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Federal lead exposure regulations impact work done on pre-1978 residences and child-occupied facilities

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Nearly any renovation or removal activity involving lead-based paint in a pre-1978 building where children under the age of six reside or occupy at least 60-hours a year is regulated to certain performance standards and is required to have work performed by a certified professional. Pursuant to Subchapter IV of the Toxic Substances Control Act (TSCA), the United States Environmental Protection Agency (U.S. EPA) developed regulations for "lead-based activities" and "renovations" in "child-occupied facilities" and "target housing." (15 U.S.C. §2681, *et seq.*). This lead exposure reduction program is administered by U.S. EPA in all states, except: Wisconsin, Iowa, and North Carolina, which are authorized to administer their own programs in lieu of the federal program.

It is interesting that a "child-occupied facility" is defined slightly differently under the two sets of TSCA regulations. In the parts of the regulations concerning "lead-based paint activities" (40 C.F.R. §745.220, *et seq.*) a "child-occupied facility" is: "a building or portion of a building, constructed prior to 1978, visited regularly by the same child, six years of age or under, on at least two different days within any week (Sunday through Saturday period), provided that each day's visit lasts at least three hours and the combined weekly visit lasts at least six hours, and the combined annual visits last at least 60 hours. . ."¹

In the part of the regulations applicable to "all renovations performed for compensation" (40 C.F.R. §745.220, *et seq.*) the same sentence above is used to define "child-occupied facility" *except* that it is applicable to children "under six years of age" rather than "six years of age or under." Thus, a

day care center, preschool, and kindergarten classroom easily meet the definition of "child-occupied facility, but if a kindergarten (for example) is occupied by children who are all six years old, then the portion of the regulations applying to "renovations performed for compensation" is (oddly) not applicable.

In addition to "child-occupied facilities," the regulations apply to "target housing," defined as: "any housing constructed prior to 1978. . . or any 0-bedroom dwelling." (15 U.S.C. §2681(17)). Multi-family dwellings are subject to the regulations. However, exempt from the statutory definition of "target housing" is housing for the elderly or persons with disabilities, unless a child *less than* six years old resides or is expected to reside there. *Id.* The portion of the regulations applicable to "lead-based activities" (40 C.F.R. §745.220, *et seq.*) also exempts residential dwellings that are inhabited and owned by the person (or his family) doing the work, as long as there is no child residing in the dwelling with an elevated lead level.

The portion of the regulations applicable to "renovations performed for compensation" excludes renovations to target housing or child-occupied facilities where, at a minimum, the areas affected by the renovation have been determined pursuant to specified testing standards to be free of lead. Additionally excluded in housing in which the owner has signed a statement that: no children under the age of six and no pregnant woman resides there; it is not a child-occupied facility; and that the renovation firm will not be required to use the work practices contained in EPA's renovation, repair and painting rule. There is also a *partial* exemption for "emer-

gency renovations" which are not planned and result from a sudden, unexpected event that, if not immediately attended to, presents a safety or public health hazard, or threatens equipment and/or property with significant damage.

While there is nothing in these regulations that mandates a person to engage in lead-based paint activities, if any of the following is done at a six-year old or younger child-occupied facility or non-exempt residential dwelling, it is a lead-based paint activity that *needs* to be done by certified lead abatement professional: inspection, risk assessment, abatement (meaning, essentially, the removal of paint and dust; encapsulation of lead-based paint, or removal or permanent covering of lead-based paint contaminated soil). Likewise any "renovation" in a under six-year old child-occupied facility or non-exempt residential dwelling needs to be done by a certified lead renovation professional. There are record-keeping and notification requirements for "renovations."

A "renovation" any modification that results in the disturbance of six-square feet or more on the interior and 20-square feet or more on the exterior of painted surfaces of any structure built prior to 1978. (40 C.F.R. §745.83) It includes, but is not limited to: repair of painted surfaces, scraping or sanding of painted surfaces, window repair, and weatherization projects.

Additionally, regulations require that *all renovations* performed for compensation in pre-1978 "target-housing" and child-occupied facilities provide a copy of the U.S. EPA's pamphlet titled "Renovate Right – Important Lead Hazard Information for Families, Child

Care Providers, and Schools" to building owners, occupants in cases of target-housing, and parents and guardians of all children using the child-occupied facility, and obtain a written acknowledgment from such persons prior to the start of work. Although there is no specific limitation on the notification regulations to parents and guardians of children of any age, since the definition of "child-occupied facility" addresses situations in which a room or rooms in a larger building are the only rooms occupied by children ages six and under. Thus, it would be a strained interpretation to try to apply the notification requirement to all parents and guardians in, for example a school, when only two kindergarten rooms of that school (and the bathrooms and common areas used by the kindergarten class) comprise the "child-occupied facility."

However, from a parent-relations perspective, although not required by regulations, child-occupied facilities should consider distributing the pamphlet to all parents and guardians of children in the school. There are also requirements to, in certain cir-

cumstances, post informational signs while the work is proceeding.

In both "target-housing" and "child-occupied facilities" the buildings can be excluded from the regulations *if* they are tested pursuant to the standards specified in the regulations and are found to be below specified actionable limits of lead (as provided in the same regulations).

The regulations have teeth and can bite, at a minimum, owners and hired contractors. Enforcement can occur one of two ways: U.S. EPA can enforce its regulations (or, if you are in one of the three states that have an authorized program, the state can enforce it), or through a "citizen suit." (15 U.S.C. §2619). The costs of suit and reasonable fees for attorneys and expert witnesses may be recoverable if a "final order" is issued in a "citizen suit" case. Additionally, there are civil penalties payable to the United States for any suit or administrative action it brings in the amount not to exceed \$25,000 each violation and, if criminally prosecuted as a knowing or willful violation, the maximum penalty is increased

to up to \$25,000 per day of violation and up to a year imprisonment. There is a five-year statute of limitation that should be applicable to any civil penalty sought under the lead exposure reduction statute and regulations. (28 U.S.C. §2462).

Although it is not required, if you are a child-occupied facility, multi-family housing, or residence that is anticipating renovations – test for lead, find out whether these regulations are applicable to you, and educate yourself and your tenants/occupants prior to the start of work even if you are "lead-free." Including TSCA-regulated substances like lead and asbestos in your pre-work planning can ultimately make for a smoother and more economical project. ■

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1. Arguably, the applicability of the regulation to children six years of age can be challenged since the enabling statute applies to children under the age of six.

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