

Landlord Liability for Lead Exposure: Title X

Exposure to lead-based paint and lead water pipes may lead to serious health problems, particularly in children. Brain damage, attention disorders and hyperactivity have all been associated with lead poisoning. Landlords who are found responsible for lead poisoning may face liability for a child's lifelong disability. Jury awards and settlements for lead poisoning are typically enormous, because they cover remedial treatment and education of a child for the rest of his life, and include an award for the estimated lifelong loss of earning capacity caused by the injury. The costs of a typical "slip and fall" injury pales in comparison to some of the multi-million-dollar jury awards and settlements for lead poisoning.

Buildings constructed before 1978 are likely to contain some source of lead, be it lead-based paint, lead pipes or lead-based solder used on copper pipes. (In 1978, the federal government required the reduction of lead in house paint; lead pipes are generally only found in homes built before 1930, and lead-based solder in home plumbing systems was banned in 1988.) Pre-1950 housing in poor and urban neighborhoods that has been allowed to age and deteriorate is by far the greatest source of lead-based paint poisonings.

To help combat the health problems caused by lead poisoning, the Residential Lead-Based Paint Hazard Reduction Act (42 U.S.C. § 2852d) became law in 1992. Commonly referred to as Title X [Ten], the goal of this law is "lead hazard reduction," which will be accomplished by evaluating the risk of poisoning in each housing situation and taking the appropriate steps to reduce the hazard. Much of Title X is directed to federal housing and federally financed private housing—that is, federally owned and managed housing (known as "HUD housing") and federally subsidized private housing.

Title X also addresses private rental housing. The Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) have written

regulations explaining the law (24 Code of Federal Regulations Part 35 and 40 Code of Federal Regulations Part 745). Compliance with Title X became effective for all landlords as of December 6, 1996.

a. Disclosure of Lead Paint Hazards

You must inform tenants, before they sign or renew a lease or rental agreement, of any information you possess on lead paint hazards on the property, including individual rental units, common areas and garages, tool sheds, other outbuildings, signs, fences and play areas. If your property has been tested (which must be done only by a state-certified lead inspector), you must show a copy of the report, or a summary written by the inspector, to tenants. With certain exceptions (listed below), you must give every new (or renewing) tenant a disclosure sheet, even if you have not tested for lead paint hazards. You can use the disclosure form developed by the EPA, or you can design your own, as long as it meets the EPA requirements.

HOW LEAD POISONING OCCURS

When the dangers of lead-based paint were first discovered, the ingestion of lead-based paint chips was considered the most common means of poisoning. While this source (or "vector") for lead poisoning certainly exists, it is now widely acknowledged that airborne lead-laden dust caused by the deterioration of exposed lead-based paint is the greater culprit. Falling on window sills, walls and floors, this dust makes its way into the human body when it is stirred up, becomes airborne and is inhaled, or when it is transmitted directly from hand to mouth. Exterior lead-based house paint is also a potential problem in that it can slough off walls directly into the soil and be tracked into the house.

An equally powerful source of lead-based dust is the dust that results from renovations or remodeling, including, unfortunately, those projects undertaken to rid the premises of the lead-based paint. Lead poisoning can also occur by drinking water that contains leached-out lead from lead pipes or from broken-down lead solder used in copper pipes.

Children between the ages of 18 months and five years are the most likely to become lead-based paint victims. Their poisoning is detected when they become ill or, increasingly, in routine examinations of presymptomatic children where elevated blood levels of lead easily appear.

What about tenants who began renting before December 6, 1996: Must you provide disclosure forms for them, too? Your compliance obligations depend on whether the current tenant has a lease or is renting on a month-to-month basis:

- **Tenants with leases.** You need not comply with Title X until the lease ends and the tenant renews or stays on as a month-to-month tenant.

- **Month-to-month tenants.** You should have given month-to-month tenants a disclosure statement when you collected your first rent check dated on or after December 6, 1996.

