

LEAD PAINT IN NON-RESIDENTIAL BUILDINGS

The brunt of lead poisoning prevention legislation has been borne by the owners of residential property, primarily property occupied by children aged seven or younger. The legislative scope has been slowly expanding to include schools and day care centers and, with the adoption of the Residential Lead-Based Paint Hazard Reduction Act ("Title X"), public buildings built before 1978, commercial buildings and superstructures

On September 2, 1994, the Environmental Protection Agency (the "EPA") issued proposed regulations pursuant to the mandates of Title X, requiring the training and certification of workers engaged in lead-based paint activities ("LBP Activities") in target housing, "Public" and "Commercial" buildings. The proposed regulations state that no person shall engage in LBP Activities without certification from the EPA. Public buildings are defined as buildings constructed prior to 1978, except target housing, which are generally open to the public or occupied or visited by children, including but not limited to schools, day care centers, museums, airport terminals, hospitals, stores, restaurants, office buildings, convention centers and government buildings. Commercial buildings are defined as buildings used primarily for commercial or industrial activity, which are not open to the public, or occupied or visited by children, including but not limited to, warehouses, factories, storage facilities, aircraft hangers, garages, and wholesale distribution facilities.

The applicability of the regulations to the particular nonresidential building is tied to the nature of the activity being undertaken;

only certain LBP Activities are covered in public and commercial buildings. Under most state and local legislative schemes, the presence of young children, whether lead poisoned or not, will determine the scope of the violation and/or the mandated response. For example, in New York City, if a child has an elevated blood lead level, it must be reported to the Department of Health who must, in turn inspect the child's residence. If lead paint is found, it must be abated, regardless of the paint's condition following specified protocols and safety standards. Under New York City Department of Housing, Preservation and Development regulations, a violation and order to abate will be issued if there is peeling or chipping paint in an apartment in which a child 6 or under resides. In housing built before 1978 there is a presumption that peeling or chipping paint is lead-based paint.

If LBP Activities are undertaken in public or commercial buildings, the persons performing these activities must be trained and certified. The training and certification requirements are very similar to those set forth in regulations issued under the Asbestos Hazard Emergency Response Act, which now apply to asbestos abatement activities in public and commercial buildings. The EPA proposed regulations issued on September 2, 1994 specifically establish guidelines for identification of lead-based paint, risk assessment, abatement and demolition in public buildings; as well as demolition, identification of lead-based paint and deleading of lead-based paint in commercial buildings and superstructures. EPA is also developing guidelines and regulations for renovation and remodeling activities under-

taken in these buildings. It is too early to predict the content of these regulations.

In addition to the regulations issued by the EPA, property owners are also affected by the interim final lead in the construction industry regulations issued by OSHA in May 1993. The OSHA regulations apply whenever an employee involved in construction activities may be exposed to levels of lead above an action level of 30 ug/m³ or a permissible exposure limit of 50 ug/m³ ("PEL"). The trigger is tied to the potential exposure of the worker, not to the level of lead in the paint or soil. For example, on a demolition project, once it is determined there is any lead on the surface to be demolished, an assessment must be undertaken to determine whether the particular activity will create levels of exposure above the action level or the PEL. If the property owner's employee is engaged in the defined activity, it is the owner's obligation to make the initial exposure assessment and adopt appropriate worker protection measures. If the property owner has retained a contractor to perform the work, the property owner must inform the contractor that there is lead present in order that the contractor can make the initial exposure assessment and institute appropriate protective measures on behalf of its employees.

The OSHA worker protection program involves worker training, personal protective equipment, respiratory protection, engineering controls, medical surveillance and record keeping. It will be interesting to observe the development of the OSHA and EPA programs in light of the preemption of all state worker protection regulations in those areas in which an OSHA standard, such as the OSHA lead in construction or lead in general industry standards, exists.

The OSHA proposed indoor air quality ("IAQ") standards may also have an impact on commercial building owners, to the extent that remodeling or renovation activities are undertaken in the building. The proposed regulations require the employer (this could be the building owner or its tenant) to develop and implement a work plan to minimize the entry of air contaminants to other areas of the building during and after performance of the work. Air contaminants are very broadly defined to include vapors from paint, cleaning chemicals and solvents and other airborne substances which together may cause material impairment to employees. In addition, certain chemicals used in lead abatement activities are themselves a source of IAQ contamination and should be care-

fully compared with other options on the market.

The final area of concern for property owners who are undertaking lead abatement activities is the disposal of the waste products of these activities. Lead, above certain defined levels, is a hazardous waste and its disposal is regulated under the Resource Conservation and Recovery Act ("RCRA"). In certain states, such as New York and New Jersey, enforcement responsibility is assumed by the state under its own regulations. The requirements of RCRA apply to the generator of the waste. Although "generator" is defined as the person whose act creates the waste, there is still a great deal of dispute as to whether the abatement contractor, the building owner or both become generators when lead is abated. Perhaps the most significant aspect of RCRA applicability is the hazardous waste created by certain abatement methods together with its concomitant costs, risks and paperwork, compared with non-hazardous waste produced by other abatement methods, bringing about significantly reduced costs, risks and paperwork.

Although the nonresidential property owner cannot completely avoid the reach of lead abatement legislation, the impact of lead abatement legislation should be limited to affirmative activities undertaken by the owner or its tenants, such as maintenance, renovation and remodeling. The key to lead, as with other environmental hazards, such as asbestos, is information and record keeping. In each instance the building owner's best course is to determine at the earliest possible time, whether the building has lead paint, lead pipes or other leaded materials. The testing should be performed by a trained professional and results should be kept where they can be easily reviewed. If a building owner can affirmatively state that there is no lead in the building, the costs of OSHA compliance can be significantly reduced. If this is done, labor costs for specially trained lead abatement workers might be avoided in their entirety.

In the event it is determined that lead is present in a building, a standardized procedure should be adopted with respect to disclosure, as needed, and appropriate response actions by the building, its tenants and contractors. In addition, it is essential that each time remediation is undertaken, records be kept in the event of future renovation activities, relating to the affected space, or site of the property itself.

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