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Calif. Bounty Hunters Will Benefit From Prop 65 'Reform'

Law360, New York (May 13, 2014, 2:03 PM ET) -- If California Gov. Jerry Brown wants to reform Proposition 65 to reduce frivolous enforcement lawsuits, why are recently proposed legislative amendments predicted to increase litigation risks for companies doing business in his state? That is the billion dollar question that product manufacturers and retailers are asking — and asking loudly — since the reforms were announced. And, if a recent public workshop is any indication, the business community must and will keep pushing for extensive changes before any legislation is adopted.

A central justification for and principle of Proposition 65, officially known as the Safe Drinking Water and Toxic Enforcement Act, is to educate consumers about chemical risks. Yet many experts agree the California public has become immune to the required warnings. Predictably, the regulation has instead spawned a cottage industry of plaintiff attorneys bringing "bounty hunter" lawsuits against businesses for minor or illusory violations of the statute. This trend prompted Gov. Brown to declare in May 2013 that Proposition 65 reform was necessary to end these “frivolous shakedown lawsuits.”

In response to this clarion call, California’s Office of Environmental Health Hazard Assessment issued proposed amendments to the regulation on March 7, 2014. Under these notional reforms, businesses operating or selling products in California would need to substantially change their warnings if their products or premises contain certain chemicals listed as “known” carcinogens or reproductive toxicants. OEHHA has claimed — with little support — that these changes will provide “more clarity to the Proposition 65 warning requirements and more specificity regarding the minimum elements for providing a ‘clear and reasonable’ warning for exposures that occur from a consumer product, including foods and exposures that occur in occupational or environmental settings.”

The opposite is likely to occur.

Businesses would no longer be able use the long-standing “safe harbor” warning language if they believe a listed chemical may be in their product. Instead, they must definitively know the chemical content of all their products and premises — including potential contaminants — and warn of presumed “exposures” to the specified chemicals. Combined with an additional requirement to submit onerous information about the chemicals to OEHHA for posting to its website, these “reforms” pose a substantial and unjustified economic and human resources burden for businesses, coupled with the very real risk of

new enforcement lawsuits for those who do not — or cannot — comply to the satisfaction of the bounty hunter plaintiffs.

The Business Community's Reaction

On April 14, 2014, 30 days in advance of the original deadline to submit comments on the proposed amendments, OEHHA held a public workshop in Sacramento, California, to discuss its proposed reforms. OEHHA severely underestimated the level of public interest — so much so that the workshop had to be moved to another location to accommodate all the attendees.

Many trade groups were represented and strongly expressed their sentiments, including the California Manufacturers and Technology Association, American Coatings Association and Association of Home Appliance Manufacturers. Following an overview of the amendments by OEHHA's Chief Counsel, nearly two hours of pointed questioning focused heavily on opposition to and skepticism about the reforms.

At bottom, it appears that many businesses are preparing formal public comments reiterating and expanding on these stated concerns. After the workshop, the California Chamber of Commerce requested more time for stakeholders to submit comments. OEHHA agreed and extended the submission deadline to June 13, 2014.

According to Anthony Samson, Policy Advocate at CalChamber, "an extension of time was critical to provide the business community with adequate time to prepare a comprehensive comment letter in response to OEHHA's extraordinarily problematic proposal. To wit, OEHHA's proposal would exacerbate the already abusive Proposition 65 litigation climate in California, and would further do more to alarm and confuse consumers, and less to inform them. This is the precise opposite of what meaningful reform should look like."

OEHHA would be well-advised to listen carefully to the concerns of the business community and note the relative silence from plaintiffs' attorneys. Collectively, they speak volumes about who will actually benefit from the proposed amendments. Even so, many informed observers — notably including the Proposition 65 defense bar — are worried that the businesses to be most financially burdened by these changes are largely unaware of the proposals and will not voice legitimate concerns in time to have any meaningful effect on the process.

