



NEWS & VIEWS

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August 2009

No More Spreading Lead

There's a new federal rule that contains provisions taking effect in late April, 2010, that will require lead-safe work practices in pre-1978 housing and child-occupied facilities. With limited exceptions, when paint is disturbed, efforts must be undertaken to prevent the creation and spread of dusts. This is because the dust, even when invisible, will be toxic if it contains lead. Lead dust inflicts serious damage on the health of anyone who is exposed, and particular damage to the developmental capability of children. Lead has been associated with reductions in IQ, increases in criminal activity, and difficulty in learning, as well as several serious health problems affecting many parts of the body, including the blood and the nervous system. If you have always thought that lead poisoning is a problem restricted to poorly-maintained homes where the paint can be seen peeling off the walls, or to hungry children eating chips of paint because the lead tastes sweet, you need to readjust your thinking. Lead poisoning occurs across all economic strata. If renovation that fails to minimize, contain and clean up dusts occurs in a well-appointed home, it puts inhabitants at risk. Exposure to lead paint dusts is now considered to be the leading cause of lead poisoning, and renovation, repair and painting contracts are significant causes of lead dust creation. That is the new world we live in, where it is beyond doubt that lead dusts are a substantial risk to everyone's health, and where reasonable people would expect proper precautions to be observed. If you have a container of something labeled POISON you wouldn't take the poison out of the container and leave it lying around, would you? We are in a moment of transition now during which health science has strongly established the recognition that disseminated lead dusts from disturb-

ing old paint is poison, but we have not yet placed it within containers that have such warnings. That is what is changing. It is now becoming an inescapable fact that spreading lead is unacceptable. This has been in the works for a long time. The new rule is the latest regulation derived from the 1992 Residential Lead-Based Paint Hazard Reduction Act, (RLBPHRA, also known as "Title X") which required the promulgation of the regulation known as 40 CFR Part 745, Subpart F, the "Disclosure Rule", (also known as Section 1018), which requires disclosure of the fact that lead is, or may be, present when renting or selling pre-1978 housing. It also created subpart E, the "Pre-Renovation Education Rule", which required the handing over to customers by contractors, of the "Protect Your Family from Lead in Your Home" pamphlet, before beginning work that would disturb lead paint. The new rule replaces the old Subpart E and is titled "Residential Property Renovation", but everyone has been calling it the "Renovation, Repair and Painting" rule. It changes the entire thrust of lead law to date. Subpart F and the old Subpart E articulated the "right-to-know" about lead dangers. This right, which actually existed at civil law when recognized by courts, emerges from the concept that in a civilized society, it is wrong for one party to have access to information that the other party needs, and for the first party to be able to withhold that information when it conflicts with their own selfish interests. This is the case, for example, when you are trying to sell an old house, and it has lead risks, but you don't want to say anything about that, because you want to make the sale and you don't want the potential buyer to think there's anything wrong with the house. But in a civilized society, we place that

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ABOUT THE AUTHOR

Rick Reibstein, a former EPA attorney who helped develop enforcement practices and policy pertaining to the lead disclosure rule, is the founder and director of the Regulated Community Compliance Project (RCCP). The RCCP provides education on federal lead-based paint requirements. He now provides assistance and has no enforcement role. It is safe to contact him with questions.

The Lead Paint Issue

LEAD, continued from page 1

selfish interest in making sure you make the sale at a distant second place to the buyer's vital interest in not being poisoned. So the rules stated they have the right to know that the house has lead risks. This logic is so strong that it even extends to the idea that the house *might* have lead risks, simply because it was built back when lead might still be in the paints sold for residential use. In fact, the closer you get to 1978 the less likely it is that there is any lead in the house, but the dangers are so great that even a small chance that lead is there is enough to require disclosure that it might be there. Lead is that bad, the risks to buyers are that great, and the position of the seller or lessor is that important. Congress determined that it was a mark of an advanced society that people would incorporate this level of responsibility to each other when making transactions.

But everyone knows that sellers and landlords can decline to investigate whether lead is there, and choose to say that they don't know whether or not lead is there, and prospective buyers and renters will receive the message that lead might be there, not information about whether it is or not. And everyone knows that the simple act of handing over the "Protect Your Family" pamphlet, which has excellent information on how to protect yourself from harm, may or may not be effective. For example, it tells you that washing children's hands is important, and feeding them foods rich in iron and calcium (which inhibits the uptake of lead into the body). But what if the family does not read the pamphlet?

