JLC Report

EPA Delays Enforcement of Lead-Safety Requirement, But Pleases No One

Remodeling contractors concerned about missing the April 22 deadline for becoming certified under the EPA's Remodeling, Renovation, and Painting rule (RRP) got what sounded like good news in June: The agency announced it would not be taking any enforcement action for violations of the rule's certification requirements until October 1. Remodelers who have enrolled in a training program with an EPA-certified trainer by that date will have until December 31 to complete it.

The intent of the change, according to the agency, was simply to give contractors some extra time to comply with the new rules, which are applicable to acceptable work practices in pre-1978 housing.

The EPA's handling of the new requirements had been strongly criticized by builders organizations for being insufficiently publicized — leaving many builders unaware of the training requirement until the deadline was upon them — and for failing to ensure that enough certified trainers were available in all parts of the country to provide training to builders who wanted it (see "Uncertainty Abounds as Lead-Safe Remodeling Deadline Nears," *JLC Report,* 3/10). Many members of the building community welcomed the announcement. "This is really good news," Donna Shirey, chair of the NAHB remodelers council, told *Remodeling* magazine on the day the decision was announced.

A slightly thinner book. But on reading the fine print, it's less clear what there is to be happy about. The central fact about the enforcement delay — which the EPA took pains to clarify in a question-and-answer page on its website shortly after the decision was announced — is that it applies only to the violation of working without the required training and certification, not to any violation of the lead-safe work rules themselves. As is explained on the agency website, "EPA will use its enforcement authority to ensure compliance by enforcing work practice standards and their associated record-keeping requirements against all renovators and firms."

Stripped to its essentials, the enforcement delay comes to this: All contractors working on pre-1978 housing — whether already certified or not — must adhere to the lead-safe work practices and record-keeping requirements that took effect in April. If an EPA site inspection uncovers any violations of those rules, the contractor will be held liable for those violations.

The good news? Uncertified contractors nabbed for violating the lead-safe work rules will not be charged with the added violation of working without the required training. In effect, the agency reserves the right to throw the book at contractors who violate lead-safe work rules — but

■ Washington State has postponed plans to enact a tough new energy code — designed to increase building energy efficiency by 30 percent — that was to have taken effect on July 1 of this year. Governor Christine Gregoire requested a nine-month delay from the state's Building Code Council to allow the struggling construction industry a chance to gain strength; the council responded with a four-month postponement that may be extended for an additional five months. The new energy code is the subject of an ongoing lawsuit by the Building Industry Association of Washington, which maintains that the state has no authority to enact the measure because it exceeds federal energy efficiency standards.

■ The chairman of the North Carolina Building Codes Council has vowed to take on the issue of vinyl siding melted by sunlight reflected from low-e windows (see "Low-E Windows Blamed for Melted Vinyl Siding," *JLC Report,* 5/10). "We're going to do it in a carrot-and-stick manner," Dan Tingen told TV channel WCNC. "It's going to be our job ... to resolve this thing." The comment followed an incident in which Pulte Homes replaced melted siding on a Charlotte home after the homeowner, frustrated with the company's response to complaints, distributed fliers with the bold headline "My home is melting ... is yours?"

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until December 31, the book thrown at uncertified contractors will be missing one page.

Stirring the pot. One group that is not happy about the delay is the National Association of the Remodeling Industry. "Our members are frustrated," says director of education Dan Taddei. "All but about 10 percent of them are already certified. When we polled our people recently they said they didn't want a delay — they were ready to move forward. Now the EPA is stirring the pot again."

Not only is the delay unfair to contractors who went to the time and trouble to get trained and certified by the original deadline, Taddei says, but it glosses over the difficulty of working within the rules. "First they required training and certification and now they're telling uncertified contractors, 'Just go on our website, read up on lead-safe practices, and go do it.' If that's all there is to it, why have a training requirement at all?"

Inflammation and backlash. What prompted the EPA to delay the certification requirement at this late date? It may be that the agency, stung by criticism of the lead-safe practices requirements, was seeking to placate builders by offering the only concession available to it. "They couldn't change the April 22 effective date," Dan Taddei says. "It was too late for that. But enforcement is discretionary. They had some room to maneuver there."

