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Landlord's Handbook: Guide to Promoting Lead Safe Housing

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LANDLORD'S HANDBOOK:
GUIDE TO PROMOTING LEAD SAFE HOUSING

Prepared By:
Environmental Law and Justice Clinic
536 Mission Street
San Francisco, California 94105-2968
Telephone: 415/ 442-6647 FAX: 415/ 442-6609

GOLDEN GATE UNIVERSITY
School of Law

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DISCLAIMER

This Handbook is intended as advisory and informational guidance only. It is designed to assist property owners understand their legal obligations regarding lead in housing and how to reduce lead hazards on their property. The information contained herein is not intended as legal advice per se because the law can be interpreted differently depending upon the particular facts of each case.

While every precaution has been taken in preparation of this Handbook, the authors and publisher assume no responsibility for errors or omissions. Nor is any liability assumed for damages resulting from the use of information contained herein.

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I. INTRODUCTION

Once thought to be an effective and efficient ingredient in paint and pipes, lead has now become a major health concern in this country, particularly for young children under age seven. Some of the adverse health effects in young children include reduced intelligence, learning disabilities, slowed growth, coma, and even death. What is considered a "safe" level of lead has steadily declined over the years, from 60 micrograms per deciliter of whole blood (ug/dL) to the current level, set by the Center for Disease Control, of 10 ug/dL.

More than half of the nation's housing stock is believed to contain some lead-based paint. Of the housing units built before 1978, 75% are believed to contain some lead-based paint. Homes built before 1950 are likely to contain paint with higher concentrations of lead. Among California's housing stock, some 8.6 million housing units were built before 1978 when lead-based paint was banned. Over 20% of the state's housing units (over 2.2 million units) were built before 1950. Home built before 1950 are likely to contain paint with higher concentrations of lead. It is estimated that more than 560,000 California children age six or less -- the group at greatest risk -- live in these homes.

Lead-based paint is the major source of lead poisoning. But lead can also be found in tap water, the soil or the air in the form of dust contaminated with lead particles. Although lead-based paint poisoning can occur in any housing, the problem is most acute in older, poor, urban communities. As a result, a disproportionate number of minority children are lead poisoned. According to a 1988 study of households with incomes under \$6,000 living in metropolitan areas of more than one million, 68% of the African-American children had elevated levels of lead in their blood compared to 36% of White children in those same communities. Overall, African-American children ages one to five have blood lead levels at or above 10 ug/dL nearly four times the rate of White children (according to the National Health and Nutrition Examination Survey III).

While lead poisoning is beginning to receive the widespread attention and concern that it deserves, there are currently no clear or uniform standards of care regarding how property owners should evaluate and control lead hazards. There is no uniformity among the states, or even among cities within California. However, efforts to establish this type of clear guidance are underway. Federal

agencies have issued guidelines for the control of lead hazards, and a federal task force mandated by the 1992 Residential Lead-Based Paint Hazard Reduction Act (commonly known as "Title X") recently issued detailed recommendations on a wide range of issues dealing with lead-based paint hazards. ("Putting The Pieces Together: Controlling Lead Hazards in the Nation's Housing". This report by the Lead-Based Paint Hazard Reduction and Financing Task Force is available from HUDUSER, 1-800-245-2691 or from The Clearinghouse, 1-800-424-LEAD). In California, the Department of Health Services is also developing standards for the control of lead-based paint hazards. Also at work is a broad-based task force of public and private stakeholders, convened by a non-profit organization called Lead Safe California, has been drafting a comprehensive lead poisoning prevention law to be introduced during the 1996 legislative session.

This Handbook is part two of a three-pronged effort to continue the focus on lead. It is designed to educate property owners and landlords in California about their legal responsibilities to maintain lead safe housing, as well as help them learn how to protect against lead hazards. The predominant focus is lead-based paint hazards, but the Handbook also includes some information about lead in drinking water. Already available is the Tenant's Handbook: Your Legal Right to Lead Safe Housing, designed to educate tenants about their legal rights. We hope that together these materials will assist landlords and tenants to begin working together to find a solution to the very complex problem of preventing lead poisoning. The third part of this educational campaign involves training judges hearing landlord-tenant cases involving lead poisoning.

The Handbook is divided into eight sections. In using the Handbook, we recommend the following: First - Read "Protecting Against Lead Related Risks" which explains corrective measures and other steps you can take to prevent lead poisoning. Second - Read the section dealing with the type of housing you own or manage. This section focuses on the specific laws affecting your type of property. Third - Read "Your Duty to Inform". This explains California's Proposition 65 and outlines a landlord's responsibility to inform tenants of lead hazards. Fourth - Finally, the Handbook provides answers to some basic questions on what lead poisoning is, how lead poisoning occurs, and what to do if you suspect a lead hazard on your property, as well as a list of resources that you can turn to for more help.

II. PROTECTING AGAINST LEAD RELATED RISKS

This section discusses what property owners should do to prevent and control lead hazards. There are no established legal standards of care for private property owners in California, but as discussed below, federally adopted guidelines, as well as standards in other states, provide important guidance for property owners. The federal regulations impose requirements on workers involved in lead hazard control activities. They also establish standards of care for federally assisted housing (which are discussed in another section of the handbook, **FEDERAL PROPERTY OWNERS AND THE LAW**). There are also several local programs that can provide property owners with financial assistance in controlling lead hazards.

After describing existing government standards and programs dealing with lead-based paint, this section also discusses the availability of insurance for lead poisoning claims. The section concludes with some recommendations for property owners to follow in controlling lead hazards, as well as a list of ten things to do to protect against lead related risks.

In general, there is a growing recognition that the mere presence of lead-based paint does not necessarily pose a health risk, but that the greatest risks of lead poisoning come from deteriorating lead-based paint and lead-contaminated soil and dust. Therefore, there is a growing emphasis on the use of temporary or "interim" controls to reduce the likelihood of lead exposure, as opposed to more permanent and expensive "abatement," i.e. permanent removal of lead-based paint. These understandings are reflected in the recommendations provided below.

Federal Lead Hazard Control Standards

Federal agencies have recently issued a number of regulations dealing with lead-based paint hazards. In June 1995, the U.S. Department of Housing and Urban Development ("HUD") issued "Guidelines For The Evaluation and Control of Lead-Based Paint Hazards in Housing" which provides comprehensive, detailed information about how to identify and control lead-based paint hazards in different types of housing. Issued pursuant to Section 1017 of the Residential Lead-Based Paint Hazard Reduction Act or Title X, the

guidelines are designed to help owners sharply reduce childhood exposure to lead without unnecessarily increasing the cost of housing. They are to be used as guidance in "federally supported work" which includes any lead hazard evaluation or reduction activity in federally owned or assisted housing or housing funded by HUD, the Farmers Home Administration, or the Department of Veteran's Affairs. The guidelines can also be very useful to private property owners whose property is not federally assisted. Copies can be obtained from HUD USER (1-800-245-2691).

The U.S. Environmental Protection Agency ("EPA") is also currently developing rules governing lead-based paint hazard evaluation and abatement activities in public and private housing and has issued draft guidelines entitled "Guidelines for the Evaluation and Control of Lead-Based Paint". The guidelines require property owners to plan when to conduct lead hazard work, assess the lead risk, select control methods which work best for specific areas of the property, conduct clean up and clearance testing by an independent party, arrange for ongoing monitoring and maintain records of all evaluation and control activities. Copies can be obtained from the EPA.

EPA also has developed lead-based paint guidelines for renovation and remodeling activities entitled "Reducing Lead Hazards When Remodeling Your Home." (The document may be obtained by calling 1-800-424-LEAD.) EPA is also developing training and certification regulations for risk assessors, inspectors, and contractors to ensure all lead hazard reduction work is conducted safely and effectively. A final rule is expected to be published in December, 1995.

In July, 1994, EPA also issued interim guidance on what constitutes dangerous levels of lead in paint, dust and soil. In part, the guidance recommends that if the contaminated soil is located in an area children use and the lead levels are between 400-5000 ppm (parts per million), interim controls, such as planting ground cover, moving play equipment and restricting access, should be applied. For lead soil levels exceeding 5000 ppm, abatement is suggested. For lead in dust, interim controls are recommended when the following levels apply: floors....100 ug/ft²; window wells....800 ug/ft²; window sills....500 ug/ft².

Finally, as required by Title X, the federal Occupational Safety and Health

Administration (OSHA) has issued regulations protecting construction workers exposed to lead. The rules apply to workers involved in lead-based paint hazard evaluation and control activities, as well as remodeling and renovation activities that may disturb lead-based paint in public and private housing. The regulations set maximum lead exposure levels for workers doing any lead hazard control work, and require that the following steps be taken during any lead related work: exposure assessments, use of compliance methods, respiratory protection, protective clothing and equipment, hygiene facilities and practices, medical surveillance, worker information and training, use of warning signs, recordkeeping, and monitoring. Owners must insure that their workers receive the specified protections. Owners should also be sure that the contractors they hire are aware of and comply with these regulations. (Complete rules can be found at 29 CFR (Code of Federal Regulations) Part 1926.62.) The California Occupational Safety and Health Administration has also adopted similar regulations. (See Cal. OSHA Construction Safety Order for Lead, 8 Cal. Code of Regulations section 1532.1)

State Lead Hazard Control Standards

Although California has not implemented a statewide lead hazard control program yet, the Department of Health Services (DHS) is in the process of developing lead hazard control standards as required by the Childhood Lead Poisoning Prevention Act, Health and Safety Code section 309 et seq. Other state laws require DHS to undertake a pilot study of public elementary schools and public day care facilities to address problems of lead contamination in these settings (Education Code section 32240 and 32243); to create an occupational lead poisoning registry and investigate cases of take-home lead exposure (Health & Safety Code section 429.13); and require health insurance policies and service plans to cover blood lead screening of children at risk for lead poisoning (Insurance Code section 10123.5 and Health and Safety Code section 1367.3).

As noted above, a broad-based coalition of California stakeholders has been meeting throughout 1995 to draft a comprehensive lead poisoning prevention law, with the goal of introducing legislation during 1996. The group has reached some general consensus on the duties that would apply to all property owners of pre-1978 rental housing. These would include:

- (1) Carrying out essential maintenance practices to minimize or avoid lead hazards, including use of safe work practices, annual visual inspections, and prompt repair of deteriorated paint;
- (2) Conducting risk assessments (i.e. on-site evaluations) of residential units within a certain time period to determine the nature and severity of lead hazards; and
- (3) Controlling identified lead hazards by using interim controls or abatement, or a combination, so long as the controls meet a "clearance examination" by an independent risk assessor. "Interim controls" refer to a variety of measures that temporarily reduce human exposure to lead hazards such as dust removal, paint stabilization, treating friction surfaces, soil coverings, etc. "Abatement" refers to measures that permanently reduce lead hazards such as paint removal or enclosure.

Property owners who perform these duties would be entitled to a "rebuttable" presumption that they acted reasonably in any personal injury lawsuit claiming that they acted negligently (See **Negligence** section below.) In addition, it is anticipated that insurance coverage will be available to property owners who carry out the specified lead hazard controls.

Other states have passed comprehensive lead abatement or containment statutes that may provide guidance for California property owners. Massachusetts is one such state that has passed statewide lead legislation. Included within its statute are specific requirements as to what surfaces must be abated or contained and to what extent. (Mass. Ann. Laws ch. 111, section 197(b) and (c).) For example, containment (the covering or enclosing of lead paint) or abatement (the removal of lead paint) should be performed on:

- 1) all peeling paint or materials containing lead both interior and exterior;
- 2) on all lead paint or materials on door frames below the 5 foot level and 4 inches from all edges, on all doors below the 5 foot level, stair rails, stair rail spindles, stair treads, porch railings, and all other interior or exterior surfaces that are accessible to children;

- 3) on all lead paint or materials on the interior or exterior surfaces of windows having sills below the 5 foot level when the surfaces are either movable or impact on movable surfaces; and
- 4) on all exterior lead paint.

