulations' enactment.² Accordingly, all owners of existing City cooling towers must register all

¹ Additionally, on August 6, 2015, the Department of Health and Mental Hygiene ("DHMH") mailed an order to all cooling tower owners mandating disinfection of all cooling towers within 14 days of receiving the order in the mail. Owners have until August 27, 2015 to comply with the Commissioner's Order.

² N.Y.ADC. LAW § 28-317.3.

cooling towers with the Department of Buildings (“DOB”) by September 17, 2015.³ New cooling towers must be registered with the DOB prior to initial operation. Additionally, owners must report when a cooling tower is permanently shut down. Any cooling tower that is temporarily out of use for five (5) days or more must be cleaned and disinfected within fifteen (15) days before initial use. Included in the registration information owners must provide the DOB is the following:

1. Address of the building at which the cooling tower is located,
2. Intended use of the cooling tower,
3. Name, address, telephone number and email address of owner,
4. Manufacturer of the cooling tower,
5. Model number,
6. Specific unit serial number,
7. Cooling capacity (tonnage),
8. Basin capacity, and
9. Commissioning date of the cooling tower.

Owners can register a cooling tower online at the following website link:

http://www.nyc.gov/html/dob/html/safety/cooling_tower.shtml

Annual Certification Requirements (The First Certification Due By November 1, 2016)

Beginning on November 1, 2016, the owner or operator of a cooling tower must file a certification with the DOB stating that the cooling tower was inspected, tested, cleaned and disinfected and that a maintenance program and plan has been developed and implemented.⁴ The Regulations require that this certification be filed every year on November 1.

Owners Must Develop a Cooling Tower Program and Plan in Accordance with ASHRAE 188-2015 by March 1, 2016

By March 1, 2016, owners are required to develop and implement a maintenance program in accordance with Sections 5, 6 and 7.2 of the American Society of Heating, Refrigeration, and Air-Conditioning Engineers Standard 188-2015 (“ASHRAE 188-2015”).⁵ ASHRAE 188-2015 sets forth minimum legionellosis (the bacteria causing Legionnaires’ Disease) risk management requirements and can be purchased at the following website link: www.ashrae.org/bookstore.

³ The Regulations define a cooling tower as a “cooling tower, evaporative condenser or fluid cooler that is part of a recirculated water system incorporated into a building’s cooling, industrial process, refrigeration, or energy production system.” “Owner” is defined in the building codes as “any person, agent, firm, partnership, corporation or other legal entity having a legal or equitable interest in, or control of the premises.” N.Y.ADC. LAW § 28-101.5.

⁴ N.Y.ADC. LAW § 28-317.5.

⁵ N.Y.ADC. LAW § 17-194.1(c).

Quarterly Inspections (Effective Upon Promulgation of Certain Standards by the DHMH)

Pursuant to the Regulations, cooling towers are required to be inspected at a minimum every three (3) months during the periods of a year that the tower is in use.⁶ Each inspection shall:

1. Include an evaluation of the cooling tower and associated equipment for the presence of organic material, biofilm, algae, and other visible contaminants,
2. Include a test for the presence of microbes in the water of the cooling tower,
3. Be performed by or under the supervision of a qualified person, and
4. Be recorded and maintained for at least three (3) years.

The Department of Health and Mental Hygiene (“DHMH”) is due to establish the credentials required for consideration as a “qualified person” and to establish targets and acceptable testing, analysis and microbial level standards. The quarterly inspection provisions do not come into effect until such standards are promulgated by the DHMH.

Owners will have a 48-hour deadline to clean and disinfect a cooling tower once the owner becomes aware (or reasonably should become aware) that test results indicate a “maintenance deficiency requiring mitigation.” If any testing indicates that microbe levels could pose a serious health threat, owners are required within 24-hours to (i) notify the Department of Buildings, and (ii) clean and disinfect the cooling tower, including the use of a biocide.

Failure to Comply With the Regulations

Any violation of the Regulations can result in civil penalties of up to \$2,000 (first violation), \$5,000 (second or subsequent violation), and up to \$10,000 for any violation that results in a fatality or serious injury. Additionally, an owner’s failure to comply with an abatement order is a misdemeanor crime punishable by either a fine of up to \$25,000 or imprisonment or both.

New York City Hotels

The recent situation in the Bronx is eerily similar to a case twelve years ago where the Union asserted that the Hotel’s cooling tower was potentially spraying contaminated fluid on the doormen and guests. In that 2003 case, after hearing expert testimony and receiving evidence, the Impartial Chairperson directed the Hotel to shut down the cooling tower pending its repair.

Hotels are reminded that, with the advent in 2006 of IWA Article 69, Safety and Health, the City’s cooling tower regulations are part of a Hotel’s obligation under that Article. Therefore, Owners are advised to make compliance with the regulations a priority and Hotels must be sure to maintain documentation required by the regulations.

From a strategic perspective in dealing with the Union on potential health and safety issues, we have repeatedly advised Hotels to be proactive and we have suggested that consideration be

⁶ N.Y.ADC. LAW § 17-194.1(e).

given to retaining your own experts to perform a general audit or specific review. For example, (i) Emilcott Associates; or (ii) Risk Management, an allied Association member have been used by Hotels for these issues. Since Emilcott is the Union's health and safety expert, we have asserted that their use by Hotels means that the Union and its Business Agents cannot challenge Emilcott's work.

We urge Owners and Hotels to consult with their general business counsel concerning compliance with the regulations. Nonetheless, if you have any questions, please do not hesitate to contact David R. Rothfeld, Judith A. Stoll, Lois M. Traub, Alexander Soric, Robert L. Sacks, Michael C. Lydakis, or Jaelyn K. Ruocco.

cc: Joseph E. Spinnato, Esq.
Vijay Dandapani, Chairman