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Impact of CA Prop. 65 on Manufacturers and How They Can Use the New “Safe Harbor” Warning Provisions That Became Operative on August 30, 2018

by Malcolm Weiss

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California’s “Prop. 65”¹ is the law responsible for the ubiquitous chemical warning labels and signs that California consumers encounter on a daily basis. At its core, Prop. 65 prohibits businesses with 10 or more employees from knowingly and intentionally exposing Californians to chemicals known to the State of California to cause cancer or reproductive harm without first providing them a “clear and reasonable” warning. This responsibility applies to businesses throughout the supply chain, inclusive of manufacturers, distributors and retailers, and encompasses chemical exposures from products and facility operations. Even if your company is located outside of California, Prop. 65 applies if your product is acquired by a California consumer. Violations can be expensive with penalties up to \$2,500 per day per violation, plus attorneys’ fees and injunctive relief against your business.

It should come as no surprise that California’s Prop. 65 is one of the nation’s most challenging consumer right-to-know statutes. Not only is it complex and costly to determine whether an “exposure” from a listed chemical would occur at a level that requires a warning, but businesses face the additional challenge of dealing with aggressive private citizen enforcers who seek out Prop. 65 claims. For plaintiff’s, the Prop. 65 enforcement “business” is lucrative. In 2017 alone, nearly 700 Prop. 65 claims were settled and defendants paid over \$25 million in plaintiff’s attorneys fees and civil penalties.

With more than 900 chemicals on the Prop 65 List², it may be difficult to determine whether a chemical exposure has occurred from a product that would require a warning. Exposure assessments evaluate multiple factors including chemical content, route(s) of exposure (dermal, oral, inhalation), frequency and duration of contact, and other variables.

If you conclude that your business will cause a chemical exposure that requires a Prop. 65 warning, you can benefit from the Office of Environmental Health Hazard Assessment’s (“OEHHA”)³ new Prop. 65 warning regulations that became operative on August 30, 2018. These regulations prescribe “safe harbor” warning content and methods of transmission that are deemed “clear and reasonable” under the statute. The new regulations are extremely detailed and, among other things, specify a warning symbol, font size, where the warning must be located, and when it must be provided in languages other than English.

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The “safe harbor” provisions are voluntary and the regulations expressly state that they are not the exclusive means to provide Prop. 65 compliant warnings. However, while other warnings may meet the “clear and reasonable” standard, businesses may have to defend the use of non-safe harbor warnings in court. Thus, businesses are wise to use the new “safe harbor” warnings to avoid non-compliance claims.

Manufacturers and others in the chain of commerce can face Prop. 65 compliance challenges because they do not always know where or how their products may be offered for sale, used or incorporated into other products downstream. Without such information, upstream businesses are not always able to effectively determine whether to affix a Prop. 65 warning to a product or its packaging. Businesses typically seek to avoid providing Prop 65 warnings on products that do not end up in California, since such warnings can negatively impact sales. One way upstream businesses can address these uncertainties and reduce the risk of incurring Prop. 65 claims is to put downstream customers *on notice* to evaluate their own warning obligations. For practical purposes, if your downstream customer is in compliance with Prop. 65, you, as the manufacturer or distributor, would also likely be in compliance. Another way is to contract with vendors and customers to either share Prop. 65 liability or reduce (or eliminate) the potential for exposures to listed chemicals to levels that do not require warnings.

Because Prop. 65 compliance often depends heavily on what is happening downstream and upstream of your business, an effective Prop. 65 compliance plan should incorporate informative communications with vendors and customers, who may have better knowledge of the presence of a Prop. 65-listed chemical in a product or their own Prop. 65 warning obligations.

For more Prop. 65 information, you can review our website at www.HuntonakProp65.com or *OEHHA's Questions and Answers Guide for Businesses*, available on its website.⁴

Notes

¹ Formally known as California's Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code § 25249.6 et seq.

² See the Prop. 65 List of chemicals known to the State of California to cause cancer or reproductive harm at: <https://oehha.ca.gov/proposition-65/proposition-65-list>.

³ OEHHA is the California State agency responsible for implementing Prop. 65.

⁴ OEHHA has provided general information for businesses on its website at: <https://www.p65warnings.ca.gov/businesses>. OEHHA's Q&A Guide for Businesses is available at: https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa.pdf.

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