Maryland is another state that has a comprehensive lead abatement statute. (Md. Environment Code Ann. section 6-815 and 6-819.) Maryland's comprehensive lead abatement statute imposes the following requirements on property owners:

- 1) visually inspecting all exterior painted surfaces accessible to children and all interior painted surfaces;
 - a) "exterior surfaces accessible to children" include porches and porch ceilings, exterior window sills and trim, exterior door frames and trim, exterior steps, railings, fences and fascia boards.
 - b) "exterior surfaces accessible to children" does not include exterior window sills and trim, exterior doors and frames, and railings that are not within reach of children under the age of six, unless they are attached to or part of porches and balconies that are part of the affected property and proximate to areas frequented by children.
 - c) "exterior surfaces accessible to children" exclude cornices three stories or more above ground level.
- 2) removing any chipping, flaking, or peeling paint on exterior surfaces accessible to children and on interior surfaces, and repaint all such affected areas;
- 3) repairing all defects which are causing chipping, peeling, or flaking paint which the owner knows of or should know of;
- 4) stripping and repainting, or replacing or encapsulating with vinyl or metal, all interior window sills;

- 5) making all window wells smooth and cleanable by installing vinyl or aluminum caps;
- 6) fixing the top sash of all windows which are not free of lead paint to eliminate friction caused by movement of the top sash;
- 7) properly rehanging all doors so that lead-painted surfaces can not rub against another surface;
- 8) making all bare floors smooth and cleanable, and cover kitchen and bathroom floors with a smooth, water-resistant covering;
- 9) cleaning with a High Efficiency Particulate Air vacuum (or HEPA-vacuum) and washing the interior with a high phosphate detergent or equivalent such as automatic dishwashing liquid; and
- 10) installing a washable door mat at the entrance to the dwelling unit or affected property.

The law further provides that after deciding to eliminate or control the presence of lead-based paint, property owners should NEVER use the following techniques in controlling lead hazards:

1. Open flame burning or torching (including propane-fueled heat grids) of lead paint surfaces;
2. Machine sanding or grinding without a HEPA local vacuum exhaust tool;
3. Uncontained hydroblasting or high-pressure washing;
4. Abrasive blasting or sandblasting without HEPA local vacuum exhaust tool;
5. Using heat guns which operate above 1,100 degrees Fahrenheit;
6. Using methylene chloride paint removal products;

7. Dry scraping (except for limited surface areas).

Local Lead Hazard Control Programs

Some counties provide property owners with assistance in carrying out lead-based paint hazard reduction or abatement activities.

Alameda County

The Alameda County Lead Poisoning Prevention Program (ACLPPP) was created in 1992 to address the problem of childhood lead poisoning. This program serves the community by offering services such as community education, outreach to doctors, hospitals and clinics, referrals for blood lead screening, free home testing, hazard reduction and technical assistance to contractors and homeowners.

ACLPPP is funded by the Federal Department of Housing and Urban Development (HUD), the Center for Disease Control (CDC), the California Department of Health Services and by a local assessment tax equal to \$10 per year charged to all property owners of homes built before 1978 in Oakland, Emeryville, Berkeley and Alameda. Any landlord or homeowner with residential property in these cities which was built before 1978 is eligible for ACLPPP services. All of the program services are free and property owners of all income levels are eligible. However, priority is given to homes with children under age 6.

After the landlord or homeowner completes an application, the property is tested and inspected by the program's staff. If the test results indicate lead is present, specific recommendations are made for reducing the lead hazards found on the property. The program will pay for the first \$5000 of recommended control work per apartment or house. There is a maximum grant of \$20,000 for buildings with 12 contaminated units or more.

If the cost to reduce the lead hazard is more than \$5000, the property owner may qualify for an interest-free loan. The terms of the loan vary based on the applicant's income. The least favorable terms would include a \$10,000 loan for 15 years at 0% interest. Other loans on more favorable terms are available depending on the income level of the applicant or tenants residing in

the unit and the number of units that require control work, with the maximum amount being \$50,000.

Currently, any lead contaminated property in Oakland, Alameda, Berkeley or Emeryville built before 1978, automatically qualifies for grant monies. However, in the future funds may be more limited depending on sources of funding and number of units abated.

City of San Francisco

In San Francisco, the Primary Prevention Program, an incentive program run by the Mayor's Office of Housing, was designed to encourage property owners to make the city's privately owned low and moderate income housing lead safe. The program was funded by a \$6.0 million grant from the Department of Housing and Urban Development and authorized by the San Francisco Comprehensive Lead Poisoning Prevention Program, San Francisco Health and Safety Code section 1627. The Program provides education to property owners as well as grants, loan guarantees, and no-interest or low interest loans to owners of lead contaminated property where deferred maintenance problems exist and children under age 6 reside or visit frequently.

You should check with your local county office or with the California State Childhood Lead Poisoning Prevention Program for information on local programs in your area. (See **HELP RESOURCES** section below).

Insurance and Lead-Based Paint Hazards

Some property owners may wish to deal with the problem of lead poisoning by insuring against lead related personal injury claims. However, during the past few years there has been an appreciable rise in the number of reported lead poisoning claims brought on behalf of children living in older, primarily urban rental housing units, particularly on the East Coast. Because of this, general insurance covering risks associated with lead-based paint hazards remains largely unavailable for owners and managers of low to moderate income rental housing built before 1978. When it is available, it is often too expensive for most property owners. In fact, the insurance industry is rapidly restricting or excluding such coverage from its policies on the premise that any lead-based paint housing presents a "commercially uninsurable liability". As a result, many

insurers have added absolute lead exclusions to their policies, other insurers have ceased writing policies covering these types of risks, while still other insurers will only insure housing units built after a certain date, i.e. after 1978.

Much of the insurance industry's reluctance is due to the lack of uniform standards for assessing and controlling lead-based paint hazards ("standards of care"). Until property owners are given clear standards to follow, insurers are likely to be reluctant to issue policies covering lead poisoning claims, at least in the absence of complete "abatement" by the owner (i.e. unless all lead based paint is permanently removed, enclosed, or encapsulated -- a very expensive and in many cases infeasible alternative). One of the goals of the comprehensive lead law currently being drafted by Lead Safe California is to provide clear standards of care for lead hazard evaluation and control. Once these are developed, hopefully, insurance will be much more widely available. The Liability and Insurance Committee of the Task Force on Lead-Based Paint Hazard Reduction and Financing, mandated by Title X is considering the need for affordable lead liability insurance and may make recommendations for modifications to traditional tort remedies against property owners who have implemented prescribed risk reduction measures.

Despite these poor indicators for insurance coverage, property owners should review their existing policies and request information about the availability of coverage for lead-related injuries on their property. At the very least, this effort will help educate insurers and their adjusters, many of whom are still ignorant of the potential health hazards of lead and lead-based paint.

Recommendations For Controlling Lead Hazards

While there is currently no mandatory or generally accepted "best" method for reducing lead hazards on your property, federal guidelines provide some useful ideas on how to accomplish this. First, you should schedule any lead control activities with other renovation activities whenever possible. Scheduling other related construction work to coordinate with lead hazard control work will reduce the chances that contained hazards will be disturbed resulting in the need for further lead work. Next, select the most opportune time to conduct lead hazard evaluation and control (often during unit turnover, remodeling or renovation work, refinancing, or substantial maintenance activity). Scheduling

other construction work to coordinate with lead hazard control work will reduce the chances that contained hazards will be disturbed. Educational materials should also be provided to your tenants and others nearby who might be affected by the ongoing lead control work. There are several readily available educational pamphlets which can be obtained from the EPA or your local lead poisoning prevention program.

The use of interim controls may be appropriate in many situations depending upon the condition of the property and the extent of the lead hazard. The only way to accurately determine the extent of your lead problem and to know whether interim controls are appropriate, however, is to have a risk assessor or inspector conduct a proper evaluation. The California Department of Health Services (DHS), Childhood Lead Poisoning Prevention Branch, maintains a list of qualified risk assessors and inspectors in the State. As noted above, interim controls are temporary measures to reduce lead exposure, such as stabilizing any deteriorated paint (i.e. any paint that is chipping, peeling or flaking) which contains lead and covering any bare soil that may be contaminated with lead. If you decide to implement lead hazard controls without an evaluation, all painted surfaces should be assumed to have lead-based paint.

Regardless of who is performing the work, OSHA regulations require that all lead control workers be trained to do such work. While some property owners may want to do lead hazard control work themselves, we strongly recommend using a professionally trained abatement contractor since using unsafe techniques to remove lead-based paint can increase hazards to occupants (as well as pose threats to workers and neighbors). Again, DHS maintains a list of contractors and workers who have been certified by DHS to perform lead related construction work in the state, including their name, phone number, and the type of certificate issued.

If interim controls are used, the property should be tested after the work is completed by an independent inspector who had nothing to do with the actual lead control activities. Most importantly, since interim controls are not permanent solutions, a monitoring program must be implemented after final testing has been completed. This should include a schedule for retesting treated areas on a periodic basis to insure that these control measures remain intact.

In the case of abatement work, many of the same steps for interim controls should be followed. For example, a proper evaluation should be conducted before beginning any abatement project, and any other renovation work should be coordinated with lead control work. In addition, because abatement is the actual removal of all lead hazards, you will have to be concerned with the disposal of the contaminated waste. The lead may even qualify as hazardous waste, and as such will require proper storage and labeling, as well as disposal at special sites. Additional local building permits may also be necessary before abatement can be performed. Again, it is strongly recommend that abatement work be performed by a certified abatement contractor. You should be able find such a contractor by contacting your local building inspection department or DHS.

EPA has published two helpful pamphlets that can assist property owners in performing lead control work properly and safely. One, mentioned above, deals with renovation and remodeling activities --"Reducing Lead Hazards When Remodeling Your Home". The other deals more generally with preventing lead poisoning in the home, but also includes helpful tips about controlling lead based paint. It is entitled "Protect Your Family From Lead In Your Home." Both can be obtained from EPA by calling 1-800-424-LEAD.

Ten Things You Can Do To Protect Against Lead Related Risks

1. **BE INFORMED**: If you are notified of a lead paint hazard in a unit or units you own, become informed about lead and its health risks and ways to reduce the hazard. A good place to start is any accompanying material you receive and the information here in this Handbook. **Do not try to clean up or abate the problem yourself.** A lead problem can be made worse and more costly to clean up if proper control methods are not used. If you *do* decide to clean up a lead hazard yourself, you should be aware that it is a complex process requiring detailed safety precautions.

2. **MAINTENANCE**: Lead clean up is least expensive in dwelling units which are properly maintained. Lead paint may be found underneath layers of non-lead paint, and if undisturbed, may not cause any problems. When

paint is peeling, flaking, chipping, or deteriorated, lead paint may be exposed and lead dust begins to accumulate. Lead dust presents the most serious health hazard resulting from lead-based paint. **The more you do to keep all painted surfaces in the units intact, the less likely it is that you will be required to make costly repairs to remove lead hazards.**

3. **TESTING FOR LEAD PAINT:** You can have a lab which is certified to do lead testing sample the paint which you believe may contain lead. Be sure the lab is certified to do this kind of testing.

4. **LEAD PAINT ON INTERIOR SURFACES:** Again, lead hazards are found most often when painted surfaces have been damaged. For example, plumbing leaks, roof leaks and rain water that gets into walls will deteriorate paint and may result in lead hazards. You may find that lead dust has collected in areas around deteriorated paint, such as behind cabinets or molding. Lead paint may be exposed or become hazardous on stairs and staircase rails. That is because these surfaces are repeatedly impacted by walking and running. Similarly, windows and doors are high impact surfaces and should be watched for peeling, deteriorated paint.

5. **LEAD PAINT ON EXTERIOR SURFACES:** As with interior surfaces, lead paint used on exterior surfaces, underneath non-lead paint, can be as much of a hazard as lead paint on the surface. As lead-based paint deteriorates due to age and weatherizing, dust and small particles from this paint may get into soil around a building. **If you are going to have lead-based paint removed from the exterior of a building, remember that before your contractor begins work, the occupants should leave the building. Dust and particles may get into the building through doors and windows which are not properly sealed.**

6. **BEGINNING LEAD CLEAN-UP WORK:** Before you begin any work to clean-up lead in your building(s), notify tenants of the work to be done. In some cases, tenants will have to be relocated while the abatement work is done. In any case, tenants should not be in the unit *during* the clean-up work.

