

Publication

Get the Lead Out: Recent Developments in D.C. and Maryland Lead Paint Laws

Attorneys

James B. "Jim" Witkin

March 2015

Washington Lawyer

From Washington Lawyer, March 2015

By James B. Witkin and Megan M. Roberts-Satinsky

The District of Columbia and Maryland have some of the broadest and strictest laws in the country dealing with lead-based paint in housing. Recently, both jurisdictions' laws were expanded. The Maryland law used to apply only to properties built prior to 1950, but as of January 1, 2015, it will also apply to properties built between 1950 and 1978. The District recently implemented a new schedule of fines applicable to violators of its law.

Familiarity with lead laws is important for real estate and business attorneys who advise the owners of buildings on compliance with the laws, and for litigators who must defend those owners in enforcement actions. Similarly, lenders whose loans are secured by multifamily housing have an interest in making sure their borrowers are in compliance. Equally important, attorneys for the tenants whose health the laws are intended to protect should be aware of these changes.

The Maryland Lead Paint Law

Maryland's Reduction of Lead Risk in Housing Act was enacted in 1994, almost 15 years before the D.C. law.^[1] Generally, the law requires owners of properties containing lead-based paint to register their properties with the state; to provide notifications to tenants; to perform periodic testing; and, if necessary, to abate defective paint. When the law was enacted, it applied only to properties built prior to 1950.^[2] However, the law was amended in 2012 to apply to properties before 1978; that change became effective January 1, 2015. Maryland estimates that 330,000 rental units were built between 1950 and 1978.^[3]

Applicability of the Maryland Lead Paint Law

The Maryland law applies to "affected property," generally defined as "a property constructed before 1978 that contains at least one rental unit."^[4] Rental units include individual units within multifamily rental dwellings. Excluded are units within a hotel, motel, or similar transient building, or units

Continued

that do not have areas used for “living, sleeping, eating, cooking, or sanitation such as an unfinished basement.”^[5]

Some properties are exempt from some (but not all) of the provisions of the law. These include “lead-free” units, which contain no lead-based paint (above certain thresholds) on any surfaces. Also, partially exempt from the law are “limited lead-free” units, which have lead-free interior surfaces but may have lead paint on the exterior, so long as the exterior surfaces are not chipping, peeling, or flaking.^[6] Exterior surfaces include not just the outside of buildings, but also fences, play structures, and benches.

To maintain the limited lead-free exemption, property owners must have buildings re-inspected every two years. If the renewal certification is not timely submitted to the Maryland Department of the Environment (MDE), the original certification is no longer valid. All inspections must be performed by accredited inspectors.^[7]

Property Registration

All affected properties must be registered with MDE.^[8] The annual fee is \$30.^[9] Prior to December 31 of each year, the owner of an affected property must renew its registration with MDE. Property owners who fail to pay the required annual registration fees may be subject to a civil penalty of up to triple the amount of unpaid registration fees, plus the cost of collection and attorneys’ fees.

Owners of lead-free or limited lead-free properties pay a one-time processing fee of \$10 per unit, payable with the first registration. The \$10 processing fee is paid separately. The owner is not required to register or pay the registration fee. However, if a limited lead-free property is not recertified on time, the \$10 fee per unit will be payable again.

The Risk Reduction Standards

The owner of an affected property (i.e., one that is not lead free or limited lead free) must comply with the “Risk Reduction Standard,” which basically means that at every change in tenant occupancy, the owner must have an independent and accredited lead paint inspector perform a test for lead-contaminated dust.^[10] MDE’s regulations outline the procedures for lead-contaminated dust testing.^[11] Prior to conducting a lead-contaminated dust test, the inspector must visually confirm that there is no chipping, peeling, or flaking paint. If there is chipping, peeling, or flaking paint, the owner must first have an MDE-accredited lead paint contractor remove or repaint any defective areas.

If a property does not pass the lead-contaminated dust test, the inspector issues a failing certificate that is submitted to MDE within 30 days.^[12] However, the owner may remediate any noncompliant lead paint and re-inspect the unit prior to the inspector submitting the failing certificate to MDE. If tenants must be relocated during the risk reduction activities, the property owner is responsible for the temporary relocation costs.^[13] When a rental unit passes the lead-contaminated dust test, the inspector provides a Lead Paint Risk Reduction Certificate (Form 330). Given the inspectors’ critical role under Maryland’s lead paint program, they must be accredited by MDE and may not be related to the owner.^[14]

