

Article for Maine Association of Realtors

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Quick Quiz: what's important to think about if you are conducting a lease or sale transaction of a residence built before 1978? Answer: Lead paint. Or, as it is more accurately termed, lead-based paint. For extra credit: what do the feds require?

You may know state rules concerning lead paint. Most states require that the transaction – for all but exempt properties – include “disclosure” paperwork. Some states require that lead-based paint hazards be removed in homes with children who have been found to have high levels of lead in their blood. Most people don't realize that there are federal rules, too, and that federal officials at the U.S. Environmental Protection Agency, and at Housing and Urban Development, are empowered to take action to ensure compliance with the federal rules.

The federal law on lead-based paint was created by Title X of the 1992 Housing and Community Development Act, and the part that requires the disclosure paperwork is Section 1018. You can find the regulations at 40 CFR (Code of Federal Regulations) Part 745, Subpart F. Why should you care?

What you need to know is that the federal agencies take a slightly different approach than the state. The federal law does not, as your state law provides, give EPA or HUD the power to order you to clean up homes with lead. (There is authority for EPA to issue such orders when there are substantial risks from lead-contaminated waste, under hazardous waste law). The federal lead-based paint rules take a “right-to-know” approach. That's why you have that paperwork as part of the transaction. What real estate professionals need to understand is that because that's the tool the agencies have been given by Congress to protect people (particularly children) from lead, the agencies take it very seriously. (States take it seriously, too, but the federal agencies generally seek higher penalties – see below). Failure to comply with the requirements is not considered to be a mere paperwork error! The agencies are working hard – inspecting records, levying penalties, referring serious cases to the U.S. Attorney (who has greater powers to redress harm) to ensure that landlords and sellers respect the rights of tenants and purchasers to know about lead-based paint and lead-based paint hazards.

Here's a quick overview of the requirements: if the pre-1978 home is not in one of the exempt categories, you must provide to the purchaser or lessee a federal or federally approved lead hazard pamphlet called “Protect Your Family From Lead in Your Home”. If you have a computer, go to www.epa.gov/lead, click on Additional Resources, and download the pamphlet. If you don't, call 1-800-424-LEAD. Single copies are free of charge, and then you can xerox them, or you can order 50 copies for \$26 from the Government Printing Office (202 512-1800). (It used to be that you could get these for free, but budget cuts have made this infeasible for now).

In the contract or attached to it you must have a lead warning statement (the exact wording of which can be found in the regulations cited above – there are slight differences between rental and sales contract warning statements). You may have already made these a standard part of your transaction, and you don't have to think about them. But here's something you should think about every time. You must disclose to the lessee or purchaser the existence of any known lead-based paint or lead-based paint hazards, and you must make available any information that you have pertaining to the topic. You have to give them a list of records or reports you have. This includes reports showing the lead-based paint hazards have been addressed!

Now why would that be necessary? Think about it. State laws require that lead-based paint hazards be abated, or maybe you did renovation. But that may only mean that chipped and peeling paint is removed. That may only mean the lead-based paint is covered up. There may still be lead-based paint there. Occupants and new owners have a right to know that. There have been cases where people have either been told that the lead-based paint has been taken care of, or that it has been removed, *when it is still there*.

If the new occupant removes the covering or prepares the surface for repainting, as new occupants so often do, they and/or their children can become lead-poisoned. If there was information that could have been given to them that would have led them to act differently, then the whole idea of the law – to give people the ability to protect themselves, respecting their right to know about the risk - has been circumvented.

So what you must do is go look in your records and make sure you give to the purchaser or tenant, or make available to them, *whatever you have pertaining* to lead-based paint.

Also, let us consider the case of the seller who was told by a prospective buyer that as a result of a test showing the presence of lead-based paint, the buyer is not going to go ahead with the purchase. The buyer then courteously offers the test results to the seller, who says to himself, “I do not want to accept that information because I don’t want to have to give it to the next prospective purchaser”. This is legal. The law does not require that he accept the information or keep it or perform such a test himself.