As you'll see, the disclosure form has a place for the tenant to initial, indicating that the tenant has received the form. Make a copy of the initialed form and keep it safely in your records for at least three years. If a federal or state agency questions whether you're complying with the disclosure law, you'll have a cabinet full of signed forms as evidence. And, if a tenant claims to have developed symptoms of lead poisoning and points to your property, you'll want to have proof that you disclosed what you knew

WHAT'S A LEAD-PAINT HAZARD?

A "lead hazard" includes deteriorated lead-based paint, lead contaminated dust or soil or the results of disturbing lead paint without containing the dust. The suspect paint, dust or soil will become a legal hazard depending on two measurements: the concentration of lead and the area that's affected.

Concentration. The chart below shows the minimum concentrations that will establish a lead hazard.

Lead in Paint Hazard Levels	Lead in Bare Soil Hazard Levels	Lead in Dust Hazardous Levels
lab test results of 5,000 ppm (parts per million) or 0.5% or more (by weight)	lab test results of 400 ppm or more in bare soil in areas where children play	dust from interior floors with 50 micrograms of lead per square foot (50 μ g/ft ²) or more
XRF test results of 1.0 milligrams of lead per square centimeter (1.0 mg/cm ²) or more	lab test results of 1,000 ppm or more in all other areas	dust from interior horizontal window surfaces with 250 micrograms of lead per square foot (250 μ g/ft ²) or more
		dust from exterior floors and exterior horizontal window surfaces with 800 micrograms of lead per square foot (800 μ g/ft ²) or more

Area Affected. Soil, paint or dust with sufficient lead will become a legal hazard if it is present in an area that

is equal or bigger than:

- two square feet in any one interior room or space
- twenty square feet on exterior surfaces, or
- ten percent of the surface area on the interior or exterior of a component such as window sills, baseboards and trim.

Finally, if lead-based paint is “deteriorated” or “disturbed” and is associated with a person with a blood lead level over 10 micrograms per deciliter, it’s a lead hazard, no matter what the concentration of the dust, soil or paint or the size of its presence. (Health & Safety Code § 17920.10.)

Source: California Department of Health Services, www.dhs.ca.gov/childlead.

b. Information on Lead Hazards

You must give all tenants the lead hazard information booklet “Protect Your Family From Lead in Your Home,” written by the EPA. You may reproduce the booklet in a legal-size, 8 1/2 x 14-inch format, and attach it to the lease or rental agreement. The graphics in the original pamphlet must be included. Or, you may use California’s pamphlet, approved by the EPA, *Environmental Hazards: A Guide for Homeowners, Buyers, Landlords and Tenants*. See sidebar, Resources: Lead, below, for information on these booklets.

LEAD INSPECTIONS

While lead inspections are not required by federal law, you may voluntarily arrange an inspection in order to certify that your property is lead-free and exempt from federal regulations. (See list of exemptions, below.) Also, if you take out a loan or buy insurance, your bank or insurance company may require a lead inspection.

Professional lead inspectors don’t always inspect every unit in large, multi-family properties. Instead, they inspect a sampling of the units and apply their conclusions to the property as a whole. Giving your tenants the results and conclusions of a building-wide evaluation satisfies the law, even if a particular unit was not tested. If, however, you have specific information regarding a unit that is inconsistent with the building-wide evaluation, you must disclose it to the tenant.

c. Penalties

The EPA doesn’t deploy the lead police to make sure that landlords deliver a lead hazard information booklet and disclosure statement to every tenant. However, the EPA will respond if a tenant calls and complains. This will probably result in no more than a letter or call from the

inspectors, since the EPA will not cite you unless your noncompliance with the laws is willful and continuing. But a landlord who continues to ignore Title X may find himself subject to the penalties of up to \$10,000. You may have to pay substantial damages to a tenant who is injured by lead and who could have taken steps to avoid the exposure had you warned him of its known presence.

