

How to Contest HPD 'Presumed' Lead-Based Paint Violation

Say the city's Department of Housing Preservation and Development (HPD) sends you a lead-based paint violation that you believe was mistakenly issued. In certain limited situations, you can contest that violation. HPD lets you contest what's known as a "presumed" lead-based paint violation. This is a violation that HPD issues if it has found peeling or deteriorated paint in the apartment, but, for some reason, can't perform a test for lead-based paint using an X-ray fluorescence analyzer (XRF) machine—for example, HPD couldn't get access to the apartment within the required time to perform the test. For HPD to issue the presumed violation, the apartment must have a child under age 7 and be in a building built before Jan. 1, 1960, with three or more apartments. To contest the presumed violation, you must fill out and file an HPD contestation form, along with various other documents.

Though the process for contesting a violation may be complicated, it's worth doing, given how costly it is to correct a lead-based paint violation under the new lead-based paint law. We'll tell you when you may contest a lead-based paint violation and the procedure for doing so.

When You Can Contest Violation

You're allowed to contest only *presumed* lead-based paint violations. You can't contest a violation issued after HPD has tested for lead-based paint in an apartment using an XRF machine. How will you know that the violation was presumed? The violation notice will say "presumed," says an HPD official we spoke with. Also, all presumed lead-based paint violations are designated as order # 616. HPD will include a contestation form with the violation notice on all presumed lead-based paint violations, according to the HPD official. The form says "Contestation Of Lead-Based Paint Hazard Violation" on top.

To successfully contest the presumed violation, you must be able to prove one of the following:

1) That the paint in question had no more lead than the levels permitted by law. The law permits no more than 1.0 milligram of lead per square centimeter as measured by an XRF machine. To prove that the paint that was the subject of the violation has no more than this amount, you must hire someone to test the surface area using an XRF machine. That person should be specially trained to operate the machine, says Josh Sarett, of ALC Environmental, a Manhattan-based company that performs lead tests, inspections, and risk assessments. To find someone who can perform this test, you can check the Yellow Pages under "Lead Paint Detection & Removal Services," suggests Sarett. The test should cost roughly \$250 to \$350, depending on the number of violations in the apartment, he says.

If the test results using the XRF are inconclusive, HPD allows you to confirm them by laboratory analysis of paint chips, with the results reported in milligrams of lead per square centimeter. If the surface area of a paint chip sample can't be accurately measured or if an accurately measured paint chip sample can't be removed, you can report the laboratory analysis in percent by weight. The paint will be classified as lead-based if it contains more than 0.5 percent of metallic lead.

2) That your building was built on or after Jan. 1, 1960, and so isn't subject to the lead-based paint presumption.

Who Can File Contestation Form?

To be eligible to fill out and file the contestation form, you must be:

- The registered owner of the building;
- The registered office or director of a corporate owner; or
- The building's registered managing agent.

When to File Contestation Form

You must file the contestation form, along with various required documents (see below), no later than six days before the date set for correction in the violation notice. File the form with HPD's Emergency Services Bureau, 105 East 106th St., 4th Floor, New York, NY 10029.

What Documents to Submit

The documents you must include with the contestation form vary, depending on the reason you're contesting the violation.

If lead-based paint content at or below legal amount. If you're contesting the violation because you believe the paint in the apartment doesn't contain more lead than the amount allowed by law, you must include the following documents with your form:

➤ *The results of a lead-based paint test and/or paint chip laboratory analysis.* This must include a description of the testing/analysis methodology and the manufacturer and model of the XRF machine used to perform the test.

➤ *A sworn (that is, notarized) statement signed by the person who performed the testing or sampling.* HPD will include a special form with the required statements for the person to fill out. The person signing the form states that the testing or sampling was performed in accordance with section 27-2056.2 (7) of the housing maintenance code (that is, the provisions of the city's lead-based paint law that covers how lead-based paint is measured using an XRF machine). If sampling was done, the statement must

also state that the sampling was done in accordance with 40 CFR section 745.227 (that is, the provisions of federal law that cover the methods for taking lead-based paint samples).

PRACTICAL POINTER: The person who does the testing or sampling must be a certified lead-based paint inspector or risk assessor.

➤ *A copy of the training certificate of the person who performed the test or sampling.* If a laboratory performed a test on paint chip samples, you must also submit a copy of the New York State ELAP certification for the laboratory that performed the test.

➤ *A copy of the inspection report prepared by the person who performed the test.* The report should include a description of the surfaces in each room where the testing or sampling took place.

If building built on or after Jan. 1, 1960. If you're contesting the violation because the building was built on or after Jan. 1, 1960 (and so isn't subject to the presumption of lead), you must submit proof of this. For example, you could submit a copy of the building's certificate of occupancy (C of O), says Manhattan attorney Adam Leitman Bailey. You can download a building's C of O from the Department of Building's Web site at www.nyc.gov/buildings.

But note that even if the building's C of O was issued on or after Jan. 1, 1960, HPD may not consider it sufficient proof that your building was built on or after Jan. 1, 1960, especially in a borderline case. For example, if tenants first occupied your building in 1959, based on a temporary certificate of occupancy, HPD won't consider it a post-Jan. 1, 1960, building, even if the final C of O was issued on or after Jan. 1, 1960. If your building fits into this borderline situation, it's best to consult your attorney and ask her to help you get other proof that your building was built on or after Jan. 1, 1960, says Bailey. ■