However, the law does require that he tell the truth to the next purchaser and he is not permitted to lie and say he has no knowledge. He knows there is lead present and if he says so, not only is he in compliance with the law, but he may save lives. This kind of violation may indeed be hard for a federal official to prove, but you never know. Someone could always reveal that the owner was told of the presence of the lead. Doing this sort of thing also leaves him open to serious civil liabilities, and the federal law says that in the case of a civil suit by a private party for a violation of this law, the plaintiff can get treble damages (three times the established damages).

You must provide this right-to-know information *before* the agreement is made, so make sure you have all the dates right. Don’t back-date them! The federal agencies have prosecuted landlords for falsifying the records, and some have seen jail terms.

In the case of a sale, you must provide a 10-day opportunity to inspect. Now here is another important point: *agents must ensure compliance with this law*. If you are an agent and your client, the owner, says “I am not providing any inspection opportunity”, you have to make a decision. Is it worth breaking the law to keep that client? Violations of the law are punishable by fines of up to \$11,000 per violation. If you are found in violation, EPA or HUD may request information about your transactions in the past, to see how extensive your noncompliance may have been. If you refuse to provide the information, you may receive a subpoena, which is enforceable in court. You will cut costs if you don’t stonewall. The agencies’ penalty policies provide for reductions in penalties when violators cooperate.

The rules explicitly require you to obtain certifications and acknowledgments that the disclosures have been made, and that the necessary documents or knowledge either do not exist, or have been provided. You must keep the documentation to show you have complied with the law. This is your proof and protection. Although you only need to retain transaction documentation for three years, it is advisable to maintain it indefinitely, and you need to maintain documentation pertaining to lead in the housing indefinitely. Here are some other things to note about the federal law:

- Oral disclosure is not adequate, even if the transaction is oral.
- The lead warning statement must be in the language of the contract.
- A short-term lease exemption is valid only if the time limitation is documented.
- Lead in common areas is included.
- A material change in the lease and new information can trigger the disclosure requirement even when the disclosure was previously made, or the tenant’s residence predated the law.
- “Lead-safe” is not the same thing as “lead-free”! No home is considered lead-free and thus exempt unless you have a lead-free certification.
- Information pertaining to lead-based paint hazards includes information about deteriorated lead-paint surfaces.

- Any person knowingly violating the provisions of the disclosure law shall be jointly and severally liable to the purchaser or lessee in an amount equal to three times the amount of damages incurred by such individual.

Go to: <http://www.epa.gov/lead/leadbase.htm> for access to the regulations and to “interpretive guidance”, which answers many specific frequently asked questions about the application of the rules, and provides clear language explanations of the requirements. You will also be able to obtain the disclosure forms, and the pamphlets (in English, Spanish, and Vietnamese).

The New Pre-Renovation Rule

In addition, if you are conducting renovation for compensation, (which can include payment of rent), then you must become familiar with the new federal Pre-Renovation Education Rule (40 CFR 745.80-745.88). This new right-to-know rule requires provision of the lead hazard pamphlet to owners and occupants before renovations in non-exempt pre-1978 housing are conducted. As with the Disclosure Rule above, the requirements apply to most pre-1978 housing, and not just housing that you know has lead-based paint. “Renovation” means any modification of all or part of any existing structure in the housing that disturbs more than 2 square feet of painted surfaces.

Go to: <http://www.epa.gov/lead/leadrenf.htm> for the text of the rules, for interpretive guidance and clear language explanations of the requirements.

EPA’s website: <http://www.epa.gov/lead/leadinfo.htm#remodeling> contains information on how to test for lead, how to find qualified lead professionals, and how to keep homes lead safe, including when performing renovations.

The basic idea of these rules and information resources is that if people are told about actual and potential lead hazards, and what they can do to protect themselves, then many instances of lead poisoning and elevated lead blood levels can be avoided. This is a critical health and environmental concern and there is a role that you can play, beyond the minimum of what is required, to protect all potential victims – especially children.

The BU Regulated Community Compliance Project will be conducting outreach in New England throughout the year to help you understand these laws, and to inform you about other relevant matters, such as what is required during lead abatements, and how to perform renovations safely. Contact us at: reibste@bu.edu, or call 617 358-3366.