RENTAL PROPERTIES EXEMPT FROM TITLE X REGULATIONS

These rental properties are exempt from the federal Title X regulations:

- Housing for which a construction permit was obtained, or on which construction was started, after January 1, 1978. Older buildings that have been completely renovated since 1978 are not exempt, even if every painted surface was removed or replaced.
- Housing certified as lead-free by a state-accredited lead inspector. Lead-free means the absence of any lead paint, even paint that has been completely painted over and encapsulated.
- Lofts, efficiencies, studios and other “zerobedroom” units, including dormitory housing and rentals in sorority and fraternity houses. University-owned apartments and married student housing are not exempted.
- Short-term vacation rentals of 100 days or less.
- A single room rented in a residential home.
- Housing designed for persons with disabilities (as explained in HUD’s Fair Housing Accessibility Guidelines, 56 Code of Federal Regulations § 9472, 3/6/91), unless any child less than six years old resides there or is expected to reside there.
- Retirement communities (housing designed for seniors, where one or more tenant is at least 62 years old), unless children under the age of six are present or expected to live there.

Cities and counties may have their own lead laws imposing additional requirements on

property owners. For example, the City and County of San Francisco strictly regulates how lead paint is to be worked on and removed. Check with your local building department for any lead paint laws that might apply to residential property owners.

LEADED MINI-BLINDS

Some imported mini-blinds from China, Taiwan, Indonesia and Mexico are likely to contain lead, but are not banned by the Consumer Product Safety Commission. If your property has leaded mini-blinds, you do not have to disclose this fact unless you know that the blinds have begun to deteriorate and produce lead dust. To avoid problems, use mini-blinds from other sources or different kinds of window coverings.

Your insurance company may not cover you if a tenant is injured by lead that you knew about

and failed to deal with. Insurance policies uniformly deny coverage for losses that you knew (or should have known) were likely. If you understand the effect of lead on the human body, once you know about the presence of lead on your property, you can reasonably expect poisonings. Facing a lawsuit without insurance will probably end your business.

d. Why Landlords Should Test for Lead

Before the advent of Title X and the EPA regulations concerning disclosure of lead in residential rental property, landlords who suspected that there might be lead lurking in the tenants' paint or water faced a difficult choice:

- Landlords who had their property tested and learned that lead was present had thereby gained the knowledge that their property had a dangerous defect; as a result, these landlords placed themselves at increased legal risk for tenant lawsuits unless they took prompt and effective remedial action.
- On the other hand, landlords who didn't test had to live with the nagging suspicion that their property might be making their tenants sick and damaging the development of children exposed to lead.

Although the EPA regulations do not require a landlord to test for lead, practical considerations point strongly in that direction. It comes down to this:

- If your rental property was built after 1978, it is unlikely to have lead poisoning problems, and you've probably got nothing to worry about.
- If your property was built before 1978 (particularly pre-1950 housing in poor condition), you should consider having the property inspected—especially if you rent to families with children under the age of six.

In sum, as with many landlord problems discussed in this book, there is no effective way to hide a serious lead problem over the long run. Your best bet is to tackle it directly on your own terms, before you are forced to do so. The next section explains how to go about getting information on testing and reducing one of the most serious lead hazard risks—lead-based paint.

IT MAKES SENSE TO TEST FOR LEAD

make liability for lead poisoning a subject of an exculpatory clause, and the clause is not upheld in court, you will have effectively established that you were aware of the lead problem. (Why else would you have written such a clause?)

Unless your rental property was built after 1978, consider testing your rental property for lead. Here are seven good reasons why:

- 1. It's cheaper than a lawsuit.** Lead hazard control (as discussed below) is much less burdensome than going through a lawsuit, let alone living with the knowledge that a child's health has been damaged.
- 2. Deliberate ignorance won't shield you from a lawsuit.** Even though the EPA regulations do not require testing, ignorance of the condition of your property may not shield you from liability in a lawsuit brought by an injured tenant. At some point, a court may rule that the danger of lead paint in older housing is so well known that owners of older housing will be presumed to know of the danger. Should this "imputed knowledge" of the hazard ever be attributed to you, a jury will have a difficult time believing that you were truly ignorant. Moreover, an

injured tenant may be able to show the court that it was likely that you were, in fact, apprised of the lead problem—through your attendance at seminars for landlords, subscriptions to periodicals aimed at property owners and even reading this book!

