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Proposed Prop 65 Rules Won't Please Calif. Businesses

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California's Proposition 65 warning requirements (Health & Safety Code Sections 25249.6 et seq.) have long been a major concern for businesses that want their products offered for sale in the state's large marketplace. Businesses whose products contain even a detectable amount of any one of more than 900 chemicals often face enforcement lawsuits brought by for-profit plaintiffs unless their products contain a "clear and reasonable" Proposition 65 warning. Short of eliminating the chemical entirely, the only way for businesses to immunize themselves from such "bounty hunter" claims has been for companies to label or display their products with a generic "safe harbor" warning — language set forth in the original Proposition 65 regulations, which states, "This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm."

For companies that believe no such warning is appropriate for their products, California also has adopted safe harbor warning thresholds for a few ubiquitous chemicals. While these safe harbor numbers are frequently set at levels that many scientists consider unjustifiably low, they have the benefit of providing a floor on the warning threshold and thereby facilitating compliance programs. Relying on the safe harbor can also eliminate one of the most expensive and uncertain elements of litigation in enforcement actions: determining the warning threshold.

California courts have agreed that compliance with regulatory safe harbors are, per se, compliance with Proposition 65. For warnings, no specific chemical or any other information need be provided; for the regulatory threshold, no further inquiry into the appropriate level is permitted by the plaintiff.

Three new developments in the past 10 days threaten to make Proposition 65 less predictable and more difficult to comply with and to significantly increase the potential for and the cost of Proposition 65 litigation.

New Proposition 65 Warning Regulations Proposed for Adoption

On Jan. 12, 2015, California's Office of Environmental Health Hazard Assessment formally proposed an extensive set of new rules concerning the requirements for Proposition 65 warnings to be deemed

"clear and reasonable" (or, which in other words, fall within a "safe harbor"). While Proposition 65's current regulations allow for safe harbor compliance with its warning requirements through a generic, one sentence, simple black-on-white statement appearing in English, the proposed regulations will require:

1. use of a yellow triangle pictogram containing an exclamation point;
2. a more unequivocal warning statement indicating that the product "can expose" a user to chemicals known to the state to cause cancer and birth defects or other reproductive harm;
3. listing particular chemicals if they are among a group of 12 that OEHHA has identified and which are the most frequent targets of Proposition 65 litigation (already being referred to as "the dirty dozen");
4. adding a URL to all warnings linking a public website that OEHHA will operate to provide information supplementing the warning for those so interested, including potential plaintiff's lawyers (see more about this below); and
5. presentation of the warning in additional languages if the product label otherwise displays them for any other purpose (in French for Canadian products and often in other languages for free trade purposes).

The proposed new Proposition 65 warning regulations specify alternative and additional requirements for certain types of products, including for food, restaurants and several products or facilities that have previously been the subject of enforcement litigation. They also adopt revised and more onerous requirements for warnings for "environmental exposures," such as for air emissions that arise from the operation of facilities or equipment within the State.

OEHHA's regulatory proposal also seeks to alter the allocation of responsibility for giving Proposition 65 warnings as between retailers and their supply chains. The regulation would impose the warning obligation on a retailer only when any of the following applies:

- the product is a house brand;
- the retailer caused the listed chemical to be added to the product;
- the retailer has altered a warning label;
- the supplier has provided warning materials that the retailer has failed to pass on to the consumer;
- the retailer has "actual knowledge" of the potential exposure to a listed chemical; and either there is no supplier subject to Prop 65 or the supplier is not subject to U.S. jurisdiction.

For the purposes of this last criterion, "actual knowledge" is defined as "specific knowledge of the product exposure that the retailer receives from any reliable source. If the source of this knowledge is a notice [of intent to sue], the retailer shall not be deemed to have actual knowledge of any product exposure that is alleged in the notice until two business days after the retailer receives the notice."