It's also possible — though this is speculation — that the agency plans to curtail all enforcement efforts until sometime after the new certification deadline, but has chosen not to say so for fear of inflaming consumer advocacy groups concerned with lead safety.

If so, it's already too late. On June 26, the group Parents for Nontoxic Alternatives announced its intention to go after noncompliant remodelers on its own. In a message posted on a news e-mail list maintained by the National Center for Healthy Housing, a member of the group noted that uninvolved parties have the power to file lawsuits for compliance with the Toxic Substances Control Act, which provides the legal foundation for the RRP rule. By joining forces with an attorney, the writer suggested, those parties might qualify for a share of any resulting settlement. — *Jon Vara*

Feds and States Turn Up the Heat On Employee Misclassification

Like other enterprises with labor needs that shift from job to job and season to season, construction companies have long relied on subcontractors to get jobs done in a timely fashion without crippling overhead costs. But that long-established way of doing business is looking increasingly uncertain as the federal government and the states — driven partly by pressure from organized labor and partly by a desire to increase tax revenues — have put ever-increasing pressure on employers to justify their classification of independent contractors as nonemployees.

The most recent evidence of the trend is a pair of similar bills introduced in the House and Senate in April of this year. The Employee Misclassification Prevention Act would impose civil penalties of up to $5,000 per employee on employers who improperly classify

■ Plumbing-fixture manufacturers are in an uproar over a recent "draft interpretive rule" from the DOE that redefines "showerhead" in a way that restricts multiple outlet devices — like those with separate hand-held sprayers — to a combined flow of 2.5 gallons per minute. Previously, higher flow rates were permissible as long as each individual outlet did not use more than 2.5 gpm. The agency will issue a final rule after considering input received during a public comment period that ended on June 19.

■ South Carolina Governor Mark Sanford has signed a bill that will delay a requirement for fire-sprinkler systems in new homes built in the state. The requirement is contained within the 2009 IRC, which the state adopted earlier this year for implementation in January 2011. Thanks to the new bill, however, the fire-sprinkler provision will not take effect until January 2014.

■ The DOE has launched a volume-purchase program designed to increase the market share of high-efficiency R-5 (U-factor 0.2) windows by making them more affordable. A DOE website, www.windowsvolumepurchase.org, lists qualifying products from more than two dozen vendors who have agreed to sell at volume discounts to builders, government agencies, and consumers. The minimum purchase for new-construction applications is 20; for retrofit projects, it's 15. The target price for the high-performance windows is approximately $4 per square foot above that of conventional windows.

workers as independent contractors. Among other provisions, it would also require the states to conduct audits to identify employers who are misclassifying employees; direct the Department of Labor to undertake targeted audits of employers in certain industries; revise the Fair Labor Standards Act to require employers to notify workers of their status as employees or independent contractors; and allow the Labor Department and the IRS to share information on cases of worker misclassification.

Uncollected taxes. From the taxman's point of view, the fewer independent contractors out there, the better. Because such workers are responsible for keeping track of their own earnings and figuring out any income tax owed — as opposed to a conventional employer-employee relationship, in which that burden falls to the employer — there are more players for the government to keep track of. There's also more opportunity for independent contractors to evade taxes that they legitimately owe.

According to Labor Department numbers, up to 30 percent of all businesses routinely misclassify employees as independent contractors. And the nonpartisan Government Accountability Office estimates that underpayment of Social Security taxes, unemployment insurance, and income taxes cost the government $2.72 billion in 2006 alone.

Who's a contractor and who's not? Deciding whether a worker is a legitimate independent contractor or a misclassified employee can be a tricky call. Government agencies typically try to determine an individual's employment status by applying some sort of test. The two best-known are the so-called ABC Test used by many state unemployment agencies and the more elaborate 20 Factor Test used by the IRS.

The ABC test considers three criteria, all of which must be met for an individual to be recognized as an independent contractor. First, he or she must be free from control or direction by the entity for which the work is performed. Second, the service performed must be outside the usual course of business of that entity — or it must take place outside the entity's usual places of business. Finally, the individual must be customarily engaged in an independently established trade, occupation, profession, or business.