The Maryland law contains requirements that are triggered when a tenant sends a “notice of defect,” which informs the property owner that there is peeling, chipping, or flaking paint, or when the property owner receives a notice from the local health department that there is a resident pregnant woman or child under six years of age with an elevated blood

Continued

lead level.^[15] Within 30 days of receiving the notice, the owner must comply with the Modified Risk Reduction Standard, meaning it must pass the test for lead-contaminated dust and perform certain lead hazard reduction treatments.^[16] Any required hazard reduction treatments must be performed under the supervision of MDE-accredited personnel.^[17]

Tenant Notices

Owners of affected properties must provide tenants with several written lead paint disclosure documents, including a) the Notice of Tenants' Rights, prepared by the MDE;^[18] b) the Federal pamphlet "Protect Your Family From Lead in Your Home";^[19] and c) the Lead Paint Risk Reduction Certificate previously discussed. The materials must be provided "upon the execution of a lease or the inception of a tenancy," and every two years after that. The biennial redistribution of materials is an easy requirement for landlords or management companies to overlook.

Maryland requires that the disclosure documents be provided to the tenant by certified mail, return receipt requested, or by a "verifiable method approved by" MDE. The "verifiable method" is defined broadly to include "any method in which written receipt may be acknowledged by the intended recipient, agent, or representative."^[20] All notices must be given to a tenant identified in the lease as a lessee or, if there is no written lease, the party to whom the affected property was rented.

Enforcement

After an environmental investigation is performed in response to a lead poisoned person at risk, MDE has the authority to issue abatement orders.^[21] Local health departments or local jurisdictions may also issue abatement orders, which MDE has the authority to enforce in a civil or administrative action. Maryland law prohibits landlords from taking any retaliatory action against tenants who inform them of lead paint hazards.^[22]

MDE also has the authority to impose administrative penalties for violations of lead paint laws.^[23] MDE may impose a penalty of \$20 per day for each affected property that is not registered or for which the registration was not renewed. The state takes the position that each unit counts as a separate violation. The penalty may be imposed from the date on which compliance was required under the law. MDE is authorized to impose penalties up to \$500 per day for failure to perform required risk reduction activities. In addition, MDE may impose penalties of up to \$25,000 for failure to be an accredited inspector or to follow safe work practices.^[24] However, there is a maximum penalty of \$100,000 for each action (with the exception of registration violations).

MDE regularly takes enforcement action for violations of the Maryland lead paint law. Between March and May of 2012, MDE issued 22 Administrative Complaints for violations of the lead paint law. The penalties sought or agreed to by defendants ranged from \$5,000 to \$65,000.^[25]

Transfers of Property

Several provisions of the Maryland law apply upon a change in ownership of an affected property. A new property owner has 30 days after acquisition of an affected property to register with MDE and obtain a new lead paint tracking number. Also, prior to acquisition or within 15 days following transfer of title, the new owner must provide the required Notice of Tenants' Rights, the Lead Paint Risk Reduction Certificate, and the federal lead paint pamphlet to tenants.^[26]

Continued

In addition to the above requirements, current property owners must disclose any obligation to perform either the Risk Reduction Standard or Modified Risk Reduction Standard “at or prior to the time a contract of sale is executed” if the owner will not perform the required treatment activities prior to the transfer in ownership.[27]

What if a purchaser determines that the seller of an affected property has not complied with the law? Maryland has a procedure that gives the purchaser a certain amount of time after closing to bring the property into compliance. The purchaser must submit an Application for Compliance Plan for the noncompliant property to MDE at least 30 days prior to transfer of legal title.[28] If the plan is accepted, and depending on the number of units in the property, the purchaser may have up to 180 days to come into full compliance with the lead law; however, not all deadlines are that long—a transferee has only 15 days from closing to register the property with MDE and to distribute the required disclosure and notice materials to tenants. Also, the state charges an application fee of \$200 per unit (not to exceed \$10,000 for the building).

Issues Specific to Properties Constructed Between 1950 and 1978

Owners of properties built between 1950 and 1978, which are newly covered under the Maryland law, face specific compliance requirements. MDE takes the position that these properties must have been registered by January 1, 2015, when the law took effect. However, MDE’s position is that all required notice and disclosure materials (MDE’s Notice of Tenants’ Rights, federal lead paint pamphlet, and Lead Paint Risk Reduction Certificate) and lead dust tests must be performed only upon the first change in occupancy after January 1, 2015. Owners of properties building between 1950 and 1978 are subject to the Notice of Defect and Notice of Elevated Blood Lead Level provisions that trigger the modified risk reduction inspection, discussed previously.