The right-to-know of the buyer and seller is critical and cannot be denied. But the new lead rule is necessary because it is not enough. The new lead rule has sprung from the same roots as the disclosure and education rules: from a sense of what a civilized society does. In a country where people are supposed to behave decently towards each other, it is expected that efforts will be made to prevent the spreading of poisons. It is not enough to simply say, oh, there might be poisons in that place where you will be living. It is necessary to make the effort to prevent the poisons from coming to rest in places where they will harm others. This is the rationale behind all of our pollution laws. We have applied them to industry. The new lead law follows the same logic.

This new law presumes that lead is present. Before, you were urged to test for the presence of lead, but if you didn't want to, you didn't have to, and you could put on the disclosure form that you didn't have any

knowledge. But now, if you want to escape the requirement to use lead-safe work practices when paint is disturbed in nonexempt locations, you have to test and show that lead is not present. (You have to use a test approved by the U.S. Environmental Protection Agency).

This new law requires that you inform owners and occupants on lead-based paint hazards before the work begins, (as before, but with a new pamphlet); that individuals performing renovations are properly trained; renovators and firms performing the renovations are certified as capable of doing lead-safe work, and the work practices are followed. These include the following actions. After performing pre-renovation education and putting up notifications of the work, the work area must be isolated – people kept out, things like furniture that will collect dust removed, windows and ducts closed or covered to prevent the movement of dust), and plastic put up to contain the dusts. Certain activities, such as using machines that sand, grind, or blast, unless they have dust collection that meets HEPA standards (High Efficiency Particulate Air filter), or a heat gun over 1100 degrees Fahrenheit, are prohibited. The wastes must be contained. And leaving the workplace without cleaning it up, to the standards described in the rule, is now a violation of law.

If a landlord or property manager does the renovation, unless they do it for free and are not compensated through their contract or lease in any way, they are considered the renovator and must become certified and observe all the requirements. If they hire someone, they should know that the firm they hire must comply with significant documentation requirements. *This presents an opportunity for liability protection.* To understand how important it is, it is necessary to first understand the relationship between the new rule and liability in civil litigation. The new rule is a part of what is called administrative law. It is enforced by federal agencies. The U.S. Environmental Protection Agency (EPA) and the Housing and Urban Development (HUD) agency have been charged with ensuring compliance with the nation's lead rules since 1992. (HUD has had strict rules requiring lead-safe work practices at HUD-financed properties for several years). If EPA contacts you for information about

compliance with the rules, it is a good idea to respond quickly and fully, because it has been given the authority under the Toxic Substances Control Act to subpoena and inspect the documents that must be kept to show compliance with all the rules discussed above. The penalties for failing to show compliance are significant. The excuse that it's just a paperwork violation is worthless, because Congress anticipated that these rules would be enforced through the requirement of documentation and made failure to demonstrate compliance through the proper paperwork a serious matter. In addition there are state health laws, which typically require that the lead be abated when children are found to have elevated levels of lead in their blood. These can be costly.

But all that is just one part of the law. The other big part is what can happen in litigation between sellers and buyers, landlords and tenants, or others who may have been harmed by the dissemination of lead dusts. (These also can include neighbors or visitors who may suffer exposure, or contamination of their property, or communities seeking cleanup of land or water that has been contaminated by lead dusts. In addition, there are workplace limits on exposure, to protect employees). If someone's child, for example, is harmed by lead, in addition to state and federal actions, the

Please see **LEAD**, page 3



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family might decide to sue. This is not a particularly easy case to make. The family has to find an attorney, perhaps mount expert witnesses, show causation of the harm by the exposure, and above all, win the argument that the defendant was negligent.

What is negligence? It is when a duty that is owed to others is "breached". That is, something that everyone expects of others, in a civilized society, was not done, or something that reasonable people would not do to others, was done. Negligence has traditionally turned on whether harms are "foreseeable". This makes a lot of sense. If you can see that someone is crossing the street in front of you, you can be expected to stop your car. But if you cannot see them in time, if they dash out too suddenly, it is not your fault.

This is what has just changed. Now, with this new law in place, there is a very good argument that lead poisoning is a foreseeable result of failing to isolate the workplace, notify the occupants, minimize the generation of dusts, contain them, and clean them up. This new rule is a clear and resounding statement that these are things that are expected of people. This new rule should make it very much easier for anyone to sue, successfully, in the event of harm, related to situations where lead-safe work practices have not been followed.