The IRS 20 Factor Test is more open-ended. The agency considers a list of 20 criteria — such as whether the worker receives training from the company for which the work is performed, has set hours of work, or furnishes his or her own tools and materials — in light of whether they are more likely to make the worker an independent contractor or an employee. (A worker who must work set hours, for example, would be more likely to be an employee, while a worker who is able to designate his or her own hours of work would be more likely to be an independent contractor.) By its nature, the test is highly subjective. No single element is decisive in itself; the IRS makes its decision about a worker's status based on the proportion of "more likely" to "less likely" responses. While 20 of one or the other response might provide a clear answer, a fairly even split renders any individual worker's classification arguable, to say the least.

"Safe harbor" at risk. Employers in industries that make frequent use of contract workers have long enjoyed the benefit of the doubt in cases where a worker's status is less than clear-cut. Section 530 of the Revenue Act of 1978 created a "safe harbor" for businesses that classify workers as independent workers for employment tax purposes. In general, the safe-harbor provision applies if the business has a "reasonable basis" for treating a category of workers as independent contractors, files federal tax returns consistent with that classification, and treats all employees holding similar positions in the same way. Where the safe-harbor provision applies, the IRS is prohibited from using the 20-Factor Test to reclassify workers.

A second pair of worker-classification bills before Congress, however, would do away with that protection. Under the Taxpayer Responsibility, Accountability, and Consistency Act of 2009, the safe-harbor provision would be repealed. And this bill, like the Employee Misclassification Prevention Act, would subject employers who misclassify workers to stiff penalties.

According to NAHB economist Rob Dietz, the Taxpayer Responsibility Act "would require a company to make its case to the IRS before it could classify someone as an independent contractor. Depending on administrative costs and how quickly the IRS is able to make that determination, that could just shut down some businesses, particularly smaller ones."

The states push ahead. Regardless of what happens at the federal level — neither pair of bills seems guaranteed to pass — several states are moving ahead with their own initiatives. Among them are the following:

- A bill filed in the Oklahoma legislature earlier this year would allow that state's tax commissioner, worker's comp board, and employment security commission to share information and coordinate investigative and enforcement efforts against businesses that misclassify workers.
- In New Hampshire, the interagency Task Force for Misclassification of New Hampshire Workers has created a tip-off website where visitors can report businesses suspected of improperly classifying employees as independent contractors.
- Iowa has followed up on the report of a

state task force on independent-contractor misclassification by hiring nine full-time employees and budgeting $771,000 to crack down on businesses that classify workers incorrectly.

• Massachusetts Governor Deval Patrick has issued an executive order creating a task force to identify illegal misclassification of workers. Its stated goal is to "foster compliance with the law by educating business owners and employees about applicable requirements; conduct joint, targeted investigations and enforcement actions against violators; protect the health, safety and benefit rights of workers, and restore competitive equality for law-abiding businesses."

• In 2007, New Jersey enacted the Construction Industry Independent Contractor Act, which imposes a civil fine of $5,000 for each worker found to have been misclassified as an independent contractor.

• Also in 2007, Illinois enacted the "Employee Classification Act," which imposes fines of $1,500 per day for each misclassified worker.

Cash cow. Contractors in states that have not yet taken any action on the issue shouldn't let the still-uncertain status of the federal bills lull them into thinking they can afford to be casual about worker classification. The 2011 federal budget, released early this year, suggests that the Obama administration sees worker misclassification as both a regulatory priority and a potential cash cow. It allocates $25 million to the Department of Labor and the Treasury to "eliminate incentives in law for employers to misclassify their employees; enhances the ability of both agencies to penalize employers who misclassify; and restores protections to employees who have been denied them because of their improper classification."

An unspecified portion of that $25 million will be used to hire an additional 100 enforcement personnel at the federal level and to make grants to individual states. And if all goes according to plan, taxpayers stand to make a tidy return on that investment: The measure is expected to increase treasury receipts by more than $7 billion over a 10-year span. — *J.V.*