

December 2009

## Toxic Tort Alert

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### **EPA lead law to impose new requirements on contractors and landlords**

#### **Applicability**

The U.S. Environmental Protection Agency (EPA) has enacted the Renovation, Repair and Painting (RRP) Rule, developed under the Toxic Substances Control Act, going into effect on April 22, 2010, which imposes a new set of requirements for contractors and property owners and managers who renovate, repair or prepare surfaces for painting in pre-1978 rental housing or space rented by child care facilities. The new RRP Rule may create a new standard of care in lead paint tort cases and impose negligence per se against a landlord and/or renovator especially where a small child-care facility (as defined under the Rule) in target housing undergoes a renovation without compliance with the Rule and a child in the facility is found to have an elevated blood lead level.

This Rule was designed to address lead-based paint hazards by renovation, repair or painting activities that disturb lead-based paint and target housing and child-occupied facilities. Child-occupied facilities means a building or portion of a building, constructed prior to 1978, visited regularly by the same child, under the age of 6 years, on at least two different days within any week, provided that each day's visit lasts at least three hours, and the combined weekly visits last at least six hours, and the combined annual visits are 60 hours.

The Rule establishes requirements for training renovators, other renovation workers, and dust sampling technicians; for certifying renovators and dust sampling technicians and renovation firms; for accrediting providers of renovation and dust sampling technician training; for renovation work practices; and for record keeping.

The Rule does not distinguish between single family or multiple family dwellings. These regulations do not apply when treating lead-based paint hazards of:

1. Two square feet or less of deteriorated lead-based paint per room or equivalent; or
2. Twenty square feet or less of deteriorated paint on the exterior building; or
3. Ten percent of the total surface area of deteriorated paint on an interior or exterior type of component with a small surface area.

#### **Work practice standards**

On or after April 22, 2010, all renovations must be directed by renovators certified in accordance with § 745.90(a) and performed by certified renovators or individuals trained in accordance with safe work practices of § 745.90(a) (b) (2), and record keeping requirements of § 745.86(b) (6) and (b) (7) in target housing or child-occupied facilities, unless the renovation qualifies for one or more exemptions identified in § 745.82(a) or (c).

## Exemptions

The RRP Rule has certain exemptions, which are defined as follows:

1. Renovations in target housing or child-occupied facilities in which a written determination has been made by a certified inspector or certified risk assessor that the components affected by the renovation are free of paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram/per square centimeter (mg/cm<sup>2</sup>) or 0.5 percent by weight, where the firm performing the renovation has obtained a copy of the determination.
2. Renovations in target housing or child-occupied facilities in which a certified renovator, using an EPA-recognized test kit and following the manufacturer's instructions, has tested each component affected by the renovation and determined that the components are free of paint or other surface coatings that contain lead equal to or in excess of 1.0 mg/ cm<sup>2</sup> or 0.5 percent by weight.
3. Renovations in target housing for which the firm performing the renovation has obtained a statement signed by the owner that the renovation will occur in the owner's residence, no child under the age of 6 resides there, no pregnant women reside there, the housing is not a child-occupied facility, and the owner acknowledges that the renovation firm will not be required to use work practices contained in the EPA RRP law.
4. Minor repair or maintenance activities, including minor heating, ventilation or air conditioning work, and plumbing, that disrupt 6 square feet or less of painted surface per room for interior activities or 20 square feet or less of painted surfaces for exterior activities, where none of the work practices that are prohibited or restricted under the RRP Rule are used and where the work does not involve window replacement or demolition of painted surface areas. Jobs, other than emergency renovations performed in the same room, within the same 30 days, are considered the same job for the purposes of determining whether the job is a minor repair and maintenance activity.

## Emergency renovations

5. The information distribution requirements, warning sign, containers, waste handling, training and certification requirements, do not apply to emergency renovations, which are renovation activities that were not planned, but result from a sudden, unexpected event (i.e., routine failures of equipment) that if not immediately attended to will present a safety or public health hazard or threaten equipment and/or property with significant damage. Interim controls performed in response to an elevated blood lead level in a resident child are also considered emergency renovations. However, emergency renovations are not exempt from the cleaning requirements, which must be performed by certified renovators or trained individuals with the cleaning verification requirements, which must be performed by certified renovators and in accordance with record keeping requirements.