Thus, retailers may be able to defend a Proposition 65 suit if they can show that the product is not a house brand, the retailer did not add the chemical or alter or interfere with the warning and the retailer had no "actual knowledge" of the exposure for products whose supplier is either exempt from Proposition 65 or is not subject to U.S. jurisdiction. To take advantage of this last provision, the retailer must be able to prove that it either had no actual knowledge of the exposure, or if it first learned of the exposure when it received a notice of intent to sue, it either provided warnings or stopped sale of the

product in California within two business days. Because this "relief" from the warning requirement still requires proof of the retailer's knowledge or state of mind, it seems unlikely to have any significant impact on the amount of litigation retailers face. Simply stopping sale within two days of receiving a notice of intent to sue does not appear to be sufficient to prove lack of knowledge — the question will be whether the retailer had "reliable information" relating to the exposure at some time prior to the notice.

The net effect of the retailer provision appears to be that retailers will not be responsible for warnings for products supplied by persons subject to the law and the jurisdiction of the U.S. unless they are house brands or the retailer interferes with the warning. For products provided by other suppliers, the plaintiff must be able to prove that the retailer had actual knowledge of the exposure, with the two-day grace period if the first knowledge was gained from the notice of intent to sue.

New Proposition 65 Website-Related Requirements Proposed for Adoption

Although not contemplated by the voters when they approved Proposition 65 over 25 years ago, OEHHA is proposing that it operate a website to provide information to the public to supplement and explain the basis for the Proposition 65 warnings given by businesses. Information to be provided on this website may include the routes or pathways by which exposure to a chemical from a product may occur, OEHHA's quantification of the level of exposure to a chemical presented by a product, and other information that may be of interest to bounty hunter plaintiffs as well as to sensitive consumers and other members of the public.

Significantly, in addition to its potential public education function, the proposed website regulations also empower OEHHA to demand that manufacturers, importers and distributors of products bearing a Proposition 65 warning provide the agency with information. Such information may include the identities of the chemicals in the product for which a warning is being given, the location or components of a product in which such chemicals are present, the concentration of those chemicals, and "any other information the lead agency deems necessary." While trade secret protection may be asserted in some circumstances, the requirement to provide information upon request will be enforceable by public prosecutors, including the California attorney general and district attorneys.

Challenge Mounted Against Proposition 65's "Safe Harbor" Level for Lead

On Jan. 13, 2015, one of the most historically active Proposition 65 bounty hunter groups, the Mateel Environmental Justice Foundation, filed a lawsuit in the Alameda County Superior Court in Oakland, California, seeking a writ of mandate and declaratory relief that essentially challenges the regulation's longstanding "safe harbor" warning threshold for lead. Mateel, which is being co-represented by its usual counsel and by attorneys who usually represent the Center for Environmental Health, contends that the already most-stringent-in-the-world 0.5 microgram/day regulatory warning threshold for lead was not set consistent with Proposition 65's thousand-fold safety factor requirement for reproductive toxicants. It therefore argues that the 0.5 microgram/day warning threshold for lead should be declared illegal and inoperative, despite it having been published as a final rule more than 25 years ago. If this were to occur, prior compliance determinations or even court-approved settlements based on the existing lead warning threshold could be called into question. Mateel further argues that OEHHA should be ordered to promptly establish a dramatically more stringent safe harbor level for lead based on controversial scientific views that have evolved over the past two decades.

While it is yet to be known whether the California attorney general will vigorously defend the

longstanding regulatory safe harbor level or instead attempt to settle this lawsuit with some sort of compromise, businesses can ill-afford the revision to the lead warning threshold that Mateel contends the statute demands. Such a result would likely mean that any product that presents an exposure to any detectable amount of lead, no matter how small, will require a Proposition 65 reproductive harm and birth defects warning. If this were to occur, reformulation standards that have established thresholds for such warnings based on the concentration of lead in a product would likely become meaningless as most have been justified on the basis of the 0.5 microgram/day safe harbor level that is the subject of Mateel's attack.

Conclusion

In sum, this is no time for businesses subject to Proposition 65 to rest comfortably, regardless of whether they have been giving warnings or relying on widely used reformulation standards/warning thresholds, including those often employed by international third-party testing laboratories to "pass" products for Proposition 65 compliance. Instead, involvement in OEHHA's current rulemaking process, including by providing feedback on the agency's warning and website proposals before its announced public comment deadline of April 8, 2015, is essential. Actively expressing support for the attorney general's potential defense of the Mateel lawsuit — or possibly joining other businesses and trade associations in intervening in the case — is likewise an important consideration and time sensitive.

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