7. **HIRING A CONTRACTOR:** If you hire a contractor, be sure the contractor and employees are properly trained in lead removal. They should utilize proper techniques for removing lead-based paint, know how to contain

lead dust, dispose of waste material properly and protect and isolate areas surrounding the contaminated area. The Department of Health Services (DHS) maintains a list of contractors qualified to do lead hazard work. You can get this list by calling the Department at (510) 450-2424.

8. **PAINTERS**: The California Department of Health Services maintains a list of painters qualified to remove lead-based paint. You can get this list by calling the Department at (510) 450-2424.

9. **REMOVING LEAD DUST**: When lead-based paint is removed from an interior or an exterior surface, lead dust will be created which must be removed. A "HEPA" vacuum has special filters to catch tiny dust particles and should be used whenever lead hazards are found in or around a unit or building. **A regular household vacuum will only make a lead dust problem worse by spreading the dust around and into the air, making it easier to be inhaled by occupants.** A HEPA vacuum can be rented or purchased at many hardware stores.

10. **REGULAR INSPECTION**: After lead work has been done, unless the work involved *complete* removal of the lead hazard, for example removal of an entire window or door, clearance testing should be conducted to ensure the control work was thorough and complete. It will also be necessary to continue monitoring and inspecting the area to be sure all lead hazards remain controlled.

III. PRIVATE PROPERTY OWNERS AND THE LAW

A. STATE LAW

Every person who rents a place to live in California has the right to safe housing. Uncontrolled lead hazards, like any other building hazard, make housing unsafe for those who live there. As a landlord, therefore, you have the responsibility to keep your units "lead safe." In addition, as a landlord you may be subject to liability if someone living in your property becomes lead poisoned from an unsafe condition on the property. Your liability may extend to the medical costs associated with these injuries, the resulting pain and suffering, as well as tenant relocation costs.

There is no legal standard for safe or allowable amounts of lead in existing painted surfaces. Moreover, as noted above, there is a growing consensus that in determining whether lead-based paint poses a hazard, far more important to know the *condition* of the paint rather than the *amount of lead* in the paint. The greatest risks of lead poisoning are posed by lead-based paint that is deteriorating or flaking, lead in dust, and contaminated lead soil.

There are some reference points for determining a safe amount of lead in paint, however. Federal and state governments use values ranging from 0.7 to 1.2 milligrams per centimeter squared (or 0.7 - 1.2 mg/cm²) of wall when lead is measured using a portable x-ray fluorescence analyzer. Another standard provides that 0.5% lead by weight when tested using laboratory analysis is unsafe. (See "Preventing Lead Poisoning in Young Children" by the Center for Disease Control, October 1991.) Currently, the relevant values used in California are the Department of Housing and Urban Development (HUD) definitions: 1.0 mg/cm² or 0.55 by weight or 5,000 parts per million (ppm). The California Department of Health Services has proposed, but not yet adopted, a standard of 600 ppm lead as unsafe.

This section explains current California laws that regulate lead hazards on property. There are six legal theories discussed. The first three (warranty of habitability, nuisance, constructive eviction) are often used to resolve issues around the property itself, such as maintenance and repairs. The next three theories (strict liability, negligence, failure to disclose) generally apply when someone has been injured. The legal standards governing these issues are still emerging, and there are few California laws or cases that deal directly with lead.

As noted above, throughout 1995, a statewide task force has been meeting to develop a comprehensive California lead poisoning prevention act that would clarify standards of care and standards of liability for owners. However, in the meantime it is unclear how the courts will respond to lead poisoning claims and other lead-related cases. We believe that both property owners and tenants will be better served by taking a preventive rather than reactionary approach to dealing with lead-based paint hazards.

PROPERTY LAW THEORIES

The Warranty Of Habitability

Under California law, a landlord has a duty to put rental property in a safe condition and keep it in a condition fit for living. This means that in return for monthly rent, a landlord has a legal duty to repair all damages or correct all problems which make an apartment unlivable, both before the tenant moves in and while the tenant is living in the unit. The warranty of habitability lasts for as long as the monthly rent is being paid and extends to damages which were not the result of the tenant's willful and careless conduct. (Civil Code section 1941.2 and 1929.) Under these civil code provisions a tenant has a duty to keep the leased property clean and fit.

This so-called warranty of habitability stems from California Civil Code section 1941, as well as caselaw holding that a warranty of habitability is implied in every residential rental agreement and can not be waived or bargained away. (Green v. Superior Court, 10 Cal. 3d 616 (1974)). Under California Civil Code § 1941 landlords are required by law to meet minimum standards when renting or leasing a house or apartment. Once rented, they have a duty to maintain safe and sanitary conditions on the property. Specific conditions that must be maintained are listed in the statute. If a landlord fails to maintain these conditions, the warranty may have been breached, making the landlord liable for any damages the unsafe conditions caused. While lead hazards are not one of the specific conditions found in the statute, the courts have not ruled out a landlord's potential liability for maintaining a non-listed hazard, like lead, on his or her property. (Green v. Superior Court, 10 Cal. 3d 616 (1974)). Courts in other states with laws similar to Civil Code section 1941 have ruled that the warranty of habitability also applies to lead. See Housing Authority v. Olesen,

624 A.2d 920 (Conn. App. Ct. 1993); Haddad v. Gonzalez, 576 N.E.2d 658 (Mass. 1991). We believe it is likely that California courts will take the same approach.

If the warranty is breached and necessary repairs are not made within a reasonable time, state law provides tenants with an immediate remedy. This is often called the "repair and deduct" provision, and it can be found in California Civil Code section 1942. Typically this provision comes into effect after a tenant requests his or her landlord to correct any problems which make the apartment uninhabitable. If the landlord fails to do so, the tenant can make the repairs him or herself and deduct the cost of the repairs from the rent, so long as the repairs do not exceed one month's rent.

Nuisance

California Civil Code section 3479 defines a nuisance as "[anything] which is injurious to health or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." The definition of nuisance "has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." (Prosser, Law of Torts, section 86 (4th ed. 1971).) In other words, a nuisance can be anything that makes it difficult or impossible to freely enjoy one's apartment or house. Furthermore, section 731 of the California Civil Code authorizes an action by any person whose property has been injured or whose enjoyment of property is reduced by a nuisance.

In practice, California courts have carved out at least six types of interference which can rise to the level of nuisance. They are physical interference with land¹, interference with the present enjoyment of land², danger of future injury³, mental and emotional disturbance⁴, exhibition of

¹ For example, a neighboring building or fence that crosses the property line.

² For example, the spread of dust, smoke, or odors from a neighboring property.

³ For example, a dilapidated housing unit being used to store combustible debris.

obscene matter⁵, and nuisances *per se*⁶. More importantly, the courts have found that a substandard housing condition which endangers a tenant's health is also a nuisance. (Smith v. David, 120 Cal. App. 3d 101 (1981).)

No appellate court in California has found that lead-based paint or lead contaminated water in an apartment is a nuisance. However, because the statutory definition of what constitutes a nuisance is so broad, it may be possible to argue that these conditions substantially interfere with a tenant's right to enjoy and use an apartment, and thus meet the definition of a nuisance. Such a claim would be particularly strong where a child in an apartment has been found to be lead poisoned.

Typically, someone who is harmed by a nuisance can recover property damages and personal damages. Personal damages can include both physical injury and mental distress. In Acadia, California, Ltd., v. Herbert, 54 Cal. 2d 328 (1960) the court stated that even though the tenant may not have suffered physical injury, he could recover damages for the discomfort and annoyance he suffered as a result of his fear for the safety of himself and his family when it is caused by a nuisance. Therefore, under this theory, a tenant could possibly recover damages due to the fear of contracting lead poisoning once the tenant knows a lead risk exists. Similar to cases seeking damages for a fear of contracting cancer, the probability of contracting lead poisoning would be a key factor in such a case based on a lead hazard. (See **Negligence** section below)

In addition, California Civil Code section 3483 states that "every successive owner of property who neglects to abate a continuing nuisance upon or in the use of such property created by a former owner, is liable therefore in the same manner as the one who first created it." In other words, if a nuisance was created by the property's previous owner and you as the present owner fail to correct that ongoing nuisance once learning of it, you are equally liable as the owner who created it. Applying this theory of continuing nuisance to lead hazards, it would not matter that the current landlord did not put the lead paint

⁴ For example, establishment of a mortuary and funeral parlor in a residential neighborhood.

⁵ For example, an adult bookstore.

⁶ Any activity declared by law to be a nuisance. Prostitution is one example.

onto the walls or install the lead pipes. The present owner is liable for having allowed the lead to remain on the property, thus continuing the nuisance.

If lead hazards in an apartment can be shown to be a nuisance, landlords arguably will also be in violation of the Building Standards Code, Health and Safety Code section 17920.3(c). This statute provides that any apartment unit in which a nuisance is maintained constitutes substandard housing. (See Local Authority To Abate Lead Hazards.)

Constructive Eviction

Constructive eviction occurs when a tenant has not actually been evicted or ordered to leave the apartment, but because of physical conditions in the apartment, the apartment is unlivable and the tenant has no choice but to leave. Acts or omissions of the landlord which make the apartment, or a substantial portion of it, unfit for the normal purposes for which the apartment was leased, forcing the tenant to leave, will support a cause of action for constructive eviction. (Groh v. Kover's Bull Pen, Inc., 221 Cal. App. 2d 611 (1963); Stoiber v. Honeychuck, 101 Ca. App. 3d 903, 926 (1980).) In Stoiber v. Honeychuck, the apartment was ordered to be vacated by the County Health Department due to numerous housing code violations. The court stated that this was enough to establish a cause of action for constructive eviction.

Applying this legal theory to a lead case, it is possible for a tenant with small children to argue that the presence of lead-based paint in the apartment and the landlord's refusal to correct the situation makes it necessary for the tenant to leave the apartment, thus being constructively evicted. If a court concludes that a tenant has been wrongly evicted, the landlord will not be entitled to rent during the period of eviction and may be liable for any other expenses the tenant incurs as a direct result of the eviction. In fact, California Health & Safety Code section 17980.7 provides for relocation costs in the event housing is found to be in a condition that substantially endangers the health and safety of tenants. This code section requires a court to order a property owner to pay relocation benefits whenever an owner makes repairs as a result of being cited for maintaining substandard housing and the tenant can not safely reside in the premises during the repairs. These relocation costs can include moving costs, increased costs in rent and storage costs.

TORT LAW THEORIES

In addition to the landlord-tenant theories of liability founded in property law described above, some plaintiffs are using tort principles to hold landlords liable (principles of law designed to correct a wrong). The major theories have included negligence, breach of the duty to disclose, and strict liability. Though California law on this subject is still in its infancy, other states have established the standard of care for a landlord's liability through statute and caselaw. Massachusetts, Connecticut and Maryland are among the leaders in states passing comprehensive lead abatement statutes and establishing landlord tort liability for lead poisoning. They provide examples of how California law in this area may develop.

Strict Liability

For reasons of public policy, the law holds certain wrongdoers strictly liable for their actions regardless of whether the wrongdoer knew of the danger or should have known of it. The purpose of this doctrine is to insure that the costs of injuries resulting from defective products or dangerous situations are borne by those who stand to profit from these products rather than by the innocent victim. Strict liability is the most plaintiff oriented of all the tort theories, since the plaintiff has less to prove in order to win his or her case -- the situation or product was dangerous and it caused the plaintiff's damages.

In Greenman v. Yuba Power Products, Inc., the court ruled that a manufacturer is strictly liable when he places a product on the market and it proves to have a defect that causes personal injury, provided the manufacturer knew the product would be used without inspection for defects. (Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 62 (1963).) This rule has been extended to cover not only manufacturers but retailers (Vandermark v. Ford Motor Co., 61 Cal. 2d 256 (1964).), and others (Price v. Shell Oil Company, 2 Cal. 3d 245 (1970).)

Until very recently, the theory of strict liability also applied to landlord-tenant situations. (See Golden v. Conway, 55 Cal. App. 3d 948, 961-62 (1976) and Becker v. IRM Corp., 38 Cal. 3d 454, 464 (1985).) But that has changed.

The California Supreme Court recently ruled that landlords and hotel proprietors can not be held strictly liable for injuries caused by defective conditions. (Peterson v. Superior Court of Riverside City, SO29736, filed August 21, 1995.) The one possible exception left open by the court is where the landlord participated in the construction of the building or otherwise created the defective condition causing the injury.

