New Labeling Requirements Under California's Proposition 65 Coming in 2018: Devil is in the Details

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California's Safe Drinking Water and Toxic Enforcement Act of 1986 - better known as Proposition 65 — is that tricky piece of legislation responsible for the ubiquitous placards and labels found throughout the state warning you about the dangers of your coffee, your French fries, the gas you pump and even your shower curtain.

This law is also well-known for the cottage industry of private attorney generals (less flatteringly known as "bounty-hunters") that enforce it. Notices of Violation brought under Prop. 65 by private enforcers now number more than ***7 new claims per day*** (double the number from just two years ago), and in 2017, Prop. 65 settlement payments totaled $25.6 million, 75 percent of which went to plaintiff's attorney fees. These claims are overwhelmingly based on the absence of warnings on products containing substances that the State of California has determined cause cancer, birth defects or other reproductive harm. Once Cal-EPA's Office of Environmental Health Hazard Assessment (OEHHA) adds a new substance to the list, applicable products in California are required to include a warning within 12 months of the listing unless it can be demonstrated that exposure levels are below the acceptable level, which is no easy feat. Failure to provide the prescribed warning can result in penalties as high as $2,500 per day, per exposure incident. OEHHA updates the list of Prop. 65 chemicals at least annually, and it now includes approximately 1,000 substances.

Starting this August, a new front for Prop. 65 litigation is opening up with the implementation of revised labeling and warning requirements that affect not only the content of required warnings, but also clarifies and allocates responsibility amongst a product's manufacturers, producers, packagers, importers, suppliers, distributors and retailers for ensuring that consumers receive compliant warnings. While most of the 2018 revisions have been characterized as simple clarifications, they also appear likely to spawn an entire new line of claims aimed at the adequacy of warning, which will be in addition to the ongoing claims for failure to warn.

The new warning requirements become operative on Aug. 30, 2018, after which time, the current safe harbor warning requirements will no longer be valid, unless the product was manufactured prior to that date and complies with applicable warning requirements in effect prior to that date. The new warnings must include a triangular symbol with an exclamation point in its center and information concerning the nature of the risk (e.g. may cause cancer). Additionally - applying best practices - the labels and warnings should include the name of the chemical triggering the warning requirement, and may be required to include the warning in more than one language. The warning requirement revisions also apply to and provide details for internet and catalogue sales of covered items. Given the size of California's economy, an internet retailer (and suppliers thereto), regardless of geographic location, should assume that its products will be sold to California consumers, and thus take actions now to prepare for the upcoming revisions.

In addition to detailing new warning formats, the revisions acknowledge the potentially complicated supply chain processes with respect to warning obligations, and at the same time seek to minimize associated burdens on retail sellers. In an effort to clarify how these obligations are allocated up the supply chain, OEHHA has published a set of questions and answers on their website. Two such questions, explicating supply chain scenarios, are paraphrased here:

Question: If a company is a manufacturer or producer of a consumer product, but does not sell it directly to retailers, how can it comply with the requirement to provide warnings to retail sellers?

***Answer*:** A consumer product manufacturer that does not sell directly to retailers has two options for compliance: (1) Label the product with the required warning; or (2) Provide a warning notice and the warning materials to the packager, importer, supplier or distributor via their authorized agent, and take appropriate actions (directly or via others in the supply chain) to ensure that the warning is passed along to the retailer and ultimately to the consumer. A manufacturer or producer may choose to enter into a contract with other businesses along the chain of commerce for their product to ensure that the warning is appropriately transmitted to the retailer and end consumer.

Question: If a company manufactures component parts or ingredients that are sold in bulk to other manufacturers or formulators, how can it comply with the requirement to provide a warning, especially if the need for a warning depends on the concentration or the manner of use of the listed chemical in the final product?

Answer: The company would only have responsibility for a consumer warning if it has knowledge that the end use of the component part or ingredient can expose a consumer to a listed chemical. For example, if a manufacturer of a food ingredient knows that the ingredient is typically used in certain types of prepared foods and could thereby result in an exposure, then the ingredient manufacturer should provide the warning notice to the product manufacturer. The product manufacturer is then responsible for determining whether the product they are manufacturing causes an exposure to the chemical at a level that requires a warning. If so, the product manufacturer is responsible for passing the information along to its customers or the product retailer.

Prop. 65 serves very important environmental and health objectives by reducing hazardous material exposure and informing consumers about the products they encounter on a regular basis; even as it imposes confusing and vexatious burdens on manufacturers and retailers. Because of its aggressive enforcement, Prop. 65 claims and requirements should be taken seriously. For manufacturers, it is imperative to evaluate your supply chain, both up and downstream. The upstream analysis should include a review of all material safety sheets for raw and starting materials to determine if a listed substance is present, and if so, whether it could result in an exposure as defined under the law. The downstream analysis should include an evaluation of distribution channels to determine if the product will be repackaged and/or used in a manner that could trigger a warning requirement. In most circumstances, unless a product has a known and narrow geographic distribution outside of California (e.g. not for sale via the internet), a manufacturer should assume that the product will end up in California and act accordingly. Contract provisions, supplier certifications and indemnity agreements are also important tools for allocating responsibility, costs and compliance risks associated with Prop. 65.

About the Author:
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