## **Specific requirements for interior renovations**

No more than 60 days before beginning renovation activities in any residential dwelling unit or target housing, the firm performing the renovation must:

1. Provide the owner of the unit with the EPA pamphlet titled “Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools” or any other state or local pamphlet approved by the EPA and developed for the same purpose.
2. Obtain from the owner a written acknowledgement that the owner received the pamphlet.
3. Obtain a certificate of mailing at least seven days prior to the renovations.

## **Requirements for common area renovations**

No more than 60 days before beginning renovation activities in common areas of multiunit target housing, the firm performing the renovation must:

1. Provide the owner with a pamphlet and;
2. Obtain from the owner a written acknowledgement that the owner has received the pamphlet, or obtain a certificate of mailing at least seven days prior to the renovation.
3. Notify in writing, or ensure written notification of, each affected unit and make the pamphlet available upon request prior to the start of the renovation or while the renovation is ongoing, and post informational signs describing the general nature and locations of the renovation and the anticipated completion date. These signs must be posted in areas likely to be seen by the occupants of the affected units and must be accompanied by a posted copy of the pamphlet, or allow the occupant to obtain a copy from the renovation firm at no cost to the occupant.
4. Prepare, sign, and date a statement describing the steps performed to notify all occupants of the intended renovation activities and to provide the pamphlet.
5. If the scope, locations, or expected starting and ending dates of the planned renovation activities change after the initial notification, the firm performing the renovation must provide further written notification to the owners and occupants. The firm must also comply with the pre- and post- cleaning protocol set forth in § 745.85.

## **Child-occupied facilities**

Child-occupied facilities may include, but are not limited to, day care centers, preschools and kindergarten classrooms, and may be located in target housing or in public or commercial buildings. With regard to common areas in public or commercial buildings that contain child-occupied facilities, the child-occupied facility encompasses only those common areas that are routinely used by children under the age of 6, such as restrooms or cafeterias. Common areas that a child under 6 only passes through, such as hallways, stairways and garages, are

not included. In public or commercial buildings that contain child-occupied facilities, the RRP Rule applies to the exterior sides of the building that are immediately adjacent to the child-occupied facility, or the common areas routinely used by children under the age of 6.

## **Child-occupied facilities renovation requirements**

No more than 60 days before beginning renovation activities in any child-occupied facility, the firm performing the renovation must do the following:

1. Provide the owner of the building with the pamphlet; and
2. Obtain from the owner a written acknowledgement that the owner has received the pamphlet, or obtain a certificate of mailing at least seven days prior to the renovation.
3. Notify in writing, or ensure notification of, each affected unit and make the pamphlet available upon request prior to the start of renovation or while the renovation is ongoing, and post informational signs describing the general nature and locations of the renovation work and the anticipated completion date. These signs must be posted in areas where they are likely to be seen and accompanied by a posted copy of the pamphlet or information on how interested occupants can review a copy of the pamphlet or obtain a copy from the renovation firm at no cost.
4. Prepare, sign and date a statement describing the steps performed to notify occupants of the intended renovation activities and to provide the pamphlet.
5. Written notice must be given as to changes in the scope, locations or expected duration of the renovation.
6. Provide the parents or guardians of children using the child-occupied facility with the pamphlet and information describing the general nature and locations of the renovation and the anticipated completion date, by mailing or hand delivering the pamphlet and the renovation information to each parent or guardian of a child using the child-occupied facility while the renovation is ongoing. Post informational signs describing the general nature and locations of the work and anticipated completion date.
7. The renovation firm must prepare, sign and date a statement describing the steps performed to notify all parents and guardians of the intended renovation activities and to provide a pamphlet. Likewise, property owners who renovate, repair or prepare surfaces for painting in pre-1978 rental housing or space rented by child care facilities must, before beginning work, provide tenants with a copy of the EPA's lead hazard information pamphlet "*Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools.*" Owners of these rental properties must document compliance with this requirement — EPA's sample [\*\*pre-renovation disclosure form\*\*](#) may be used for this purpose.