It is possible, but probably unlikely, that the State Legislature could establish strict liability for injuries resulting from lead hazards on residential property. At least two states have done this. Massachusetts' comprehensive lead law requires owners of residential property to remove or cover lead contaminated paint, plaster, soil or other material so as to make it inaccessible to children under six years of age whenever such a child resides in the premises (Mass. Gen. Stat. Ann. ch. 111, section 197). The law also makes them strictly liable for all damages caused by their failure to do so (Section 199 of Massachusetts General Law Code).

Likewise, Connecticut law requires that landlords make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition (Connecticut General Statutes section 47a-7). The presence of paint which does not conform to federal standards under the Lead-Based Paint Poisoning Prevention Act, Chapter 63 of the Social Security Act is a violation of this provision (Section 47a-8). In Gore v. People's Sav. Bank, the court concluded that the statute did not require the landlord to have notice of the lead-based paint defect in order to be liable for damages. The statutes merely required proof that the property was not fit and habitable and that the violation caused the plaintiff's injuries. (Gore v. People's Sav. Bank, 644 A.2d 945 (Conn. App. Ct. 1994); matter reversed for further proceedings in Gore v. People's Sav. Bank, 235 Conn. 360 (1995).) In another Connecticut case, strict liability was found based on the violation of a local ordinance rather than the state law. (Hardy v. Griffin, 569 A.2d 49 (Conn.Super.Ct. 1989).)

Negligence

A more commonly used theory to establish landlord liability is negligence. Negligence is the breach of a duty owed to the tenant which causes injury. Broadly speaking, the law makes persons responsible for the results of his or her

voluntary acts, and for injuries caused by acting unreasonably. One exception occurs when the victim willfully or through carelessness brings the injury upon himself. (Cal. Civil Code section 1714) The duty to act reasonably has been interpreted to mean that a landlord must act towards his or her tenant as a reasonable person would under all the circumstances.

To determine whether someone's behavior is reasonable or not, it is necessary to look at all the circumstances; what is reasonable in one situation is not necessarily reasonable in another. As a result, a court must consider a number of factors, including how foreseeable the harm was, the likelihood of injury, the seriousness of such injury, the burden and expense of reducing or avoiding the risk of injury, and the defendant's degree of control over the risk-creating defect. (Rowland v. Christian, 69 Cal. 2d 108, 113 (1968); Brennan v. Cockrell Investments, Inc., 35 Cal. App.3d 796, 800-801 (1973).)

In the case of minor children, the duty of care is even higher than that owed to an adult. This greater degree of care is due to the fact that children lack the capacity to appreciate risks and to avoid danger. (Casas v. Maulhardt Buick, Inc., 258 Cal. App. 2d 692 (1968); McDaniel v. Sunset Manor Co., 220 Cal. App. 3d 1 (1990).) This higher duty to children also applies to landlords who rent to families with children, in order to protect children from certain dangers. (Copfer v. Golden, 135 Cal. App. 2d 623 (1955).) In addition to the factors mentioned above, the natural tendency of children to get into everything must also be taken into account by a court when determining the standard of care owed to a child. (McDaniel at 10.) Therefore, as a landlord you should understand that children tenants are entitled to greater considerations than adult tenants.

Other states have had a great deal of experience with lead poisoning claims based on a negligence theory. These states have made clear that a landlord will not be held liable for personal injuries resulting from lead hazards unless the landlord had either actual or constructive notice of the lead hazard. Therefore, a plaintiff using a negligence theory also has to show that the landlord had actual notice or should have known of the lead hazard (i.e. had constructive notice or knowledge). In New York and Ohio cases, the landlords prevailed because the court found no evidence that the landlords either knew of the lead hazard or should have known of the hazard by virtue of other information. (See Brown v. Marathon Realty, Inc., 170 A.2d 426, 565 N.Y.S.2d

219 (1991) and Winston Properties v. Sanders, 565 NE.2d 1280, 57 Ohio App.3d 28 (1989).)

Maryland courts also require the tenant to prove that the landlord had either actual or constructive notice of the lead hazard before imposing liability. For example, in Hayes v. Hambruch, 841 F. Supp. 706 (D.Md 1994) the court held that the landlord could not be held liable for injuries stemming from a lead hazard in the apartment unless the landlord knew or had reason to know of the hazard. However, the court concluded that the landlord's actual or constructive knowledge that the paint chips contained a toxic substance, such as lead, combined with the knowledge that a child may ingest those paint chips, created a duty to remedy the hazard. (Hayes v. Hambruch, 841 F. Supp. at 711.)

In a footnote, the court stated that it was not unreasonable that the landlord did not know of the dangers from paint at the time the poisoning occurred. However, the court went on to say that the outcome of that particular case might have been different if the plaintiffs had shown that the potential for lead poisoning was a danger that landlords should have been aware of. (Hayes at 711.) Currently, most state courts do not hold that the dangers of lead-based paint are so common and generally known to the public that landlords should know a lead paint hazard exists in their buildings. But the statement by the Hayes court, combined with new national attention on lead-based paint hazards, may make it easier for plaintiffs to establish that landlords had constructive notice.

Again California's experience has been very limited. But in January 1995, a jury in a Los Angeles County Superior Court found the landlords negligent and strictly liable for injuries the tenants' three-year old suffered due to elevated levels of lead in her blood after health officials discovered lead-based paint in the apartment. (Morales v. Quan, No. KC 013694, California Superior Court, Los Angeles County, Pomona.) The jury based its verdict both on a strict liability theory, which treated the lead hazards as a hidden defect in the apartment, as well as a finding that the landlords were negligent in their failure to properly inspect the property for lead based hazards. The jury awarded the tenants \$150,000.

Although the trial judge subsequently set aside the verdict for reasons of proof, and the case was ultimately settled, the case clearly illustrates how

sympathetic juries may be in cases like this, as well as how lengthy, complex and expensive defending a lead poisoning case can be.

Finally, in some negligence cases plaintiffs may seek to recover damages for emotional distress stemming from their exposure to lead. The California Supreme Court recently considered whether damages for emotional distress brought on by a fear of contracting cancer or other serious illness after being exposed to a toxic substance is recoverable in a negligence action, even though there is no physical injury. (Potter v. Firestone Tire & Rubber Co., 6 Cal.4th 965 (1993).) The court concluded a plaintiff could recover emotional distress damages only if the plaintiff proves that: 1) he was exposed to a toxic substance because of the defendant's negligent conduct and 2) his fear is based on reliable medical opinion that developing cancer or some other serious illness is likely to result in the feared illness. (Ibid. at 997.)

Failure To Disclose

1. Disclosure Responsibilities Under Common Law

Landlords also have a duty to disclose the existence of hidden defects on their property. When the failure to make such disclosure causes injury to others, a property owner could be liable for those injuries. A hidden defect is one that is not readily apparent on its face and is therefore concealed. Thus, a floor that looks fine but is in reality supported by damaged beams would be a hidden defect because simply looking at the floor does not indicate anything is wrong. Similarly, looking at the paint on a wall or water from the tap in most cases will not reveal a lead hazard.

A defect is also considered hidden when a hazard is visible in some respects but its true danger is not apparent. For example, in Shotwell v. Bloom, 60 Cal. App. 2d 303 (1943), a crack in the fireplace was visible but the hazard of using the fireplace and thereby causing a fire was not. The court held that the hazard was a latent (hidden) danger even though the defect (the crack) was visible. Similarly, in Merrill v. Buck, 58 Cal. 2d 552 (1962), the door to the basement was visible, but the hazard of the steep basement stairs behind the door and the lack of a landing were hidden.

If there is some hidden defect on the premises which is known to the landlord at the time the lease is made and the danger is not apparent to the tenant, the landlord is under a duty to inform the tenant of the danger. If the landlord fails to do so, she is liable for injuries to the tenant arising from the defect. (Merrill at 557; Shotwell at 309-310.)

It should be noted that as to the presence of lead-based paint, some states have held that this rule extends only to those defects the landlord actually knew about, not to defects that the landlord should have known about. Underwood v. Risman, 605 N.E.2d 832 (Mass. 1993) is an example of this distinction. In Underwood, the tenants were a childless couple at the time the apartment was first rented. They later had a child who subsequently became lead poisoned. The tenants sued the landlord based on the landlord's failure to disclose (they could not sue under the Massachusetts lead statute discussed above). The trial court held that the landlord had a duty to disclose because the landlord was experienced in real estate, knew the dangers of lead paint, and knew that older housing was more likely to contain lead-based paint. A judgment of \$2.2 million was rendered against the landlord. In essence, the trial court applied a constructive knowledge standard, i.e. that the landlord should have known lead-based paint might be present in the apartment. The Supreme Judicial Court of Massachusetts overturned the judgment, finding that the landlord could not be liable for failure to disclose when he did not have actual knowledge of the presence of lead paint.

As the Underwood case illustrates, liability under the theory of failure to disclose does not cover all injuries. However, landlords can be held responsible for those injuries that can be reasonably foreseen. Because courts have held that it is foreseeable that children will put things into their mouths (Hayes v. Hambruch, 841 F. Supp. 706, 711 (1994); Norwood v. Lazarus, 634 S.W.2d 584, 587 (Mo. Ct. of App. 1982).), it is possible to argue that lead-based paint poisoning is a reasonably foreseeable injury requiring landlords to disclose that a risk of injury exists. For example, some state courts have held that knowledge of this propensity, including knowledge that a child may eat paint chips, when combined with knowledge that the paint chips contain lead, creates a duty on the part of landlords to disclose the existence of lead hazards to tenants. (Hayes v. Hambruch, 841 F. Supp at 711.)

California courts have not dealt with the propensity of children to put

things into their mouths in the context of lead-based paint poisoning. But they have recognized that a higher duty is owed to children, and that the scope of foreseeable risks to children must take into consideration the known propensity of children to get into things. (McDaniel v. Sunset Mannor Co., 220 Cal. App. 3d 1, 7 (1990).) (See Negligence section)

2. Disclosure Requirements under Civil Code

In addition to the caselaw cited above, California statutes require sellers of property to disclose any defects or hazards which they know of that exist on the property before the property is transferred to the buyer. (California Civil Code section 1102, et seq.) Under Civil Code section 1102.6, which outlines the form and content of that disclosure, sellers are required to disclose whether or not they know of any substances or materials which may be an environmental hazard. Lead-based paint is specifically listed as an environmental hazard which must be disclosed. Sellers are also required to disclose any nuisances. Property owners who fail to inform buyers of environmental hazards on their property may be held liable for any subsequent property and personal injuries suffered.

Unfair Competition

Business and Professions Code section 17200 (the Unfair Competition Act) prohibits businesses from conducting any unfair, unlawful or fraudulent business act or practice. The statute is intended to protect consumers from any unlawful business act or practice. Landlords in the business of renting housing are businesses for the purposes of this statute. Unlawful acts or practices are broadly defined to include violating virtually any law, including local, county or state housing or building codes. Since the passing of new legislation in 1992, the unlawful conduct need not amount to an ongoing practice or pattern of behavior, such as regularly discriminating against families with children or members of certain minority groups. Rather a single code violation is sufficient to constitute an unlawful business practice.

The use of this statute to deal with lead hazards is relatively novel. Lawsuits, however, could be brought alleging an unlawful business practice based on unlawful discrimination against families (i.e. where a landlord discourages families with children from renting an apartment because the

landlord knows or suspects a lead-based paint hazard exists), or based on violations of local or state housing codes, such as maintaining a nuisance.

B. LOCAL LAW

Local Authority to Control Lead Hazards

Local agencies in California also have authority to address lead hazards using state law as well as ordinances passed at the local level. For example, state law requires that local housing and health departments enforce minimum standards for safe housing. (California Health & Safety Code section 17961.) According to the Health & Safety Code section 17920.3, buildings or apartment units which contain any of the following conditions are considered to be substandard housing:

- *lack of or improper bathroom facilities;
- *lack of or improper kitchen sink;
- *lack of hot and cold running water;
- *lack of adequate heating;
- *dampness of rooms;
- *general dilapidation;
- *defective floors;
- *walls, ceiling or roofs which sag, split, lean;
- *any nuisance;
- *crumbling or loose plaster.

