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Still Getting The Lead Out

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Lead: It is still here in millions of homes and apartments. It is still dangerous and it is now going to increase costs of renovations. This article summarizes the science and public policy behind the 2008 federal regulations on renovations involving lead-based paint.

If anyone breathes or swallows lead at high enough concentrations, they will be poisoned. But even low levels of ingested or inhaled lead can damage public health.¹ While all populations can suffer ill effects, the US Environmental Protection Agency (US EPA) has focused its efforts on eliminating exposure of children to lead. Adults absorb five percent to 15 percent of lead they ingest and retain less than five percent of it, but children absorb about 50 percent of the lead they ingest and retain about 30 percent of it. And, in children, lead interferes with normal physiological development causing reading and learning disabilities, impaired hearing and other health problems.²

PARTIAL HISTORY OF US LEAD REGULATION

In 1992, Congress made detailed findings about the dangers of lead in the introduction to its Residential Lead-Based Paint Hazard Reduction Act.³ The key facts which prompted the legislation are that “pre-1980 American housing stock contains more than 3,000,000 tons of lead in the form of lead-based paint, with the vast majority of homes built before 1950 containing substantial amounts of lead-based paint” and “ingestion of household dust containing lead

from deteriorating . . . lead-based paint is the most common cause of lead poisoning in children.” According to the US EPA, 64 million pre-1978 homes contain lead-based paint.⁴ As the US EPA in one of its fact sheets stated, if improperly managed, chips and dust from the paint can create a health hazard.

In 1996, the US EPA promulgated rules designed to ensure that contractors who undertook lead-based paint abatement projects were qualified and conducted the abatements safely.⁵ The regulations covered lead-based paint inspectors, risk assessors and those doing the abatement. Lead-based paint abatements are construction projects that cover up or remove the paint.

Separate regulations promulgated in the 1990s require that landlords must notify tenants of possible lead-based paint hazards.⁶ The Department of Housing and Urban Development also has regulations about lead-based paint that apply to federally owned housing.⁷

Faulty lead abatement can be costly as the 1992 \$1.5 million judgment against a Milwaukee landlord for damage to occupants indicates.⁸ And standard liability insurance may not cover the costs of these exposures.

The federal, state and local governments take these regulations seriously, as shown by \$425,000 in penalties levied in 2000 by the Maryland Department of the Environment on landlords who violated lead-based paint regulations.⁹ The Department of Justice has even used its criminal authority in this area as the separate indictment of a Maryland landlord indicates.¹⁰ Although

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governments and private parties have spent millions of dollars specifically to remove lead-based paint from housing and reported cases of lead poisoning in children is dropping, the stock of homes containing lead-based paint remains huge.¹¹ Clearly, abatements targeted solely at lead removal will not eliminate the exposure problem.

2008 FEDERAL LEAD REGULATIONS

To increase the scope of activities designed to reduce children's lead exposure, US EPA recently added new regulations. These new requirements cover renovation activities where lead-based paint may be disturbed. The purpose is to ensure that the same type of work practices that were designed to prevent generation and distribution of lead-containing dust from abatement projects are applied to all renovations where lead-based paint may be disturbed.

Effective June 23, 2008, new federal regulations apply to the following:

1. Renovation of lead-based paint;
2. Training of lead-based paint renovators;
3. Dust sampling techniques;
4. Certification of renovators and samplers;
5. Accreditation of trainers.

What regulations apply immediately?

The requirement to distribute informational pamphlets in advance of the renovations that could disturb lead-based paint is in effect now. Depending on the situation, the renovator may need to notify owners, occupants, tenants, parents or guardians.¹² Before December 2008, a renovator can distribute EPA's pamphlets "Protect Your Family from Lead in Your Home or Renovate Right." After December 2008, only "Renovate Right" complies with the 2008 regulations. Renovators must keep records for three years of who got the pamphlets.¹³

What regulations are effective in 2009 and 2010?

Trainers may apply for accreditation in April 2009. Renovation firms may apply for certification required under the regulations beginning in October 2009. Only certified firms can perform renovations in target housing and child-occupied facilities after April 22, 2010. The lead work practices are in effect in April 2010. Also, after April 22, 2010, only certified renovators can direct lead-based paint work. After April 22, 2010, only work practices for renovation where

lead-based paint is involved that are approved in this regulation are permitted.¹⁴

What is "target housing"?

The new regulatory program applies to "target housing." "Target housing" is housing constructed before 1978. "Target housing" is not a "0-bedroom" dwelling, such as a dormitory or a studio apartment. "Target housing" does not include housing for the elderly or persons with disabilities unless a child six years of age or less is expected to live there.

What is a "child-occupied facility"?

A "child-occupied facility" is a building or portion of a building built before 1978. A "child-occupied facility" is visited "regularly by the same child, under six years of age . . ." ¹⁵ To meet the definition, the same child has to visit the building on two different days of the week for at least three hours each day for a total of six hours at the facility in one week and 60 hours in one year. A "child-occupied facility" can exist in a public building, a commercial building or target housing. Examples of "child-occupied facilities" are schools and day care centers.

Who needs to comply with these regulations?

Individuals and companies that are paid to renovate target housing and/or child-occupied facilities or to conduct lead-based paint dust sampling are covered by these regulations. Renovators must be trained in an official training course and firms must be certified. Such individuals and companies are likely to include housing contractors; residential remodelers; contractors in individual trades such as plumbing, heating, painting, carpentry, insulating, siding and tiling; lessors; replacement window installers; day care providers; schools and trainers of lead-based paint renovators.¹⁶

Do the new rules contain notification requirements?