For that reason this article does not begin with details about exemptions to this law. It applies only when more than 6 square feet of interior space has been disturbed, or 20 square feet of exterior space. It does not apply if the owner signs a statement that the renovation is occurring in their residence and no child under 6 resides there, nor a pregnant woman, and the housing is a not a child-occupied facility, and

the owner acknowledges that the renovation firm will not follow lead-safe work practices. It does not apply when a facility is not child-occupied, which specifically means that a child visits it regularly on at least two different days within any week, provided that each day's visit lasts at least 3 hours and the combined weekly visits last at least 6 hours, and the combined annual visits last at least 60 hours. It does not apply to single-bedroom facilities, or housing for the disabled or elderly, unless there are children residing or expected to reside there. But these exemptions are about what the agencies will do. They do not limit what someone might sue for in court. If the argument can be made that reasonable people should know that failing to contain lead dusts will create foreseeable dangers, that those who created the dusts are in a position to prevent foreseeable harm to others, and should have done so, then these exemptions will not necessarily be enough to convince a judge to dismiss the case.

This potential liability at common law is an issue for landlords and property managers who hire renovators, who could be sued as well if they don't hire someone who follows the rules, or if they take too narrow a view of when to be lead-safe. It is not just the renovating firm that faces a new risk of liability for performing work that creates lead dust dangers. Because of this, the documentation requirements of the law should be a very important focus for anyone hiring renovation, repair or painting contractors.

If you are a property owner or manager, you should know that the renovation, repair or painting contractor you hire – whoever disturbs more than the threshold amounts of paint – will have to have paperwork showing they observed all the lead-safe work practices, including the training and certification requirements. If you want to be able to show in any case that might occur that you acted responsibly, here is your proof. You might want to get copies of that documentation. **You might want to require, in your contract with the firm, that they observe the requirements and share copies of the documentation with you in order to prove it.** The rule does not require they do this for you, but that they do this for federal regulators. But why not use this for your own benefit? Imagine how much better of a position you will be in, if someone claims your



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recklessness poisoned them, if you can produce these papers. If justice prevails, your good faith attempts to do the right thing should get the case dismissed with prejudice. Now imagine you don't have those papers. The fact is, this new rule offers you great protection against civil liability for harm from lead exposure. But only if you have taken it very seriously, have taken steps to ensure the new rule is followed, and keep proof.

The point of all of this is that lead dusts are now firmly recognized and proclaimed to be a risk serious enough to justify mandating the use of preventive practices. *We can no longer wait for children to be harmed first before we act, and we cannot rely solely on right-to-know.* We cannot ignore the risks anymore, or the responsibility to reduce or eliminate them. Lead is so dangerous that we must shift the burden of proof, now, from making someone show that it is there, to presuming that it is there. This new rule takes that step in the context of administrative enforcement, and it presages the day that that step will be required by other means - by common practice, by common understanding, by common decency, and perhaps by common law.

To learn more,

- Go to: www.epa.gov/lead. The new required pamphlet, "Renovate Right", can be found at the EPA's website, along with the new Subpart E and fact sheets.
- Contact Rick Reibstein, Director of RC-CP at 617.358.336 or rreibste@bu.edu.
- Contact Debbie Valente, Manchester Chapter President, at 603.867.8465 or debbievalente@comcast.net.



Did You Know??

Not All Lead Base Paint Is a Lead Exposure Hazard!

NH RSA 130-A:1 Definitions

XI. "Lead base substance" means:

(a) When present in a dried film of paint or other coating on walls, woodwork or other surfaces, or in plaster, putty or other substances:

- (1) The presence of lead equal to or greater than 1.0 milligram of lead per square centimeter of surface area as measured on site by a portable x-ray fluorescence analyzer; or
- (2) The presence of lead equal to or greater than 0.5 percent lead by weight as determined by laboratory analysis.

XVI. "Lead exposure hazard" means:

- (a) The presence of lead base substances on chewable, accessible, horizontal surfaces that protrude more than 1/2 inch and are located more than 6 inches but less than 4 feet from the floor or ground;
- (b) Lead base substances which are peeling, chipping, chalking, or cracking or any paint located on an interior or exterior surface or fixture that is damaged or deteriorated and is likely to become accessible to a child;
- (c) Lead base substances on interior or exterior surfaces that are subject to abrasion or friction or subject to damage by repeated impact; or
- (d) Bare soil in play areas or the rest of the yard that contains lead in concentrations equal to or greater than the limits defined in RSA 130-A:1, XI(b).

This "Did you know?" provided by Debbie Valente, NHPOA Manchester President. (603) 867-8465

*To submit an article or idea,
please email Nicole Toyé at
nicole@arthurthomasrentals.com.*


Landlord Tip of the Month

[When signing leases with new tenants], landlords should inform the tenant, in writing, that any conditions in the rental unit in need of repair or correction should be noted on the [security deposit] receipt or given to the landlord, in writing, within 5 days of occupancy."