Because California does not have any regulations which address lead hazards in residential housing, some local agencies seeking to control lead hazards have been relying on the general building standard which provides that housing where a nuisance exists is substandard. (Health and Safety Code section 17920.3(c).) As explained in the nuisance section above, a nuisance is defined as an unreasonable invasion of one's right to freely use and enjoy one's property. The presence of a lead hazard in one's home could constitute a nuisance, particularly in instances where a child tenant has been found to be lead poisoned.

Once housing is found to be substandard under state law, local building

departments and other enforcement agencies can issue orders to correct the condition, as well as seek criminal penalties against noncomplying property owners.

Some localities have also enacted local ordinances that specifically address lead in housing. The main focus of these laws is lead hazard reduction (and insuring proper medical treatment for children) in homes where there are identified cases of lead poisoned children, although they also address lead hazards more generally to some degree. Some of these ordinances are discussed below.

In San Francisco, the lead enabling ordinance, entitled the Comprehensive Environmental Lead Poisoning Prevention Program, authorizes the Director of Public Health to inspect any dwelling where tests show a child with a blood lead level of 20 micrograms or more of lead per deciliter of blood. (San Francisco Health Code Art. 26, section 1601 et seq.) The department then notifies the property owner by letter of the results of the investigation, and recommends remediation methods for reducing any lead hazards discovered. (A copy of the notification is also sent to the San Francisco Department of Building Inspections pursuant to the San Francisco Municipal Code.) Within 30 days of receipt of this notification, a property owner must inform the department of her remediation plan (Property owners do this by filling out a "Building Owner's Lead Hazard Reduction Response Form".)

Additionally, if the building inspection shows elevated concentrations of lead paint (lead in the paint in concentrations equal to or greater than 5000 parts per million (ppm) or lower if determined to be appropriate), the building owner must notify all building occupants of the test results. (San Francisco Health Code Art. 26, section 1626.) This provision clearly expands upon state disclosure requirements. A landlord's failure to disclose as required by the ordinance, moreover, could be the basis of a common law failure to disclose claim. (See **Disclosure Responsibilities Under Common Law**). Persons who fail to comply with these requirements are liable for civil penalties under the San Francisco Health Code.

San Francisco's lead enabling ordinance also requires the development of additional lead hazard reduction measures. During 1995, the City's Lead Hazard Reduction Citizens' Advisory Committee began drafting ordinances requiring

property owners to abate lead hazards in buildings where an elevated blood lead (EBL) child is identified. The provisions being considered under the current draft include mandatory reduction of the lead hazard by landlords; relocation assistance to tenants required to move due to the lead hazard; payment of relocation costs by either the landlord or through a lead abatement fund; tenant provision to allow the deposit of monthly rent payments to a special escrow account rather than to the landlord until the lead hazard is corrected; and a provision to prevent landlords from passing the costs of lead abatement onto tenants in the form of increased rent in those cases where the lead hazard is the result of a code violation. The ordinances will also allow the city's Director of Public Health to test any building where an EBL child lives, declare buildings contaminated with lead a nuisance, and order abatement of that nuisance. This will expand the existing authority in the San Francisco Health Code that defines lead hazards as nuisances. (San Francisco Health Code Section 94, Article 2.)

Copies of the draft ordinance can be obtained at a nominal cost from the office of the San Francisco Board of Supervisors or at the San Francisco Public Library.

Both Los Angeles City and County also have lead abatement ordinances in place which declare lead-based paint in residential housing a "health hazard" to children and a public health hazard that must be abated. (Los Angeles City Ordinance No. 12.158; Los Angeles County Code Ordinance No. 11.28.020) For example, the Los Angeles County Health & Safety Code states that no person shall permit any substance which contains dangerous levels of lead to remain on any toy, furniture, household product or exterior surface, interior surfaces, and fixture of any dwelling, child care facility, hotel guest room, or any premise frequented by children. Further, once identified, no one can refuse to reduce or remove the readily accessible, dangerous levels of lead bearing substance. Physicians and other medical personnel are also under a legal duty to notify the county health director of any child's elevated blood lead level of 30 micrograms per deciliter or more where the child is under age seven. The Los Angeles City Municipal Public Health codes also incorporate the county code provisions.

The Los Angeles ordinances are quite broad in scope, and some have questioned whether their provisions can be realistically enforced. As in most other localities in the state, however, the focal point of local agency activity in

Los Angeles has been the need to respond to identified cases of lead poisoned children. It was a county inspection triggered by the ordinance that eventually led to the jury verdict discussed above. (See discussion of Morales v. Quan in the Negligence section above.)

Pasadena and Long Beach also have recently passed potentially far-reaching lead abatement ordinances. The two are very similar and contain the following major points: the ordinance will be triggered by a child under age six with an elevated blood lead level; any property or dwelling or premises frequented by children is covered by the ordinance, including hotels and motels; the City Health Official is authorized to enter any area frequented by a child diagnosed with an elevated blood lead level in order to inspect and sample the premises; the property owner will be responsible for removing or controlling any lead hazards revealed by the inspection; the health official shall determine the extent of the remediation; and it will be a misdemeanor for the property owner or tenant to either refuse or neglect to remove any lead hazards if ordered to do so or damage or disturb any control measures so that it causes harm to a child.

Other cities are also considering lead abatement ordinances, so landlords should be sure to check if a local ordinance is in effect in their area. Even if there is no local lead ordinance where your property is located, rent control laws may significantly affect your duties as a landlord. Typically, rent control laws specify the circumstances under which rent can be increased or decreased, particularly when there are problems with the unit. Therefore, it is possible that the presence of a lead hazard in rental housing could affect the amount of rent a landlord can collect. For example, under San Francisco's Rent Stabilization ordinance, some tenants may request an arbitration hearing when a landlord seeking a rent increase has failed to perform ordinary repair and maintenance under state or local law. (San Francisco Administrative Code Chapter 37, section 37.8(b)(2).)

C. FEDERAL LAW

Federal Law And Private Housing

Landlords who own private property built before 1978 will soon have important new disclosure obligations under federal law. Section 1018 of the

Residential Lead-Based Paint Hazard Act of 1992 or Title X (42 U.S.C. § 4852 (d) or Volume 24 of the Code of Federal Regulations) requires that property owners must disclose the presence of any known lead-based paint and lead-based paint hazard prior to the sale or rental of any pre-1978 residential property including owner-occupied units. These requirements will apply to over 75% of all California homes. Housing for the elderly or disabled is not included unless a child under age six is living there. Studio apartments, hotels and motels are also excluded from the definition of target housing.

The purpose of the rules is to ensure that families are aware of the existence of any lead-based paint, its health risks and ways to avoid lead exposure, before they become obligated to buy or lease housing that may contain lead-based paint. (Such disclosure is already required in the selling and leasing of federally owned or assisted property. See **FEDERAL HOUSING AND THE LAW** below.) The proposed rules state that any seller, lessor, or agent working on their behalf, must disclose all the information that person knows regarding the presence of lead-based paint and lead-based paint hazards to potential buyers and renters. The sellers are also required to give buyers ten (10) calendar days to conduct an inspection or risk assessment for lead-based paint hazards. Further, these disclosure activities will have to be completed before the buyer or renter becomes obligated under any contract to purchase or lease the property. These rules will not apply to foreclosure sales, informal rental agreements such as oral leases or renewals of existing leases where disclosure has already occurred.

More specifically, the proposed disclosure regulations require landlords to do the following:

- * give the prospective tenant a copy of the EPA's lead hazard information pamphlet prepared in consultation with the Center for Disease Control and Prevention (CDC) before the tenant becomes obligated under the lease;
- * give the tenant all information the landlord has regarding the presence of lead-based paint inside the apartment and in common areas such as halls or lobbies;
- * provide the tenant with a certificate of compliance and lead warning

statement which the tenant must sign;

- * keep a copy of the certificate for three years so that the EPA and HUD can monitor landlord compliance with the regulations.

In addition to the provisions above, a Lead Warning Statement must be attached to all leases and sales contracts which contains the following language printed in large type and on a separate page:

"Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place your children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligent quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the sellers possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint is recommended prior to purchase."

Under this section of Title X, the EPA or HUD can impose civil and criminal penalties against landlords who "knowingly" fail to comply with these requirements. The statute also provides for a private right to sue. Thus, tenants may bring their own lawsuits against a landlord for any personal injuries they suffer because a lead hazard was not disclosed to them. A successful tenant can recover up to three times the amount of damages they actually incurred (treble damages). The landlord may also be liable for the other party's court costs and attorneys fees spent on the lawsuit.

EPA and HUD have issued draft rules implementing these disclosure requirements. It is likely that these rules will become effective sometime in late 1996. You should contact the EPA (see the number listed in Resources section of this handbook) or the Government Printing Office (GPO) to learn exactly when they will become effective.

Liability Under CERCLA

The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") of 1980 (also known as Superfund), was enacted to respond to the escalating number of hazardous waste sites and the cost of remedying the damages caused by hazardous substances and hazardous waste. (42 U.S.C sections 9601 - 9675) Because the purpose of CERCLA is the responsible clean up of environmental hazards which pose a substantial danger to public health, public welfare or the environment, property owners whether past or present, are held strictly liable for the clean up costs of contaminated property.

The EPA has issued regulations under CERCLA identifying lead as a hazardous substance. (40 C.F.R. section 302.4) CERCLA also applies to releases of any substance designated as toxic or hazardous by other environmental protection laws. Lead has been designated as a hazardous substance under the Clean Water Act (33 U.S.C section 1321(b)(2)(A)) and the Toxic Substances Control Act (15 U.S.C. 2601, et seq.).

CERCLA will not apply to the overwhelming majority of cases in which property owners encounter lead hazards. Most importantly, lead-based paint on interior and exterior surfaces of housing is considered a "consumer product" under CERCLA, and owners therefore cannot be liable under CERCLA for the costs of controlling hazards posed by deteriorating paint or dust on these surfaces. There are at least two situations in which an owner could potentially face CERCLA liability for lead contamination, however. One, if a property owner currently owns property where the soil is so severely contaminated with lead that a CERCLA cleanup is required, the owner may be held liable for the costs of the cleanup (the same rule would apply to a site you previously owned if you owned the site at the time that the contamination occurred). Second, if an owner improperly disposes of, or arranges for the improper disposal of, lead waste (i.e. waste generated after performing lead removal work) and the waste ends up at a site that requires a CERCLA cleanup, the owner could be liable for the cleanup costs.

Under CERCLA a property owner can be held liable for the cleanup costs of any lead exceeding threshold limits that is released or threatens to be released into the environment. Under CERCLA a release is defined as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping,

leaching, dumping or disposing into the environment (including abandoning containers which contain hazardous materials). Therefore, if you as a property owner presently own or formerly owned property which is found to be contaminated and it requires clean up, you may be sued for the recovery of these clean up costs.

IV. FEDERAL PROPERTY OWNERS AND THE LAW

Focus of Federal Requirements

If you own any housing that was sold, rehabilitated or subsidized by the federal government, such as Section 8 housing, there are specific laws that pertain to your situation. Title X or the Residential Lead-Based Paint Hazard Reduction Act is designed to comprehensively address the problem of lead based paint hazards in federally assisted housing. The statute is designed to refocus attention on cleaning up contaminated housing rather than just responding to sick children. It is hoped that through this preventative approach, more children can avoid the harmful effects of lead poisoning.

Beginning on January 1, 1995, owners of housing units built before 1978 which are either sold by any federal agency, subsidized with federal assistance, or rehabilitated with federal funds must comply with Title X. Federally assisted housing is defined as residential housing owned by private or non-profit entities which are receiving federal funds. Federally owned housing refers to residential housing owned or managed by a federal agency. Title X provides that tenants residing in federally assisted housing must be informed of any lead hazards in their units; defective paint surfaces must be inspected; random testing for lead hazards must be conducted; and landlords must remove any lead hazards when a child is identified as lead poisoned and the source of the lead is the child's federally subsidized unit. (See 25 C.F.R. 35 and 25 C.F.R. 882.109(i), 886.113(i) and 887.251(i).)