Yes. A renovator must notify owners and occupants of target housing and child-occupied facilities undergoing renovation of lead-based paint hazards. Such hazards include "paint lead," "dust lead" and "soil lead." A paint-lead hazard is any damaged or deteriorated lead-based paint, any chewable lead-based painted surface with evidence of teeth marks, or any lead-based paint on a friction surface if there are certain lead-dust levels. Lead dust is a hazard if it is in concentrations greater than 40 micrograms per square foot of floor surface or 250 micrograms per square foot of interior windowsill surface. Lead soil is hazardous if the concentrations exceed 400 parts

per million in a paved area or 1200 parts per million in bare soil elsewhere in the yard.¹⁷

Other than informing owners and occupants of lead-based paint hazards before renovations begin, what is the purpose of the rule?

The purpose of the rule is to ensure that “individuals performing renovations . . . are properly trained; renovators and firms performing these renovations are certified; and [renovation] work practices [that minimize exposure] . . . are followed . . .”¹⁸

COMMON LAW LIABILITY CONSIDERATIONS

Although the work rules are phased in between now and April 22, 2010, banks and property owners may want to see the work practices outlined in 40 CFR 745.85 implemented now. Since the regulations contain quite a bit of detail on how to perform renovations, these work practices may become the common law negligence standard on how to do these jobs. For example, 40 CFR 745.85(a) requires a certified renovator to post a sign . . . “clearly defining the work area and warning occupants and other persons not involved in renovation activities to remain outside the work area.” If a child experiences increased blood lead levels allegedly due to a pre-2010 renovation, will a plaintiff’s attorney argue that posting such a sign pre-2010 was simple due care even though the regulation was not in effect yet?

Several flow charts in the 2008 EPA Small Entity Guide list work practices that firms might want to consider implementing to demonstrate the work met common law standards of due care.

In addition to the above federal regulatory and common law liability considerations, contractors engaged in work that could disturb lead-based paint should also determine if their state and local governments have additional lead requirements. According to the 2008 EPA Small Entity Guide, information on state lead regulations may be available through the National Lead Information Center at 1-800-424-5323.

Clearly, even a “simple” window replacement project will now be more time-consuming and expensive. The US EPA estimates that 189,000 small businesses will be affected by the

rule and the rule will cost \$400 million per year to implement.¹⁹ In addition, the US EPA proposed on August 21, 2008, fees for accreditation of renovators and technicians that range from \$20 to \$560 per person per activity. Of course, the US EPA has no estimates of what the costs of possibly creating a new negligence standard will have on the home repair industry.

NOTES

1. N. Irving Sax, *Dangerous Properties of Industrial Materials*, 2097 (7th Ed. 1987).
2. 73 Federal Register 21693 (April 22, 2008) and May 4, 1993 News Release “EPA and National Safety Council Sponsor Lead Poisoning Campaign.”
3. 42 USC § 4851, Findings of Residential Lead-Based Paint Hazard Reduction Act.
4. EPA Fact Sheet, “EPA Releases Final Rules to Ensure Safe Conduct of Lead-Based Paint Activities,” EPA 747-F096-005, August 1996.
5. 61 Fed. Reg. 45778 (August 29, 1996); 40 CFR 745.
6. Since 1996, sellers have been required to insert the following Lead Warning Statement into the sales contract, translating it if necessary into the same language that the contract is written in: “Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller’s possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.” And landlords have been required to insert the following Lead Warning Statement into the lease, translating it if necessary into the same language that the lease is written in: “Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing lessors must disclose the present of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.”
7. 24 CFR 35.
8. Asbestos and Lead Abatement Report, Vol. 7, No. 9, May 9, 1994 p. 65.
9. Asbestos and Lead Abatement Report, Vol. 14, No. 2, p. 15, February 2001; *See also* \$29,700 fine proposed against St. Louis landlord, Asbestos and Lead Abatement Report (ALAR), Vol. 13, No. 7, p. 70 July 2000; U.S. EPA proposed \$128,920 fine against San Antonio landlord, ALAR, Vol. 13, No. 10, p. 100, October 2000; Chicago landlords pay \$900,000 in penalties for lead violations, ALAR, Vol. 14, No. 10, p. 99 October 2001; Denver-based landlord fined \$129,000 for lead disclosure violations, ALAR, Vol. 15, No. 1, p. 8, January 2002.
10. ALAR Vol. 14, No. 3, p. 29, March 2001 and Vol. 14, No. 7, p. 17, July 2001; ALAR, Vol. 14, No. 12, p. 121, December 2001.
11. ALAR Vol. 14, No. 9, p. 95, September 2001.
12. For detailed descriptions of the activities and persons to whom the regulations apply see “Small Entity Guide to Renovate Right, EPA’s Lead-Based Paint, Renovation, Repair and Painting Program,” EPA-740-F-08-003, June 2008 (2008 EPA Small Entity Guide).
13. *See* Flow Chart 2 in 2008 EPA Small Entity Guide for a list of notification requirements.
14. 40 CFR 745.81.
15. 73 Fed. Reg. 21692 (April 22, 2008).
16. *See* 2008 EPA Small Entity Guide, p. 3 for a simple explanation of exceptions.
17. 73 Fed. Reg. 21695 (April 22, 2008).
18. 40 CFR 745.80.
19. 73 Fed. Reg. 21753 and 21756 (April 22, 2008).

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