3. You can't legally avoid renting to children. Recognizing that children are the ones most at risk for lead poisoning, you cannot simply refuse to rent to tenants with children—this is illegal discrimination under federal and state law. (See Chapter 9, Section C.3.)

4. You can't avoid responsibility by attempting a clever legal dodge. You cannot count on a clause in your lease or rental agreement attempting to shift responsibility for lead-based injuries from the landlord to the tenant to protect you. This type of clause (called an “exculpatory clause,” in legalese) will not be upheld by a California court. Ironically, if you

5. Eventually, you'll have to test to satisfy a seller or a lender. If you attempt to refinance or sell your rental property, you will find that most major lenders will require lead testing before a loan is approved.

6. Your insurance company may eventually require it. You can expect that your own insurance company may soon require lead testing as a condition of issuing a policy. Lead poisoning cases are incredibly expensive—for example, in two New York cases recently, injured tenants were awarded seven and ten million dollars. It is only a matter of time before the insurance industry nationwide realizes that it cannot continue to blindly insure all properties against lead poisoning. (Consider the reaction of the insurance industry to earthquakes and wildfires in California, where coverage for these disasters is now often difficult to procure.)

7. Your tenant may address the problem on his own. Effective January 1, 2003, the presence of lead paint hazards on residential rental property joined the ranks of problems that render property “untenantable.” (CC §1041.1; H&S § 17920.10; see sidebar, What's a Lead-Paint Hazard?, above.) This means that a tenant can use the repair-and-deduct remedy or withhold rent if hazards are present and you don't do anything about them. You'll want to avoid

withheld rent or serious repairs undertaken by persons you haven't hired.

e. How to Clean Up Lead-Based Paint

Lead is relatively easy to detect—you can buy home use kits that contain a simple swab that turns color when drawn over a lead-based surface. Knowing how much lead is present and how to best clean it up, however, are subjects for the experts. It is beyond the scope of this book to present detailed remediation or clean-up instructions, if only because each situation will require a specific response. We can, however, give you an overview of the current thinking on the issue.

The most important thing to understand when faced with a lead paint problem is that sometimes the wholesale removal of the paint, or even sanding and repainting, may not be the best solution. This is because these types of renovations often create and release tremendous amounts of lead dust, the deadliest vector for poisoning. Unless the job is done by trained personnel, the well-intentioned removal of lead paint may actually create a far bigger problem than originally existed. California already has training and licensing requirements for lead abatement professionals, and expected EPA regulations also contain specifications for the training and certification of lead removal workers.

Drastic measures may be needed when the underlying structure itself is so deteriorated that safety requires a from-the-bottom-up approach, but this is rarely the case. The most effective response to lead-based paint is usually a program consisting of these steps:

1. Inspect for deteriorated paint. Pay close attention to areas that get the most use (floors and window channels), and determine whether lead is present. An environmental engineer will be able to tell you how much lead is present at floor level and above, which will alert you as to whether your property exceeds the amounts allowable by law.

2. Clean up lead-contaminated dust with a good vacuum cleaner and detergent that is specifically designed to pick up lead. Regular

household cleaners, even TSP, do not do a very effective job of capturing lead, nor will a standard vacuum cleaner be able to filter out the microscopic lead particles. Consider using a lead-specific cleanser (“Ledizolv” is one such product) and buying or renting a “HEPA” vacuum (a “high efficiency particle arresting” vacuum, often available for rent from hardware stores or equipment rental agencies). If you are dealing with lead dust, wear a mask and disposable protective clothing.

3. Repaint with non-lead-based paint to provide a strong, cleanable surface.

4. Educate your tenants on how to identify, control and clean up any lead dust that might still be present. The EPA’s “Protect Your Family From Lead in Your Home,” a pamphlet you will be required to give to each resident under Title X, will help you in this respect.

5. Monitor lead dust situations. Design your periodic safety inspections (discussed in Chapter 11, Section K) so that you keep on top of any deterioration of lead-based surfaces.