In the past, federal laws implied that the mere presence of lead-based paint constituted a hazard. Recent scientific information, however, suggests that only when the paint is disturbed or deteriorating is a hazard present. Moreover, because of the pervasiveness of lead paint in federal housing, total elimination would be extremely expensive and thus infeasible. As a result, the goal of Title X is to reduce the risk of lead exposure rather than to totally eliminate all lead - to make federally associated housing "lead safe." This involves less expensive "interim controls" and, where appropriate, permanent hazard abatement.

Title X focuses on six (6) situations believed to present the greatest lead-based hazards. They are:

- a. deteriorated lead-based paint (i.e. paint that is peeling, cracking, chipping or located on any surface that is damaged or deteriorated);
- b. lead-based paint on any "friction surface" (i.e. windows, painted floors);
- c. lead-based paint on any impact surfaces (i.e. interior or exterior surfaces subject to repeated impacts such as doors);
- d. lead-based paint on accessible surfaces (any surface that a young child could chew on such as window sills);
- e. lead contaminated dust in concentrations exceeding EPA standards; and
- f. lead contaminated soil in concentrations exceeding EPA standards.

Assessing and Controlling the Risk

Under Title X, landlords are required to undertake inspections (a surface by surface investigation) or risk assessments (information gathering on the nature of the property plus visual inspection and sampling) to evaluate the lead risks on their property, and to develop plans to reduce lead hazards through interim controls. Interim controls are defined as any action designed to reduce, at least temporarily, human exposure or likely exposure to lead based hazards. These actions include specialized cleaning, repairs, maintenance, repainting, temporary containment, and resident education programs and on-going monitoring. Ongoing monitoring of the problem is a central element of interim controls.

Abatement is the permanent elimination of lead-based paint on any and all surfaces and includes elimination methods such as paint removal, replacing entire walls, doors, or window frames or encapsulation. Under Title X, abatement is only required if lead levels are more than 1.0 mg/cm² or .5% by weight when found on friction/impact surfaces, protruding surfaces, or any

surface in a deteriorated condition. Abatement is also required for lead located in soil where children play if the lead levels are over 5000 parts per million (ppm). Abatement of such lead contaminated soil requires complete removal of the soil and disposal of it as a hazardous waste. Under Title X all abatement work must be performed by certified supervisors and trained workers. (Toxic Substances Control Act, section 402(a).)

Below is a breakdown of the assessment/control activities required depending on the age of the property and whether the property was federally owned or federally assisted:

a) Housing Built Before 1960

For federally owned property, Title X section 1013, 42 U.S.C. section 4822(a)(3) applies and requires the inspection and abatement of any lead-based paint hazards. Moreover, federally owned units built before 1960 must be abated before sale.

If your property is subsidized with more than \$5,000 in federal project-based assistance or remodeled with federal funds, Title X section 1012, 42 U.S.C. section 4822(a)(1) requires that by January 1, 1996 all such federally assisted housing receive an initial risk assessment, followed by implementation of interim controls.

b) Housing Built Between 1960 - 1978

For federally owned property, the federal owner must show an inspection report to prospective buyers of the property.

For federally assisted property which was subsidized with federal funds in an amount over \$5,000, property owners must have an initial risk assessment performed between 1998 and 2002, followed by interim controls.

An inspection for lead-based paint also must be carried out before any federally assisted renovation and rehabilitation projects are performed, if such projects are likely to disturb painted surfaces. If your rehabilitation project receives more than \$25,000 in federal funds, all lead hazards must be abated.

V. PROPERTY OWNERS WITH FAMILY TENANTS

The Law and Families with Children

Discrimination against families with children or discrimination based on family status is illegal in California. This means that as a landlord, you cannot refuse to rent to families with children or to women who are, or may become, pregnant. Further, if you know your property contains lead-based paint or lead-contaminated water, you cannot refuse to rent to a family with children in order to protect the children. This still constitutes illegal discrimination, despite a landlord's good intentions. As a landlord, you are required give people with children the same opportunity to rent or lease a unit as people without children.

There are three separate bodies of law that make familial discrimination illegal: California statutes and regulations, federal statutes and regulations, and state and federal case law. California Civil Code sections 51, 51.2, 51.3 and 52 are known as the Unruh Act and prohibit businesses from discriminating based on any arbitrary classification including age. In California, anyone who rents or leases housing is a business for purposes of the Unruh Act. (Park Redlands Covenant Control Committee v. Simon 181 Cal. App. 3d 87 (1986).) Housing designed especially for senior citizens is exempt under section 51.3 of the law; landlord are allowed to restrict children from residing in this type of housing.

The most important case decided under California law on the subject of housing discrimination based on family status is Marina Point v. Wolfson, 30 Cal. 3d 721 (1982). In that case, the Supreme Court of California held that the owner of an apartment complex cannot refuse to rent to a family because a child will be living in the apartment. There have been many other cases upholding this decision and it has become a settled part of California law. In fact, Marina Point has been included in the Unruh Act.

The Federal Fair Housing Act (42 U.S.C. section 3601 et seq.) also makes it illegal to discriminate based on family status. Under section 3604 of the act, it is unlawful to refuse to rent or refuse to negotiate the rental of a dwelling with any person because of his or her family status. The definition of family includes any person under 18 years of age, including an unborn child, who lives with her parent or guardian. There are three exceptions: 1) a landlord who

owns three single-family houses or less; 2) a landlord who owns and lives in an apartment building with four units or less; and 3) a landlord renting a room in the same house he or she actually occupies. (24 U.S.C. § 3603(b).) In each of these situations a landlord is not required to comply with the provisions of the Fair Housing Act that ban familial discrimination. However, these exceptions apply only under federal law. A property owner may still be liable for illegal discrimination under California law.

There have been many federal court cases interpreting and defining the Federal Fair Housing Act. In one such case, a court held that a landlord could not refuse to rent to a family with children because the landlord thought the house and the land on which it was located would be dangerous to the children. (U. S. v. Grishman, 818 F. Supp. 21 (1993).) Similarly, an administrative law judge in a case filed with HUD found that the existence of lead-based paint was not proper grounds to reject families with children as tenants in an apartment. (HUD v. DiBari, HUDALJ No. 01-90-0511-1 (MA. 1992).)

These statutes and case law make it clear that landlords may not refuse to rent to families with children even when the landlord is concerned that the premises or the existence of lead-based paint may create a hazard to a child residing there. (24 C.F.R. 864 (1994); HUD v. Dunn, HUDALJ No. 04-92-0358-1, (Kentucky Oct. 8, 1993).) Even if you did not intend to discriminate (i.e. didn't know it was against the law or concerned for the safety of a child), you may still be liable under the Fair Housing Act. (Fair Housing Council of Orange County, Inc. v. Ayres, 855 F. Supp. 315 (C.D. Cal. 1994).)

Discrimination Based on Marital Status

The Fair Employment & Housing Act (Government Code section 12955) was passed in California to protect homosexual couples, communal living situations and unmarried couples living together from employment and housing discrimination. Under this law, it is illegal to refuse to rent to prospective tenants solely because they are unmarried, although the contours of this protection are not completely settled at this time.

In a recent California case, Donahue v. Fair Employment & Housing Commission, 13 Cal. App. 4th 350 (1991), a landlord told an unmarried couple

seeking an apartment that she did not rent to unmarried couples. After filing a complaint with the Department of Fair Employment and Housing, the Department charged the landlord with unlawful housing discrimination based on marital status. After the Department won, the landlord sued the Department. The court concluded that because the landlord, as a devout Roman Catholic, held the sincere belief that living together without the benefit of marriage is a mortal sin, the landlord's right to the free exercise of her religion entitled her to an exemption to the housing discrimination law.

The case was appealed to the Supreme Court of California. The Court returned the case to the appellate court for further review. Until the case is decided, landlords should continue to follow settled law and should not discriminate based on marital status.

What You Should Do to Avoid Discrimination

As a landlord, rental property owner or manager, the most important things you can do to avoid discriminating are to be aware of the laws regarding housing discrimination and to make sure that your policies, procedures and practices for evaluating prospective tenants reflect these laws.

If a tenant contacts you and reports that he or she may have been discriminated against, you should take these complaints seriously and evaluate for yourself whether there is any merit to the complaint lodged against you. Tenants who feel their concerns are not being dealt with fairly may seek legal advice or file a formal complaint with the Department of Fair Employment and Housing. Therefore, it is to your benefit as a landlord to make efforts to resolve the situation in an amicable manner.

If you are positive that neither yourself nor any of your agents has engaged in illegal activity, efforts should be made to explain to the tenant why your actions were legal and fair. By keeping the lines of communication open, you can save a great deal of time and expense. Time and expense can also be saved if alternative dispute resolution techniques are used, such as an arbitrator, rather than going to court.

VI. YOUR DUTY TO INFORM AND THE LAW

Proposition 65

In 1986, the California voters passed Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986. It is now part of the California Health and Safety Code and can be found at sections 25249.5 through 25249.13. The law in some circumstances entitles persons to notice about exposure to lead and to sue for failure to receive such notice.

Proposition 65 applies to a list of chemicals known to present a risk to human health, i.e. carcinogens and reproductive toxins, including lead. In part, Proposition 65 prohibits the discharge or release of lead into a source of drinking water. (Section 25249.5) This means that lead cannot be added to waters that eventually will become part of the drinking water supply.

Proposition 65 also requires businesses to warn individuals prior to being exposed to any of the listed chemicals. Therefore, when a business sells a product or carries on a business activity (such as leasing apartments) which exposes the public to lead, the business must warn those who are being exposed. (Section 25249.6)

For a business to be found in violation of either provision, the business must "knowingly" expose the public to lead or discharge it into drinking water. The code does not define what these words mean; however, the regulations implementing the law state that "knowingly" means that the business must know (1) that the exposure, release, or discharge is happening and (2) that lead is on the list of regulated chemicals. Thus, businesses cannot be held liable for accidents. However, this "accident exception" may not apply if the business was negligent, i.e. if the business did not use reasonable care in carrying out its business activities and this negligent conduct led to an exposure or discharge into drinking water.

Proposition 65 does not apply to businesses with fewer than 10 employees. The definition of employee has been interpreted broadly to include part-time employees, independent contractors, and businesses under contract such as real estate management companies. The statute also exempts all city,

county, state and federal agencies, including government housing agencies. There may be an exception to this rule where the government housing is managed by a private manager.

Violations of the statute are enforced by the Attorney General and local district attorneys. The statute provides for penalties of up to \$2500 per violation for each day of violation. The law also permits any private person, including a tenant, to file a lawsuit against anyone who violates Proposition 65, provided that the person (1) gives notice to the business, the Attorney General, the district attorney, and the local city attorney of his intent to sue 60 days before the suit is actually filed in court, and (2) the public prosecutors mentioned above do not sue. (Section 25249.7) Moreover, the statute provides that the citizen-plaintiff is entitled to keep 25% of any penalty awarded.

Can Proposition 65 Apply To Rental Units?

Lead in Tap Water

Tenants may be exposed to lead in tap water from their kitchen faucets and apartment pipes. Virtually all faucets manufactured in the United States today contain lead, ranging from 2% to 8% by weight. These faucets, especially when new, leach lead into tap water; some older faucets continue to put lead into tap water as well.

Because exposures to a very small amount of lead (0.5 ug/day found in the body) trigger Proposition 65's warning requirements, the statute requires that tenants be given a warning about exposures to lead in tap water resulting from the use of household faucets. Most manufacturers now are currently providing some type of warning with faucets sold in California.

It has also been argued that the leaching of lead from faucets into tapwater also violates Proposition 65's discharge requirement. In 1992, the California Attorney General filed a lawsuit against 16 faucet manufacturers, alleging exactly that. The lawsuit hinges on the argument that tap water is a "source of drinking water" under Proposition 65. Thus far, the courts hearing the case have ruled that water in residential water faucets is *not* a source of drinking water within the meaning of Proposition 65, and does not constitute an

unlawful discharge under the law. (The People v. Superior Court of City and County of San Francisco, A065913, File on June 12, 1995.) The case is currently being reviewed by the California Supreme Court.