After April 22, 2010, property owners who perform these projects in pre-1978 rental housing or space rented by child care facilities must be certified and follow the lead-safe work practices required by the EPA's Renovation,

Repair and Painting Rule. To become certified, property owners must submit an [application for firm certification](#) and fee payment to the EPA. The EPA began processing applications on October 22, 2009. The agency has up to 90 days after receiving a complete request for certification to approve or deny the application.

Property owners who perform renovation, repairs and painting jobs in rental property should also:

- Take training to learn how to perform lead-safe work practices.
- Learn the lead laws that apply regarding certification and lead-safe work practices beginning in April 2010.
- Keep records to demonstrate that the owner and workers have been trained in lead-safe work practices and followed lead-safe work practices on the job. To make record keeping easier, an owner can use the [sample record keeping checklist](#) that the EPA has developed to help contractors comply with the renovation record keeping requirements.

## Work practices standards

Renovations must be performed by certified firms using certified renovators.<sup>1</sup> Although the certified renovator is not required to be on-site at all times while the renovation project is ongoing, a certified renovator must nonetheless regularly direct the work being performed by other workers to ensure that the proper work practices are being followed. When a certified renovator is not physically present at the work site, the workers must be able to contact the renovator immediately by telephone or other mechanism. Firms must post signs clearly defining the work area and warning occupants and other persons not involved in renovation activities to remain outside the work area.

Before beginning the renovation, the firm must isolate the work area so that no dust or debris leaves the work area. While renovation is being performed, the firm must maintain the integrity of the containment by ensuring that any plastic or other impermeable materials are not torn or displaced in order to ensure dust containment. That includes removal of furniture, or covering furniture, rugs, etc., and closing windows and doors in the work area.

## Prohibited and restricted practices

The following work practices are prohibited under the RRP Rule:

- Open-flame burning or torching of lead-based paint.
- The use of machines that remove lead-based paint through high speed operation, such as sanding, grinding, power planing, needle gun, abrasive blasting or sandblasting, unless such machines are used with HEPA exhaust control.
- Operating a heat gun on lead-based paint only at temperatures below 1,100 degrees Fahrenheit.

There is a specific waste containment protocol under the RRP Rule, and the firm must perform post-cleanup verification.

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<sup>1</sup> The certification requirements are set forth in § 745.89 - § 745.90.

## Record keeping requirements and penalties

The renovation firms must retain, and if requested, make available to the EPA, all records for a period of three years following completion of the renovation. Violations of the RRP Rule are subject to civil and criminal penalties. This includes fines of up to \$32,500 per violation, per day.

## Discussion

Nothing in this RRP Rule requires the owner of properties to evaluate the properties for the presence of lead-based paint. The law pertains to the disturbance of painted surfaces by renovation, repair and painting activities. It pertains to targeted housing constructed before 1978, except housing for the elderly or persons with disabilities (unless a child under 6 years of age resides there), or any zero-bedroom dwelling.

It is essential for the owner of the property to fully screen and determine the qualifications and certifications of the renovation firm and ensure that the renovation firm has insurance in place, naming the owner and, if applicable, manager as additional insureds under its policy. The contract with the renovation firm should also contain specific hold harmless/indemnification language to the benefit of the owner. The contract should clearly define the work and specify that the renovators follow the safe work practices that are enumerated in the RRP Rule. Sample pre-renovation forms and the EPA pamphlets can be downloaded from the EPA website.

For buildings that children frequent, and where units may qualify as a child-occupied facility, the owner must now ascertain how often such children visit the units where the renovations in the targeted housing are being performed. These new requirements are in addition to those mandated by Local Law 1.

It is difficult to assess how the EPA will be able to fully monitor compliance with the new RRP law, but random inspections are expected in targeted housing.

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