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The RRP Rule: Understanding the New EPA Lead Paint Regulations

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Special to the Legal

More than 79 million American homes contain lead-based paint. An estimated 8.4 million major home renovation events occur throughout the country each year. Together, these statistics create a perfect regulatory storm when considering the potential impact of the Environmental Protection Agency's Renovation Repair and Painting Rule. The RRP Rule imposes significant new legal requirements on property owners, managers and anyone who performs renovations "for compensation." To avoid liability, it is critical to ensure compliance with this new regulatory framework.

LEAD PAINT BACKGROUND AND THE DISCLOSURE RULE

Lead-based paints were banned from residential use by the Consumer Products Safety Commission in 1978 after numerous studies confirmed that the presence of lead-based paint in residential dwellings posed a threat of lead exposure and poisoning to occupants. While lead exposure is harmful to persons of all ages, it particularly impacts children, fetuses and women of childbearing age.

Lead poisoning in young children can cause widespread neurological damage, including learning disabilities, behavioral problems and impaired growth, hearing, sight and memory. In more severe cases, mental retardation, seizures and death can ensue. To address these risks, lead-based paint has been regulated at the federal, state and local levels. Most significantly, Congress enacted the Residential Lead-Based Paint Hazard



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Reduction Act of 1992, commonly known as "Title X" or "The Disclosure Rule".

Title X resulted in both the EPA and the U.S. Department of Housing and Urban Development promulgating regulations to provide for the disclosure of lead-based paint hazards in pre-1978 residential housing offered for sale or lease. With limited exceptions, these regulations — well known to anyone who has bought or sold real estate or rented a home — broadly apply to pre-1978 housing and require, among other things, the distribution of a pamphlet on lead-based paint hazards, the use of a disclosure form stating if there is any lead-based paint or other health hazards resulting from the presence of lead at the property, a signed acknowledgment from the purchaser or tenant and recordkeeping requirements.

Disclosure Rule violations can result in civil and criminal liability and penalties of \$11,000 per individual violation. In recent years, the EPA and HUD have both ratcheted up Disclosure Rule enforcement activities: HUD has conducted Title X inspections covering more than 400,000 housing units since 1978 and the EPA has implemented enforcement initiatives throughout its various

regions. By way of example, in 2009, the EPA settled an enforcement action against a Massachusetts corporation for Disclosure Rule violations involving nearly 300 separate lease transactions between 2003 and 2006. Pursuant to the settlement, the developer paid a \$200,000 penalty and agreed to spend more than \$1.9 million on a Supplemental Environmental Project, to replace windows and abate interior and exterior surfaces containing lead-based paint.

THE RENOVATION REPAIR AND PAINTING RULE

The RRP Rule set forth at 40 C.F.R. Part 745 was crafted to address lead-based paint hazards created by renovation, repair and painting activities that disturb lead-based paint in specifically identified "target housing" and "child occupied facilities." The rule includes new requirements for training renovators, establishes a new certification process for those who disturb painted surfaces where lead paint may be present and imposes new requirements with respect to dust minimization and work practices.

The rule broadly applies to renovators, electricians, HVAC specialists, plumbers, painters, electricians, drywall installers, insulation installers, siding contractors, tile contractors, wall covering specialists and maintenance staff who disrupt more than six square feet of lead paint in target housing and child occupied facilities. The rule also indicates that potentially affected entities include those engaged in building construction (single family and multi-family), landlords who lease property in target housing or child occupied facilities, and education service providers.

Target housing is defined as pre-1978 homes (excluding certain housing for the elderly unless a child under the age of 6 is known to reside therein, or zero bedroom residences). Child occupied facilities are defined by the rule as pre-1978 buildings visited regularly by the same child, under the age of 6, at least two days per week, with each visit lasting a minimum of three hours. Examples of child occupied facilities include day care centers, preschools and kindergarten classrooms. As such, the scope of the rule covers an enormous number of buildings, particularly in urban and suburban areas that were developed prior to 1978.

The RRP Rule mandates the distribution of new renovation-specific lead hazard information prior to the commencement of any work through the posting of signs in common areas and the mailing of pamphlets. Other requirements of the RRP Rule include:

- Training and certification of individual renovators and dust sampling technicians, including a hands-on training component.
- Specific requirements for lead-based paint training providers, including a new EPA-accreditation process.
- Project-specific requirements mandating that each renovation project covered by the rule must be performed or directed by a certified renovator who is responsible for ensuring compliance with the requirements of the rule, including but not limited to posting warning signs, establishing containment of the work area and the implementation of the new work practice standards.
- New work practices standards including prohibitions on the use of high heat guns, torches, power sanding and power planing of lead-based paint surfaces. Extensive new requirements also pertain to waste handling, cleaning and the execution of a post-renovation cleaning verification.

The RRP Rule also imposes significant new recordkeeping requirements on affected entities. All renovation projects covered by the RRP Rule must be performed by certified firms. A firm seeking to become certified must apply to the EPA and attest under penalty of law that it will only use properly

trained renovators and that it will follow the work practice and recordkeeping requirements established by the rule. According to the National Association of Homebuilders, the RRP Rule will cause major home renovation projects to increase by approximately \$2,400 per job.

Counsel for property managers, building owners and renovators will need to modify contracts to allocate liability and compliance responsibilities under the RRP Rule.

EXEMPTIONS AND ENFORCEMENT REPRIEVE

The RRP Rule contains an important exemption for “minor repair and maintenance activities.” These include any interior renovation activity that disrupts six square feet or less of painted surface per room is exempt from RRP Rule requirements (the same exemption extends to 20 feet or less of exterior renovations). Specific examples of minor interior renovations set forth in the preamble to the RRP Rule include removing a face plate for an electronic switch and the addition of a new cable television outlet.

However, the RRP Rule makes clear that window replacement activities are never exempt, regardless of the square footage of painted surface disturbed. One exemption that existed in the initial RRP proposal would

have allowed individual homeowners to “opt out” of the RRP requirements under certain circumstances where renovations occurred in the owner’s residence and the owner could certify no children or pregnant women resided therein. However, in a controversial move, the EPA eliminated this “opt out” provision on April 23, 2010.

On June 17, 2010, the EPA announced that it is providing additional time for renovation firms and workers to obtain the necessary training and certifications before enforcement of the firm certification and individual renovator requirements commences. Such workers must be enrolled in training by Sept. 30, 2010, with training completed by Dec. 31, 2010.

Failure to follow the RRP Rule could result in the risk of substantial governmental fines (\$37,500 per violation), civil liability and potential litigation. Accordingly, potentially affected parties including contractors, developers, landlords, education providers, real estate investors and owners need to carefully understand the nuances of these sweeping regulations. Counsel for property managers, building owners and renovators will need to modify contracts to allocate liability and compliance responsibilities under the RRP Rule. It is also unclear whether insurers will respond with new products to provide coverage for RRP liability claims as many existing policies tend to exclude coverage for lead-related claims. With government regulators increasingly enforcing existing lead-based paint laws, the implementation of the RRP Rule will certainly add another complex layer of regulatory concern. •

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