It is important to note that the above appeal deals only with the discharge part of Proposition 65, not the warning provision. Landlords and their managers may still be required by Proposition 65 to warn tenants about lead exposures in tap water that result from pipes in an apartment (or from faucets if no warning has been provided by the manufacturer). Older buildings may have lead pipes or may have copper pipes that were soldered with lead before the practice was banned. As noted above, even a very small amount of lead exposure requires a warning under Proposition 65. The landlord or manager, however, must know that the pipes contain lead and, therefore, that an exposure to lead is occurring. If the landlord or manager knows that an apartment's pipes contain lead, arguably they have a duty to warn tenants under Proposition 65. It is not necessary for the landlord to test the water him or herself in order to "know" tenants are being exposed to lead. A landlord's knowledge can come from testing conducted by tenants, information deduced from the age and condition of the building, warnings the landlord may have received from faucet manufacturers, or other public sources of information as to potential contamination. Any of these may trigger the warning requirement.

To avoid lead contamination in drinking water, landlords should instruct tenants to always let the water run for a minute before using tap water for eating, drinking, or cooking. This should clear out water that may have absorbed lead while sitting in the faucet or apartment pipes. Cold water should always be used for cooking or drinking, since heat causes more lead to leach into the water. Water can also be tested to see if it is being contaminated with lead from faucets or pipes. It is in the landlord or property manager's best interest to test tenant tap water, warn tenants and instruct them how to avoid lead exposure and, if possible, remove the source of the lead exposure.

Lead in Paint

Landlords may also be required to provide a Proposition 65 warning if tenants, including their children, are exposed to lead-based paint or if workers hired by the landlords are exposed to lead-based paint during construction or removal activities. There are a few key issues in determining whether a warning

is required. The first is the actual level of lead exposure. Exposure refers to the amount of lead which a person actually takes into his or her body -- through eating paint chips, breathing lead dust, or through skin contact with lead particles. Because even a very small amount of lead exposure requires a warning under Proposition 65, this requirement may be met even with relatively minor exposures.

The second issue is the knowledge requirement discussed above. A landlord or manager must know that tenants are being exposed to lead in order to be held liable under Proposition 65. This depends on a number of factors, including the age of the apartment house, the landlord's or manager's familiarity with the history of the building, the condition of the building and its apartments, routine maintenance of the units and others. If the structure was built before 1950, for instance, there is a high likelihood that it contains lead-based paint. This may be one factor indicating knowledge. One may also be able to show that the landlord knew or should have known that tenants would be exposed to lead if there is peeling paint in the apartment. However, whether peeling paint, especially in older housing, can be used to show that the landlord knew or should have known that tenants were being exposed to lead is a legal issue that remains unresolved. It is also unclear whether a landlord has a legal duty to monitor peeling paint, test any peeling paint and warn tenants of any exposure to lead.

The courts are starting to see some Proposition 65 lead-based paint cases. A recent case against Stanford University alleged Proposition 65 violations stemming from failure to warn about exposure to lead-based paint. (Dennison-Leonard v. Stanford University No. 726942; Santa Clara County Superior Court, 1994). In that case, students sued Stanford after conducting tests that showed that playground equipment and student housing apartments were contaminated with lead-based paint. The case was settled before going to trial and Stanford has cleaned up most of the areas contaminated with lead-based paint.

In late 1995, the Los Angeles District Attorney sued the owner of a large residential complex (containing 1175 apartment units) at which four childhood lead poisonings had occurred over the prior two years. State inspections had revealed peeling and flaking paint on both interior and exterior surfaces of the complex, as well as workers using unsafe practices (such as uncontrolled dry-scraping) to remove lead-based paint. The suit alleges violations of Proposition

65 stemming from the owner's failure to provide warnings to both tenants exposed to lead-based paint and dust, and to workers exposed to lead-based paint and dust as a result of the unsafe removal practices. The suit also alleges violations of the Los Angeles County Lead Hazards Ordinance and California's occupational safety regulations, Construction Safety Order for Lead, Title 8 California Code of Regulations section 1532.1.

Until future cases define the limits of Proposition 65 in both drinking water and lead-based paint exposure cases, landlords and managers can avoid potential legal battles and expenses by taking some simple steps: having their properties tested for lead, warning tenants where lead is found and abating the source of lead exposure. Abatement can also increase property value and relieve the property owner from other lead-related disclosure requirements at the time of sale or even future liability under the federal Superfund law.

VII. QUESTIONS AND ANSWERS

HOW DOES LEAD AFFECT THE BODY?

Lead poisoning is a serious medical problem which can permanently affect the brain and major organs. Children are much more vulnerable than adults because their bodies are in formative stages. There is no cure for lead poisoning and many doctors believe that the damage caused by lead is irreversible. Chelation therapy (a drug treatment designed to draw lead out of the body) is reserved for children with very high blood lead levels of 40 micrograms per deciliter of blood. Lead poisoning can cause decreased intelligence, behavioral problems, decreased growth and hearing loss. Fetuses are also at risk because mother and fetus share a common blood supply which means that the baby is adversely affected by lead in the mother's bloodstream.

WHAT CAUSES LEAD POISONING?

Because lead does not disappear over time, tiny lead particles and dust are dispersed in the environment when lead-based paint chips, flakes or is worn away over time or during renovation. These particles and dust are then either inhaled into the lungs or ingested through the mouth during the normal hand to mouth behavior typical of young children. As an individual continues to be exposed, the lead accumulates in the blood stream and the bones causing damage to the nervous system and major organs.

WHERE DOES THE LEAD COME FROM?

Lead is a soft metal that is used in the manufacture of pipes, paint, gasoline, batteries and other products. As a result, the possible sources of a lead hazard are numerous and varied. The most troublesome source, however, is paint and other coatings such as stains and varnishes. Lead is also found in high concentrations in soil in areas of high building density, near roads and steel (commercial or military structures) and near the current or former sites of lead industries such as mines, smelters or factories producing lead-containing products. Lead-based paint (paint containing up to 50% lead) was widely used prior to 1978 before the manufacture of paint containing more than 0.06% lead

by weight was banned.

Lead can also be found in pottery, ceramics, canned food containers, crystal as well as some home remedies and cosmetics like Kohl, Azarcon, (also known as Rueda, Coral, Maria Luisa, Alarcon, and Liga) Greta, Pay-loo-ah, Ghasard, Bala Goli, and Kandu.

WHO SHOULD I CALL IF I AM WORRIED THAT THERE MIGHT BE A LEAD HAZARD IN MY PROPERTY?

You may want to contact a private laboratory for the analysis of either paint or water. Check with the California Department of Health Services to obtain a list of labs that are certified to do such analysis. You can also check the Yellow Pages of the telephone book under "Laboratories", and call a few labs and ask for their certification. They must give you this information.

There are low cost testing kits available at local hardware stores in order to test paint and water. However, owners are advised to contact a Certified Inspector or Risk Assessor for evaluations of the lead-based paint and or lead hazards on their properties. The Department of Health Services maintains a list of Certified Inspectors and Risk Assessors. Your local water department may also provide water analyses at a low cost. Finally, consult some of the resources at the end of this Handbook for further information.

WHY CAN'T I JUST REMOVE THE PAINT MYSELF?

There are many dangers involved in removing lead paint yourself. Contamination can easily spread to other areas. Remodeling and renovating may also create a lot of lead dust which is the most difficult source of lead to contain. Before you try to replace, cover, or remove the lead-based paint in your home, call the Environmental Health Section of your local or county Health Department before you begin working. They can tell you how to safely "de-lead" by providing detailed information about the safe handling of lead and home remodeling tips. As a responsible landlord, you should not begin working to eliminate the lead without taking proper precautions.

Any activity that disturbs lead-containing materials or exposes lead dust reservoirs (such as heating and ventilation ducts) can injure adult occupants and workers, severely poison children, contaminate neighboring properties, and generate hazardous waste. Such activity could also result in bodily injury and property damage claims against you and your agents from the injured individuals. Owners are strongly encouraged to hire Certified Inspectors/Risk Assessors with lead-related certification to evaluate hazards, recommend control options and perform hazard control work.

Even well meaning property owners may do more harm than good if proper control methods are not used. Thus, owners wishing to perform their own work or personally supervise others are advised to consider becoming certified themselves and avail themselves of training and educational materials such as the U.S. HUD "Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing". This guide provides state of the art information and is available by calling HUD USER at 1-800-245-2691.

CAN I LEGALLY REFUSE HOUSING TO APPLICANTS WITH CHILDREN?

No. It is illegal to refuse housing to applicants simply because they have children. This is called familial discrimination and is prohibited by state and federal law. A landlord who attempts to discourage applicants because he or she knows that a lead hazard exists and would be harmful to children is still violating the law.

Furthermore, it is illegal to take any type of retaliatory action against tenants for complaining to an agency about a lead hazard in your property, for organizing or participating in a tenants organization or union, for reporting a child's elevated blood lead levels (EBLs), or for protesting the unfit condition of your property. This law is found in California Civil Code sec. 1942.5.

WHAT IF I OWN SECTION 8 HOUSING?

According to federal law, property built before 1978 which is participating in the Section 8 Program must be inspected for chipping, peeling, or loose paint.

If such paint is found, it must be removed or covered within 30 days. If a child under age 6 lives in the Section 8 apartment and is diagnosed with an elevated blood level of 25 micrograms per deciliter (25 ug/dl) or more, the apartment must be tested for lead. If lead is found on any chewable surface, the owner has a duty to remove or cover all chewable surfaces up to five feet high.

It is the responsibility of the property owner to provide a lead-safe environment. Property owners who fail to take action when notified of either a child with elevated blood lead levels or chipping, peeling paint, subject themselves to a civil lawsuit by the tenant as well as discontinued participation in the Section 8 program. (See 25 Code of Federal Regulations sections 882.109(i), 886.113(i) and 887.251(i).)

CAN TENANTS WITHHOLD RENT IF A LEAD HAZARD IS DISCOVERED?

Generally speaking, a landlord has a reasonable period of time (usually 30 days) during which to fix any problems he or she is notified of by the tenant. If the landlord fails to fix the problem within that time period, the tenant may withhold some money according to the law known as the "repair and deduct" provision (California Civil Code sec. 1942). Tenants may not however, deduct more than one month's rent twice in any 12-month period.

CAN THE COSTS OF REMOVING THE LEAD HAZARD IN MY PROPERTY BE PASSED ON TO TENANTS IN THE FORM OF A RENT INCREASE?

This is one of the most debated issues on the treatment of lead hazards. It will be necessary for you to conduct some research on your own to answer this question. Generally speaking, however, if your area has rent control laws, landlords are strictly limited on when and how much a tenant's rent can be increased. If there are no rent control laws in your community, a rent increase will depend on the terms of the lease, the nature of the work completed to remove the lead hazard and other local ordinances in your city.

MUST I WARN TENANTS IF THE PROPERTY CONTAINS A LEAD HAZARD?

Landlords who own federal housing such as public housing or Section 8 housing or other property previously owned by the federal government must warn tenants of any lead hazard before they move into the apartment or purchase the property according to the Residential Lead-Based Paint Hazard Reduction Act.

In the case of private housing, beginning in late 1996, landlords who own housing built before 1978 will be required by federal law to disclose the presence of any known lead-based paint and lead-based paint hazards prior to the sale or rental of any unit. Under existing state law (Proposition 65), private owners with more than ten employees who know that tenants will be exposed to lead in their apartments must provide warnings to the tenants.

HOW MUCH LEAD-BASED PAINT CAN I DISTURB WITHOUT CREATING A HAZARD?

Studies conducted by HUD have found that even one square foot of paint with lead in a concentration of 1.0 mg/cm² or 5,000 ppm which is disturbed and distributed over a 10 foot x 10 foot room, will result in lead dust levels nearly 10 times the clearance standard of 100 mg/foot² (above which dust is defined as a lead hazard). Paint in pre-1940 housing often contains lead in concentrations of 50% by weight or 500,000 ppm, 100 times higher than the definition threshold. HUD Guidelines defines any task disturbing more than two square feet of lead-based paint a "high-risk" task. Proper preparation, dust minimization and control, and clean-up procedures should be used for even the smallest tasks.

ARE THERE SAFETY STANDARDS THAT REGULATE LEAD-RELATED CONSTRUCTION OR HAZARD CONTROL WORK?