The D.C. Lead Paint Law

The District of Columbia’s Lead-Hazard Prevention and Elimination Act was enacted in 2008 and amended in 2010,[29] the implementing regulations were promulgated in 2013,[30] and a schedule of penalties was finalized in the summer of 2014.[31] The D.C. law is both comprehensive and complex. The statute runs about 16 pages, the regulations around 50 pages, and the penalties another 10. Generally, the law requires owners of pre-1978 residential properties containing lead-based paint to provide notifications to tenants, to provide certain tenants with a lead dust report, and to conduct abatement and remediation activities in accordance with specified standards.

Under D.C. law, the presence of lead-based paint hazards is illegal in residential properties and child-occupied facilities [32] built before 1978. “Lead-based paint hazards” are defined broadly as “any condition that causes exposure to lead” from lead-contaminated dust, soil, presumed, or lead-contaminated paint.[33] Since the law presumes any paint in a building constructed prior to 1978 to be lead paint, the presence of any peeling, chipping, or flaking paint is, therefore, illegal. This presumption is rebuttable by production of documentation that a certified lead inspector or risk assessor determined that the paint in question is not lead based. The District can enforce the law with penalties ranging from \$50 for minor infractions to up to \$16,000 for repeated serious violations.[34]

Applicability of the D.C. Lead Paint Law

Continued

The law applies to residential properties and child-occupied facilities built before 1978, other than those demonstrated to be “lead free.”^[35] An apartment in a multifamily property is considered a “lead-free unit” if the owner has documented that the interior and exterior surfaces of the unit have been tested in accordance with District protocols, and the unit has been deemed lead free by an inspector with the proper accreditation. In addition, the owner must have an Operations and Maintenance Plan that, among other things, ensures the long-term safety of the hallways providing access to lead-free units.^[36] Alternatively, a multifamily property can qualify as lead free if the owner documents that the property is lead free based on an inspection conducted in accordance with specified U.S. Department of Housing and Urban Development guidelines.^[37]

Required Notice and Disclosures

Owners of pre-1978 residential dwelling units must provide prospective purchasers or tenants with a District Department of Environment (DDOE) disclosure form that provides information “reasonably known” to the owner about the presence of lead-based paint, lead-based paint hazards, and pending DDOE enforcement actions. The owner must give the disclosure form prior to the purchaser or tenant being obligated to purchase or lease the property.^[38] A landlord must repeat this notification process with respect to the Notice of Tenants’ Rights form upon renewal of the lease or upon notice of a rent increase.^[39] Also, if an owner becomes newly aware of lead-based paint in the dwelling unit, it must provide a notification within 10 days, as well as the federal disclosure documents discussed below.^[40]

Owners of pre-1978 residential property in the District are also subject to the federal lead paint law, which requires disclosure of similar, but not identical, information; the interplay between the two laws can be confusing. For example, while federal law only requires disclosure of lead paint, the District of Columbia also requires disclosure of lead hazards, which, as set forth previously, are defined to include any non-intact paint, even if it is not known to contain lead. Similarly, the federal law only requires disclosure of the presence of “known” lead-based paint; the District also requires disclosure of information the owner “reasonably should know” about the presence of lead paint or lead paint hazards. What should an owner reasonably know? The District provides the following example in the instructions for its Disclosure Form: “If an owner has not given his or her pre-1978 property a new coat of paint in the past twenty years, it is reasonable for the owner to know that the paint is no longer in intact condition.”^[41]

The District requires the owner of a property that is not certified “lead free” to have lead dust tests performed, along with a visual inspection to ensure no deteriorating paint is present, and to provide a “clearance report” where potential tenants include a pregnant woman or a child under six years old, and where the tenant informs the landlord in writing that a pregnant woman or a child younger than six is “living at or regularly visiting the residence.”^[42] The owner must then provide the tenant with a copy of the report within 30 days of the request.^[43] Note, however, that landlords who inquire as to whether a potential tenant is pregnant may run afoul of the federal Fair Housing Act. The report must be performed by a properly accredited individual,^[44] and may not be more than 12 months old.^[45] When an owner provides a clearance report, he or she must also have the tenant sign an acknowledgement form issued by DDOE and retain a copy for at least six years. Although properties that are determined to be lead free are exempt from the clearance report requirements, they are still subject to the District’s disclosure requirements.^[46]