6. Do as much as possible, within the recommendations of your experts, to prevent the

accumulation of lead dust. Theoretically, some lead dust problems might be containable by frequent, lead-specific and thorough cleaning, rather than repainting. There are some professional cleaning companies that specialize in lead dust cleaning. It is risky, however, to entrust that specialized housecleaning job to your tenants, even if you are prepared to give them the appropriate vacuum cleaners and detergents. You cannot, from a practical point of view, adequately monitor their housekeeping practices. Instead, prevent the accumulation of lead dust by painting over lead paint, if possible, even if this solution appears more costly than dust maintenance. It will certainly cost less than a lawsuit.

3. Renovations and Lead Hazards

When you renovate occupied rental units or common areas in buildings constructed before 1978, EPA regulations require that current tenants receive lead hazard information before the renovation work begins. (40 CFR §§ 745.80-88.) The regulations were developed under the federal Toxic Substances Control Act (15 U.S.C. §§ 2681-2692) and became effective on June 1,

1999. The EPA has written a helpful booklet, “The Lead-Based Paint Pre-Renovation Education Rule,” which you can download from their website. See sidebar, Resources: Lead, below.

The obligation to distribute lead information rests with the “renovator.” If you hire an outside contractor to perform renovation work, the contractor is the renovator. But if you, your property manager, your superintendent or other employees perform the renovation work, the landlord is the renovator and is obliged to give out the required information.

The type of information that the renovator must give to tenants depends on where the renovation is taking place. If an occupied rental unit is being worked on, you must give the tenant a copy of the EPA pamphlet “Protect Your Family From Lead In Your Home.” If common areas will be affected, you will have to distribute a notice to every rental unit in the building.

a. What Qualifies as a Renovation? According to EPA regulations, a “renovation” is any change to an occupied rental unit or common area of your building that disturbs painted surfaces. Here are some examples:

- removing or modifying a painted door, wall, baseboard or ceiling
- scraping or sanding paint, or
- removing a large structure like a wall, partition or window.

Not every renovation triggers the federal law, though. There are four big exceptions:

- **Emergency renovations.** If a sudden or unexpected event, such as a fire or flood, requires you to make emergency repairs to a rental unit or to your property’s common areas, there’s no need to distribute lead hazard information to tenants before work begins.
- **Minor repairs or maintenance.** Minor work that affects two square feet or less of a painted surface is also exempt. Minor repairs include routine electrical and plumbing work, so long as no more than two square feet of the wall, ceiling or other painted surface gets disturbed by the work.
- **Renovations in lead-free properties.** If the rental unit or building in which the renovation takes place has been certified as containing no

lead paint, you're not required to give out the required information.

• **Common area renovations in buildings with three or fewer units.** Only buildings with four or more units are required to give tenants information about common area renovations. Repainting a rental unit in preparation for a new tenant doesn't qualify as a "renovation" unless accompanied by sanding, scraping or other surface preparation activities that may generate paint dust. Minor "spot" scraping or sanding can qualify for the "minor repairs and maintenance" exception if no more than two square feet of paint is disturbed on any surface to be painted. (EPA Interpretive Guidance, Part I, May 28, 1999.)

b. Give Out EPA Pamphlet When Renovating Occupied Rental Units

Before starting a renovation to an occupied rental unit, the renovator must give the EPA pamphlet "Protect Your Family From Lead In Your Home" to at least one adult occupant of the unit being occupied, preferably the tenant. This is the same one you gave new tenants when they signed their lease or rental agreement. This requirement applies to all rental properties, including single-family homes and duplexes, unless the property has been certified leadfree by an inspector.

You may mail or hand deliver the pamphlet to the tenant. If you mail it, you must get a "certificate of mailing" from the post office dated at least seven days before the renovation work begins. If you hand deliver it, have the tenant sign and date a receipt acknowledging that the pamphlet was received before renovation work began in the unit. Make sure the tenant will receive the pamphlet 60 days (or less) before the work begins (delivering the pamphlet more than 60 days in advance won't do).

c. Give Out Notice When Renovating Common Areas If your building has four or more units, the renovator—you or your contractor—must notify tenants of all "affected units" about the renovation and tell them how to obtain a free copy of the EPA pamphlet "Protect Your Family From Lead In Your Home." (CFR § 745.85(b)(2).) In most cases, common area renovations will affect all units in your property,

meaning that all tenants must be notified about the renovation. But when renovating a "limited use common area" in a large apartment building, such as the 16th floor hallway, you need only notify those units serviced by, or in close proximity to, the limited use common area. The EPA defines large buildings as those having 50 or more units.

