

ARE YOU PREPARED FOR THE 300 POUND EPA LAW RUSHING TO SACK YOUR QUARTERBACK?

A new Environmental Protection Agency (EPA) regulation is like a three hundred pound defender rushing to sack your quarterback. The EPA recently enacted a new lead paint regulation that affects every contractor, not just painters. If your work disturbs paint that potentially contains lead, there is a host of new requirements that you must comply with.

The new regulation requires certain abatement actions be taken for more than six square feet of interior paint or twenty square feet of exterior paint of a home built before 1978. The new regulation, C.F.R. 745.80 et. al., was passed in 2008, but did not take effect until April 22, 2010. This regulation exposes contractors not in compliance to fines of as much as \$37,500 a day plus potential civil lawsuits for allegations of lead paint exposure.

Fines in excess of \$20,000 have already been assessed against contractors on the east coast. The lead paint lawsuits will be similar to the asbestos lawsuits with equal to or greater financial exposure for the contractor.

WHAT TYPE OF RENOVATION/OR REMODELING IS EFFECTED?

This new regulation applies to all homes built before 1978 that are inhabited *or* frequented by pregnant women or children under the age of six, including multiple unit dwellings; day care centers and schools. The new regulation also targets window contractors regardless of the size of the area of paint you are disturbing. What this essentially means is that any building pregnant women or young children visit is a potential for EPA fines, penalties, and civil lawsuits.

Renovation and remodeling activities covered under this rule includes the removal, modification or repair of painted surfaces and painted components, such as doors, surface restoration for interior areas of six square feet or more and exterior areas of twenty square feet or more. Examples include:

- Surface preparation (such as sanding, scraping or any other activities that may generate paint dust).
- The removal of building components such as walls, ceilings, windows or plumbing.
- Weatherization projects such as cutting holes in painted surfaces to install insulation.
- Renovations for purposes of converting a building into a residence or child-occupied facility.

CERTIFICATION WITH THE EPA IS REQUIRED

Both the contractor's company and at least one employee on the job must be certified in handling lead-based paint renovations. The contractor can be certified to be a certified renovator. The company must apply for certification with the EPA by having at least one employee certified as a certified renovator and paying a \$300 fee to the EPA.

To be certified, the contractor must attend an EPA approved 8-hour training course, which includes 2 hours of hands-on training. Certification is good for five years. Thereafter contractors must be re-certified and of course the EPA requires additional fees.

The certified renovator is responsible for training other members of the contractor's company and there must be a certified renovator assigned to every project that falls under the above mentioned projects.

MANDATORY WORK PRACTICES

Before starting renovation, the EPA pamphlet titled "*Renovate Right*" must be distributed to the property owner seven days prior to starting the project. A copy of the pamphlet may be found at <http://www.epa.gov/lead/pubs/renovaterightbrochure.pdf>.

The contractor must isolate the work area to ensure that no dust or debris leaves the work area while the renovation is being performed. In addition throughout the renovation process, the contractor must maintain the integrity of the containment area by ensuring that any plastic or other impermeable materials are not torn or displaced. The contractor must take any further steps necessary to ensure that no dust or debris leaves the work area while the renovation is being performed.

After the completion of the renovation, the certified renovator must give the treated area the "white glove test". The certified renovator must wipe down surfaces in the work area with a damp white cloth and compare it to a cleaning verification card provided by the EPA. If the color of the cloth matches or is lighter than the card, the surface is deemed clean; if darker, the surface would then have to be re-cleaned and retested, with the process repeating until the cloth matches the card.

After work is complete the contractor is responsible for disposing of the hazardous material. Presently there is a conflict between the federal rules and the states rules as to how to properly dispose of the hazardous waste material following completion of the renovation. Under federal rules contractors may dispose of residential lead paint abatements as they would household garbage, subject to applicable state regulations. This is where the rub is. Under state regulation, 22 C.C.R. 66261.4(b)(2), California may require materials that are deemed toxic be disposed of following more stringent hazardous waste regulations.

Not only must the contractor follow the steps above, they must also maintain records for the EPA in the event they are audited by the EPA. Contractors are required to maintain the records for a minimum of three years following the completion of the renovation. The following sets of documents are required to be maintained and kept:

- Documentation that “*Renovate Right*” pamphlets were given to the homeowner/property owner.
- Documentation that training was provided to onsite workers by the certified renovator.
- Documentation that warning signs were posted and maintained onsite throughout the project.
- Documentation that work area containment and cleaning procedures were followed throughout the project.

HOW TO PROTECT YOURSELF FROM LIABILITY

Like a quarterback needs an outstanding offensive line in order to perform effectively, a contractor must have a first line of protection in order to avoid liability. In order to protect your construction company from liability there are three concrete steps to follow.

First, get certified with the EPA. Failure to be certified can lead to fines and the EPA shutting down your project.

Second, make sure your general liability insurance policy covers lead paint. The lack of coverage for lead paint will expose your company and your personal assets when you are a party to a lawsuit alleging claims for lead paint exposure.

Most insurance policies do *not* include lead provisions and moreover specifically exclude coverage for lead related claims. So while reading insurance policies may be as fun as watching paint dry, it is important to determine where the weaknesses are in your defenses. Therefore, have your insurance policies reviewed prior to taking on any work that involves a pre-1978 project.

The next step is the creation of a second corporation established specifically to perform the lead paint removal and disposal on the project. This modular or stand-alone corporation would operate independently, but still under the umbrella of the contractor. The stand-alone corporation would be an additional layer of protection for the contractor in the likely event of lead paint litigation. In the event of lead paint litigation, this modular company would become the primary target for liability and in-turn would shield the primary company and the contractor’s personal assets from liability.

With the proper steps and a protection plan you can stave off a game ending sack of your quarterback.

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