Abatement of Lead-Based Paint and Hazards

Continued

The District's lead paint law requires that property owners maintain the paint on the interior and exterior of residential properties, including common areas of multifamily properties as well as child-occupied facilities, in an intact, nondeteriorating condition.^[47] Property owners are required to obtain an abatement permit prior to conducting abatement activities (other than certain small-scale activities^[48]) on any residential property or child-occupied facility.^[49] All lead abatement activities must be conducted by a person who is certified by DDOE as a lead abatement worker or supervisor.^[50] Issuance of an abatement permit triggers a requirement that the individual who obtained the permit submit a clearance to DDOE no later than seven days after completion of the abatement activities.^[51] Property owners must also obtain a permit from DDOE to complete renovation activities if they will disturb more than 500 square feet of painted surfaces or if the contract for the remediation work exceeds \$20,000.^[52] If the relocation of a tenant is necessary, additional requirements apply.^[53], ^[54]

With certain exceptions, property owners are required to use lead-safe work practices for "any lead-based paint activity, or demolition, renovation, remodeling, painting, carpentry, plumbing or other activity that may generate lead-based paint chips, dust, or other lead-based paint debris in or on the exterior of a dwelling unit or child-occupied facility, built prior to . . . 1978."^[55]

Recordkeeping

Property owners are required to maintain records of any federally required education or documentation associated with renovation activities.^[56] Property owners must also maintain records of all lead-related reports for a property.^[57] Owners must document that they provided the Tenants' Rights form by signing and dating, and requesting the tenant to do the same. These materials must be made available to DDOE for inspection.^[58] If a clearance report is required to be given to a tenant, the owner must retain and make accessible to DDOE the acknowledgement form for six years.^[59]

Enforcement

Notably, DDOE has the authority to enter into a residence if it "reasonably believes that activities are being or have been conducted in violation of" the lead paint laws or "upon reasonable belief that there is an imminent threat to the health and safety of the occupants."^[60] DDOE is authorized to impose civil penalties for violations of the law by issuing a Notice of Infraction (NOI).^[61] These NOIs are in addition to DDOE's enforcement authority to issue Notices of Violation; Orders to Eliminate Lead-Based Hazards; Orders to Relocate Tenants; Notices of Suspension, Revocation, or Denial of a Certification; and Cease-and-Desist Orders. There are potentially substantial penalties for violations of the law.^[62]

The Federal Lead Paint Law

In addition to the lead paint laws of the District of Columbia and Maryland, owners of residential buildings constructed prior to 1978 must comply with the federal Residential Lead-Based Paint Hazard Reduction Act of 1992, also known as Title X.^[63] Although this law is beyond the scope of this article, it requires property owners to provide the federal pamphlet to tenants as well as a fully filled-out and executed federal lead paint disclosure form. That form, which is different from the D.C. and Maryland forms, was jointly promulgated by the federal Environmental Protection Agency and Department of Housing and Urban Development and requires the landlord to provide to the tenant any information he or she has on any lead paint or lead paint hazards, and to provide any reports pertaining to lead paint. It is also important to note that Title X (like the D.C. law) does not recognize Maryland's limited lead-free designation, so these properties must

Continued

be fully compliant with the federal requirements.

Practical Considerations

The Maryland statute has been in effect for more than 20 years, and many owners of covered properties have learned how to comply with the law. Still, the expansion of the program to properties built between 1950 and 1978 is likely to come as a surprise to owners of some of those properties, since knowledge about that change in law is far from universal among members of the regulated community. Some of those owners will be scrambling to comply with the revised law after the date of its implementation.

The D.C. law is much newer, and based on anecdotal evidence, the level of awareness of the law, and compliance with it, is lower than in Maryland. As noted previously, the D.C. government has only recently acquired the ability to enforce the law by issuing civil penalties. Other branches of the District Department of the Environment have not been reticent about using their enforcement authority. Owners of affected properties should determine what they need to do to come into compliance with this admittedly complicated law before they find themselves the target of an enforcement action.

*James B. Witkin is a partner and the chair of the environmental practice group at Linowes and Blocher LLP and the editor of the American Bar Association book *Environmental Aspects of Real Estate and Commercial Transactions* (4th ed. 2011). Megan M. Roberts-Satinsky is an associate at Linowes and Blocher LLP.*