*This month's tip taken from Steven Hyde's article
Is "Close Enough," Really Close Enough?
which appeared in the May issue of News & Views
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CHAPTER MEETINGS

MANCHESTER

To be announced

Reservation Requested: 603.881.3682

SALEM/DERRY

To Be Announced

RENTAL PROPERTY OWNERS

Thursday, September 3, 8 AM

Gateway Restaurant, Rte 108 Somersworth

Topic: To Be Determined

Contact Tom Toye: 603.413.6175

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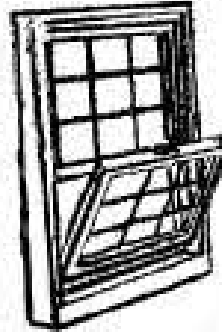
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Landlord Call to Action



Watch for this new section in upcoming issues of News & Views. Members will provide valuable information regarding legislative matters that urgently need *YOUR* action and support.

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Deb's Legal Corner

Have you had an experience in which the Courts ignored your Landlord rights? Do you believe the Courts have discriminated against you as a Landlord?

Please contact Debbie Valente to share your experiences at 603.867.8465 or debbievalente@comcast.net.

We need your input on the legal issues you have faced in order to bring them to the attention of Judge Kelley. If enough landlords respond, it will support our plea to the Judiciary that Landlords rights are being ignored. Remember, alone your voice may not be heard, but together we can make a difference!



News & Notes

Local Chapter Meeting Minutes

NHPOA BOARD OF DIRECTORS

- Year to date membership update: 43 new members, total of 390 active members
- Lake Region has 148 members & would like join the NHPOA
- Landlord Workshop - Upcoming plan is for trade show in Concord (Sept) & Seacoast (Oct.) area. Purpose: Increase membership; create greater awareness of the NHPOA; fundraiser
- Free workshop suggested [2hour] for Claremont & Keene to increase awareness membership.
- Discussed applying for grant money to help offset cost of website development
- Doris Beaulieu voted as secretary for the organization at this time
- Office Manager: Need to complete job description & seek new person to fill the position as of Aug 31.
- National Night Out on the West Side of Manchester, August 8th. Debbie will provide more information to the members. Debbie would like to have a table set up to give out information about NHPOA.
- Discussed how to handle the present list of Landlords with tenants who have children with elevated levels of lead in their blood in Manchester.
- Judy Nessel, past Nashua chapter president, voted in by the BOD's

RENTAL PROPERTY OWNERS ASSOCIATION (GREATER SEACOAST & SEACOAST)

- Sergeant Tony Bosse from the Rochester Police Department discussed the increase in thefts targeting unlocked cars in large apartment complexes and trailer parks.
- RPOA has a new address it is PO Box 444, Dover, NH 03821
- Scott Spewock, new Membership Director is working on a web site for RPOA. Scott is also working on a way to track member's vacant units so that we can refer prospective tenants to other members.
- A motion was made and voted on to purchase a lap top computer for up to \$700 including the necessary software to keep our membership information in a more portable, easily transferable place.
- A motion was made and voted on to purchase a "Pulse Pen" with pads for the cost of \$150. This device has advantages for taking notes at our meetings and is also a recording device. Further discussion is needed.
- Guest Speaker: NHPOA Vice president, Malcolm Bealieu - Malcolm discussed NHPOA restructuring; the strength of this association is in all of the statewide chapters sticking together; and the importance of more statewide association participation is needed in Concord when legislation is being proposed.
- Guest Speaker: NHPOA Secretary, Doris Beaulieu - discussed advantage of taking notes with the "Pulse Pen"
- Guest Speaker: President of the Manchester Chapter, Deb Valenti - Deb spoke about lead paint inspections and how it is important to stay pro-active with the lead issue. Get inspected & hire a contractor to remediate.
- Guest Speaker: Chris Kinneson of Somersworth Floor & Window - introduced us to a carpet made by Mohawk that is virtually stain proof. The product, called Smart Strands, has a lifetime stain warranty and 12 year wear warranty. It is available for about \$21 yard installed with pad. Ph. # is 603-692-6481.

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Attention Members: We need your help!

We would like your feedback on how to improve the NHPOA and our local chapters. Please share your ideas.

Help us grow! Please give an NHPOA application to a landlord you know and invite them to join our organization.

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The NHPOA Newsletter is distributed via email to all its members.

Please inform your local chapter president if you would like to receive a hard copy of this newsletter.

To make a submission, please email Nicole Toye directly at nicole@arthurthomasrentals.com