To comply, the renovator must deliver a notice to every affected unit describing the nature and location of the renovation work, its location and the dates you expect to begin and finish work (see a sample "Common Area Renovations Notice," below). If you can't provide specific dates, you may use terms like "on or about," "in early June," or "in late July" to describe expected starting and ending dates for the renovation. The notices *must be delivered within 60 days before work begins*. The notices may be slipped under apartment doors or given to any adult occupant of the rental unit. (You may not mail the notices, however.) After the notices are delivered, keep a copy in your file, together with a note describing the date and manner in which you delivered the notices to rental units.

d. Penalties

Failing to give tenants the required information about renovation lead hazards can result in harsh penalties. Renovators who knowingly violate the regulations can get hit with a penalty of up to \$27,500 per day for each violation. Willful violations can also result in imprisonment.

Common Area Renovations Notice

March 1, 200x

Dear Tenant,

Please be advised that we will begin renovating the hallways on or about March 15, 200x. Specifically, we will be removing and replacing the baseboards, wallpaper and trim in the 2nd, 3rd and 4th floor corridors, and sanding and repainting the ceilings. We expect the work to be completed in early May, 200x.

You may obtain a free copy of the pamphlet "Protect Your Family From Lead In Your

Home” from Paul Hogan, the building manager. Paul may be reached at (212) 555-1212.

We will make every attempt to minimize inconvenience to tenants during the renovation process. If you have questions about the proposed renovation work, feel free to contact Mr. Hogan or me.

Very truly yours,
Lawrence Levy
Lawrence Levy, Manager

RESOURCES: LEAD

Information on the evaluation and control of lead dust, and copies of the “Protect Your Family From Lead in Your Home” pamphlet, may be obtained from the regional offices of the federal EPA or by calling the National Lead Information Center at 800 424-LEAD.

Information (including pamphlets on renovation and a parents’ guide) is also available from the EPA on its website: www.epa.gov/lead.

The U.S. Department of Housing and Urban Development (HUD) issues a pamphlet entitled “Guidance on the Lead-Based Paint Disclosure Rule, Parts I and II,” which may be obtained by contacting your nearest HUD office. You can also get this information online from the HUD Lead Office website at www.hud.gov/offices/lead. Click the “Lead Paint Disclosure Rule” link. The U.S. Occupational Safety and Health Administration (OSHA) has developed interactive software, “Lead in Construction,” that will help you assess the lead problems on your property and design appropriate responses. You can access the program by going to the OSHA website at www.osha.gov. In the Search window, type in “Lead in Construction” and choose the hit that corresponds to software.

HUD also maintains a “Lead Listing” of names, addresses and phone numbers of trained lead paint contractors (for testing and abatement) in every state. Call 1-888-LEAD-LIST or access the list on the Web at www.leadlisting.org. For a copy of the California Department of Health Services’ Environmental Hazards: A

Guide for Homeowners, Buyers, Landlords and Tenants, or a list of state-certified lead inspectors, contact the Department of Health Services at 800-597-LEAD. Their website is www.dhs.ca.gov/childlead.

The lead paint renovation rules can be found at 40 Code of Federal Regulations Part 745, Federal Register Vol. 63, No. 104, pp. 29908–29921.

Require renovation contractors to give out required information. The federal disclosure requirements apply to “renovators.” When you hire an outside contractor to perform renovations in rental units or common areas, the contractor is responsible for giving out the required information. To avoid any misunderstandings, make sure your renovation contract or work agreement specifically requires the contractor to provide all required lead hazard information to tenants as provided under federal law and regulations.