Notes

[1] Maryland's Reduction in Lead Risk in Housing Act is codified in Title 6, Subtitle 8, of the Maryland Code Environment Article. [2] MD. CODE ANN. ENVIR. § 6-801(B). [3] HB 644, Fiscal and Policy Note, 9 (2012). [4] MD. CODE ANN. ENVIR. at § 6-801(b), 6-803. Prior to 2011, property owners would avail themselves of the lead paint law provision to gain the protection from liability granted by the law. However, in *Jackson v. The Dackman Company*, 422 Md. 357, 30 A.3d 854 (2011), the Maryland Court of Appeals declared the immunity provisions of the act invalid. [5] MD. CODE ANN. ENVIR. at § 6-801(T). [6] Id. at § 6-804(a). [7] Id. at § 6-1002. [8] Id. at § 6-811. [9] Id. at § 6-842(a)(2). [10] Id. at § 6-815(a). [11] MD. CODE REGS. 26.16.02.03. [12] Id. at 26.16.02.06. [13] MD. CODE ANN. ENVIR. at § 6-817(D). [14] Id. at § 6-818. [15] Id. at § 6-819. [16] Id. at § 6-819(a). [17] Id. at § 6-821. [18] Id. at § 6-820(a). The MDE-prepared "Notice of Tenants' Rights" can be found at <http://tinyurl.com/c69avf2>. [19] Id. at § 6-823. The federal pamphlet can be found at <http://tinyurl.com/k8dvueg>. [20] MD. CODE REGS. at 26.16.04.02(A). [21] Id. at § 6-822(b). [22] MD. CODE ANN. REAL PROP. § 8-208.2. [23] MD. CODE ANN. ENVIR. at § 6-849. [24] Id. at § 7-266. [25] MDE lead enforcement actions, July 8, 2014, available at <http://tinyurl.com/loq8qzr>. [26] MD. CODE ANN. ENVIR. at § 6-820, 6-823. [27] Id. at § 6-824. [28] Id. at § 6-825. [29] D.C. CODE § 8-231.01 et seq. [30] D.C. MUN. REGS. TIT. 20, § 3300 et seq. [31] The schedule of fines can be found at <http://tinyurl.com/lpct6fa>. [32] D.C. MUN. REGS. at tit. 20, § 3300.2(c). [33] D.C. CODE. at § 8-231.01(22). [34] D.C. MUN. REGS. at TIT. 16, § 3201, TIT. 20, § 4003. [35] D.C. MUN. REGS. at tit. 16, § 3314. The regulations provide lead-free standards for both single-family and multifamily properties. The single-family exemption is found in Section 3314.5. [36] Id. at § 3314.6. [37] The property may also be lead free if the lead-based paint within the unit has been enclosed such that an inspection does not detect any lead-based paint. [38] Id. at § 3313.1. [39] Id. at § 3313.8. [40] Id. at § 3313.8; D.C. CODE. AT § 8-231.04. [41] The D.C. lead disclosure form and instructions can be found at <http://tinyurl.com/p9x5xd2>. [42] D.C. MUN. REGS. at tit. 20, § 3314.1. [43] Id. at tit 20, § 3314.2. [44] Id. at § 3314.3. [45] Alternatively,

Continued

the owner may obtain three “passing clearance reports” issued at least 12 months apart, provided that the reports were issued within the prior seven years and the owner is not currently, nor has been in the past five years, subject to a housing code violation or other DDOE enforcement action. *Id.* at § 3314. The regulations require that the individual providing the clearance report be given “unobstructed access to all painted areas in the unit.” *Id.* The clearance report must also include a statement by the person conducting the inspection that there was no paint deterioration on the interior or exterior surfaces. In addition, the report must contain the analytical results for each lead dust sample, a floor plan showing where the samples were taken, and a chain of custody form for the samples. Dust sampling technicians must be certified either by DDOE or EPA. *Id.* [46] *Id.* at § 3313. [47] *Id.* at § 3300, 3301. [48] These small-scale activities include certain door replacements, covering of certain lead-contained soil, and abatement activities involving fewer than two square feet of deteriorated paint on an interior surface or fewer than 20 square feet of exterior surface. [49] *Id.* at § 3316. [50] *Id.* at § 3316.9. [51] *Id.* at § 3316.10. [52] *Id.* at § 3310.1. [53] D.C. CODE at § 8-231.05(d)(2)(b). [54] *Id.* at § 8-231.06(a). Such written notice will include a description of the general nature of work or inspection; related requirements for containment, occupant protection, and relocation; expected starting and ending dates of planned work; and any other information prescribed by the mayor. [55] *Id.* at § 8-231.11. [56] D.C. MUN. REGS. at tit. 20, § 3310.11. [57] *Id.* at § 3313.9. [58] *Id.* at § 3313.10. [59] *Id.* at § 3314. [60] *Id.* at § 3317.1. [61] D.C. CODE at §§ 8-231.15, 7-871.05. [62] D.C. MUN. REGS. at tit. 20, § 4003 et. seq. [63] 42 U.S.C. § 4852d.