At present, federal EPA regulations define hazardous levels of lead in paint, dust, and soil, and regulate training and certification standards and waste disposal. The California Environmental Protection Agency regulates disposal of

hazardous waste in ways that are more stringent than federal EPA standards. Waste disposal is a complex and difficult issue. In general, intact construction debris is not considered hazardous waste, but concentrated lead-based paint waste (chips, dust, sludge, vacuum filters, wash water) is considered hazardous. Lead contaminated soil may also be hazardous waste. Hazardous waste disposal costs can be enormous and owners and contractors are advised to minimize its generation by proper planning and waste stream segregation. Waste should never be disposed of in ways that may result in contamination or poisonings. Owners should check with the California EPA.

The Federal Occupational Safety and Health Administration has established "Lead-in-Construction" worker safety regulations. The California Occupational Safety and Health Administration's Lead In Construction Standard is almost identical to the federal OSHA regulations.

The EPA also provides 'advisory only' guidance for residential sampling for lead, for renovation and remodeling in target housing and public and commercial buildings constructed before 1978. However, this guidance may later be made mandatory.

CAN I ASSUME THE PRESENCE OF LEAD-BASED PAINT OR LEAD HAZARDS AND PERFORM CONSTRUCTION OR HAZARD CONTROL WORK ACCORDINGLY?

The older the structure, the greater the likelihood that it contains lead-based paint. 90% of housing built before 1940 contains lead-based paint. Housing that is in good condition is less likely to contain lead hazards; however, if lead paint is present in or on the house, the dust and soil may contain lead. It may be more cost-effective to assume that all paint, dust and soil contains lead and perform hazard control or construction activity accordingly.

IS IT NECESSARY TO RELOCATE TENANTS DURING LEAD CONTROL WORK?

The more dust generated by the work, the greater the risk to tenants who are not relocated. Children and pregnant women are especially at risk. However, if dust generation and access to work areas are adequately controlled,

tenants may be allowed to remain in areas of the unit where work is not being done. An owner should consult with qualified and certified professionals and the local Health Department before making this decision.

HOW DO I FIND CERTIFIED CONTRACTORS AND CONSULTANTS?

The California Department of Health Services (CDHS) maintains a list of accredited training providers and certified Risk Assessors, Inspectors, Contract Monitors/Supervisors, Lead-Related Workers, and Project Designers/Planners. Owners should also contact CDHS to verify that lead hazard consultants have received CDHS certification to perform such work.

VIII. HELP RESOURCES

FEDERAL/NATIONAL INFORMATION

- [1] **EPA SAFE DRINKING WATER HOTLINE**
800-426-4791
Provides maximum contaminant levels, educational materials, will discuss lab analysis results.
- [2] **NATIONAL LEAD INFORMATION CENTER**
800-424-5323 (800-LEAD-FYI)
Distributes basic information in English and Spanish.
- [3] **NATIONAL LEAD INFORMATION CLEARINGHOUSE**
800-424-LEAD
National Safety Council
General information on lead hazards in the home and lead poisoning.
- [4] **LEAD INFORMATION HOTLINE**
510-450-2424
Free general information on how to get testing, identify sources, lead abatement.
- [5] **ENVIRONMENTAL DEFENSE FUND**
510-658-8008
Information on lead in china dishes on request.
- [6] **HOME TESTING KIT: LEAD CHECK SWABS**
800-262-LEAD
8 swabs are \$21.95 (2-3 tests per swab).
- [7] **UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD)**
HUD HOTLINE
800-RID-LEAD

HUD USER

800-245-2691

For a copy of HUD's Guidelines For The Evaluation and Control of Lead-Based Paint Hazards in Housing

CALIFORNIA - HUD REGIONAL OFFICE

415-556-5900

[8] **HUD - FAIR HOUSING ENFORCEMENT**

415-556-6641

[9] **NATIONAL INSTITUTE OF OCCUPATIONAL SAFETY & HEALTH (NIOSH)**

800-356-4674 (800-35-NIOSH)

[10] **CENTER FOR DISEASE CONTROL**

4770 Buford Hwy (F-42)

Atlanta, GA 30341

404-488-7330

Free copies of "Preventing Lead Poisoning in Young Children" on request.

[11] **NATIONAL CENTER FOR LEAD SAFE HOUSING**

Director of Finance and Insurance

10227 Wincopin Circle, Suite 205

Columbia, Maryland 21044

CALIFORNIA STATE INFORMATION

[12] **EPA REGION IX (CA) LEAD HOTLINE**

415-744-1086

Educational materials which the EPA has published on reducing lead hazards are available such as "Reducing Lead Hazards When Remodeling Your Home".

[13] **CALIFORNIA STATE DEPARTMENT OF HEALTH SERVICES:
ENVIRONMENTAL ACCREDITATION PROGRAM/HOTLINE**

510-540-2800

Provides list of labs that are certified to test your water. If you don't want to pay for the list, check the list of labs in the Yellow Pages of the telephone book under "Laboratories" and call them and ask for their certification. They must give you this information.

The cost to test water is usually about \$20.00 for analysis but senior citizens receive a discount. This agency can also refer you to a laboratory which analyzes paint samples for the presence of lead.

510-540-2447

This extension at the State Department of Health Services provides assistance in locating State Certified Lead Abatement contractors and individuals.

[14] **CALIFORNIA STATE BAR ASSOCIATION**

415-561-8200

Referrals for attorneys.

[15] **LEADSAFE CALIFORNIA**

415-397-9401

Public interest organization working on lead legislation for California; information on Childhood Lead Poisoning Prevention Program (CLPPP).

[16] **EPA SAFE DRINKING WATER HOTLINE**

800-426-4791

Provides information on lead in drinking water.

[17] **CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY -
DEPARTMENT OF TOXIC SUBSTANCES CONTROL**

916-322-7676

Regulates waste disposal.

INFORMATION BY CITY AND COUNTY

SAN FRANCISCO

- [18] **SAN FRANCISCO HOUSING AUTHORITY**
415-554-1200
Call for lead hazard problems in federally assisted housing.
- [19] **SAN FRANCISCO BOARD OF SUPERVISORS**
415-554-5184
Obtain copies of San Francisco ordinances.
- [20] **SAN FRANCISCO DEPARTMENT OF PUBLIC HEALTH**
415-554-8930
The Childhood Lead Program provides information on preventing childhood lead poisoning and conducts environmental investigations and monitoring of children with elevated blood lead levels.
- [21] **SAN FRANCISCO NEIGHBORHOOD LEGAL ASSISTANCE FOUNDATION**
415-627-0200
Help in Cantonese, French, Tagalog, Mandarin, Spanish and English.
- [22] **SAN FRANCISCO MAYOR'S OFFICE OF HOUSING PRIMARY PREVENTION PROGRAM**
415-554-8903
Provides free and low cost financing and technical assistance to property owners for lead hazard evaluation and control.
- [23] **LEAD POISONING PREVENTION PROJECT - SAN FRANCISCO**
415-777-9648
Information about how to protect children and testing for lead (kits, on-site, laboratory, methods, etc.).
- [24] **CITY COLLEGE OF SAN FRANCISCO**
415-239-3594
The Environmental Technology Program at City College offers lead related training for Workers, Supervisors and Project Monitors involved in

construction activities affecting lead contaminated surfaces.

LOS ANGELES & L.A. COUNTY

- [25] **LOS ANGELES HOUSING DEPARTMENT**
Tenant & Landlord Information Line
800-994-4444
- [26] **LOS ANGELES HEALTH SERVICES DEPARTMENT**
Child Health Disability Prevention Program
310-940-7985
- [27] **LOS ANGELES HEALTH SERVICES DEPARTMENT**
Environment Health Administration
213-881-4000
- [28] **CITY OF LOS ANGELES**
Department of Environmental Affairs
213-580-1046
- [29] **LEGAL AID FOUNDATION OF LOS ANGELES**
Community Economic Development Unit
South Central office: 213-971-4102
ask for extension 423 or ext. 422
Central Community office: 213-252-3800
ask for extension 3219
- [30] **LOS ANGELES COUNTY CHILDHOOD LEAD POISONING
PREVENTION PROGRAM**
213-738-2030
- [31] **COMMUNITIES FOR A BETTER ENVIRONMENT**
Will provide general information on lead and lead poisoning.
310-450-5192
- [32] **LOS ANGELES LEAD ABATEMENT PROGRAM**
Will answer general questions about lead poisoning, lead in the

environment and will refer people to the proper agencies.
213-738-6129

[33] LEAD POISONING ORGANIZING PROJECT

Linda Kite

(213) 222-4495

Provides information and support to parents of lead poisoned children.

SOUTHERN CALIFORNIA CITIES & COUNTIES

[34] SAN DIEGO HEALTH SERVICES DEPARTMENT

Household Hazardous Materials Program

619-235-2111

[35] UC SAN DIEGO, WESTERN REGIONAL LEAD TRAINING CENTER

619-451-7460

SAN JOSE & SANTA CLARA COUNTY

[36] SAN JOSE HOUSING DEPARTMENT

408-277-4747

4 N. Second St., San Jose

[37] INFORMATION & REFERRAL SERVICES

408-345-4532

[38] MIDPENINSULA CITIZENS FOR FAIR HOUSING

457 Kingsley Ave., Palo Alto

415-327-1718

BERKELEY, OAKLAND AND ALAMEDA COUNTY

[39] OAKLAND HEALTH & HUMAN SERVICES

510-238-3165

- [40] **OAKLAND HOUSING & NEIGHBORHOOD DEVELOPMENT OFFICE**
General Information 510-238-3344
Paint Program 510-238-3909
- [41] **BERKELEY COMMUNITY DEVELOPMENT DEPARTMENT**
Housing & Redevelopment - Rehabilitation 510-644-6590
Housing Discrimination 510-644-6002
- [42] **ALAMEDA HEALTH CARE SERVICES AGENCY**
Lead Abatement Hotline
510-437-4752
- [43] **ALAMEDA COUNTY LEAD POISONING PREVENTION PROGRAM**
2000 Embarcadero, Suite 300, Oakland
510-535-6700
- [44] **SENTINEL FAIR HOUSING**
510-836-2687
- [45] **HOUSING RIGHTS**
3354 Adeline, Berkeley
510-658-8766
- [46] **PEOPLE UNITED FOR A BETTER OAKLAND (PUEBLO)**
510-533-0919
- [47] **LEAD REGISTRY SURVEILLANCE PROGRAM**
510-540-3054

SACRAMENTO

- [48] **SACRAMENTO HUMAN RIGHTS & FAIR HOUSING COMMISSION**
916-444-6903

[49] **SACRAMENTO HEALTH & HUMAN SERVICES**
Child Health & Disability Prevention Program (CHDP)
916-366-2151

LAW LIBRARIES

Call for hours, general information and location.

- [50] **SAN FRANCISCO CITY HALL**
401 Van Ness Avenue, Room 400, San Francisco
415-882-9313 (information recording)
415-554-6821 (direct number)
Financial District Branch Library
685 Market, Suite 420, San Francisco
415-882-9310

- [51] **HASTINGS COLLEGE OF THE LAW**
200 McAllister, San Francisco
415-565-4750

- [52] **MILLS LAW LIBRARY**
415-781-2265
220 Montgomery St., San Francisco

- [53] **SANTA CLARA COUNTY LAW LIBRARY**
360 N. First St., San Jose
408-299-3567

- [54] **SAN DIEGO COUNTY LAW LIBRARY**
1105 Front St., San Diego
619-531-3900

- [55] **SACRAMENTO COUNTY LAW LIBRARY**
720 9th St., Sacramento
916-440-6011

- [56] **UNIVERSITY OF CALIFORNIA, LOS ANGELES**
You must have a photo ID and you may have to
wait in line to enter.
310-825-4743

[57] **LOS ANGELES COUNTY LAW LIBRARY**
301 West First Street, Los Angeles
213-629-3531

WHO WE ARE:

The Environmental Law and Justice Clinic of Golden Gate University Law School was created to assist individuals, neighborhood groups and community organizations in low income and minority communities where environmental problems are most severe. Some of the Clinic's recent accomplishments include developing "good neighbor agreements" for residents living near industrial businesses; filing lawsuits to stop toxic discharging into San Francisco Bay; representing clients opposed to the siting of a new power plant in their community; challenging air quality permits; and preparing community handbooks on environmental issues. The Clinic addresses this wide range of environmental justice issues by offering a combination of legal counseling and representation, community education workshops and policy and legislative analysis.