Tangible and Predicted Costs for Businesses

Beyond the financial costs of compliance, businesses must be concerned about whether they can procure the information required to comply. Under current Proposition 65 rules, companies are not required to disclose the names of the exact chemicals present in a product, nor do they have to disclose specific potential exposure information to OEHHA. But the proposed amendments would expand the "clear and reasonable warning" requirement significantly.

In addition to requiring the specific listing of 12 "common" chemicals on warning labels, OEHHA wants

businesses to submit complete rosters of the listed chemicals in their products or premises, accompanied by detailed information concerning exposure potential. This must include “reasonably available” data on exposure levels, routes and types and steps the public may take to reduce or eliminate exposure. These will be posted on OEHHA’s website, purportedly to further the goal of creating a public resource about chemicals in products labeled with Proposition 65 warnings.

While this appears to be a laudable goal on its face, it may be highly impractical for smaller entities doing business in California. Many companies — especially retailers, distributors and importers — do not have detailed, if any, chemical content information for the products they handle. Instead, they rely on their manufacturers and suppliers to provide such information, to refrain from changing formulations without prior notice and to include appropriate warnings as needed. These companies are unlikely to possess significant information about exposure potential or pathways or means to reduce exposures.

While parties may seek to contractually assign responsibility for providing this information, such contracts will not protect anyone in the commercial chain of distribution from lawsuits if a manufacturer or component supplier adds a new listed chemical without prior knowledge or disclosure. At the same time, the proposed information submission requirements, which are simultaneously onerous and vague, will create compliance traps based on hyper-technical oversights and minor errors. Indeed, several critical terms are undefined (e.g., “reasonably available”) and these uncertainties will create fertile grounds for lawsuits.

In addition to imposing new obligations, the amendments would also revise the current warnings format and establish three-to-five minimum requirements for warnings to be considered compliant:

- A mandatory pictogram for consumer products, other than foods, that is "The Global Harmonized System" standard pictogram for toxic hazards;
- Use of the signal word “WARNING;”
- Use of the word “expose” consistent with the language in the statute;
- Specific naming of the chemical on the warning for 12 commonly known chemicals (e.g., lead, toluene and mercury); and
- The web address for the new OEHHA Internet database of warning and exposure data.

It is anticipated that OEHHA will have missed the mark if its goal is to reduce frivolous enforcement lawsuits. Failure to attach these new warnings to products in California commerce, or submission of all required information to OEHHA, will continue to subject businesses to fines and enforcement lawsuits from the California Attorney General, local prosecutors and bounty hunter lawyers.

While OEHHA has proposed a new cure period for “minor violations” that are addressed within 14 days, it would only apply to small companies with 25 or fewer employees. The section does not define “minor violation” or other important terms, leaving the language to be disputed in litigation. In light of the breadth of the proposed obligations, the corresponding cure period is too short and too narrow to provide the protection Gov. Brown intended.

Will it Mean Meaningful Changes for Consumers?

Currently, most Proposition 65 warnings do not provide information about the actual chemicals in the products or premises, choosing instead to utilize the safe harbor language: “Warning! This product contains a chemical known to the State of California to cause cancer.”

While the proposed reforms would prohibit such prophylactic warnings when a business is unsure whether a listed chemical is actually present, replacing the safe harbor language with statements that a product “will expose” consumers to the chemical will not educate consumers, but rather unduly confuse and mislead, if not unnecessarily frighten, them.

Nor will the low threshold for chemical content and exposure under the reforms provide more meaningful information to consumers at the point of sale. Instead, warnings will be just as or more prolific and would, going forward, include chemical names that may be meaningless to the general public. This will only increase consumer fatigue and distrust.

These are genuine concerns. As noted in a January 2014 Wall Street Journal article, “[b]y warning consumers of even a 0.001 percent chance of contracting cancer, it desensitizes individuals to warnings of actual threats to their health.” Because Proposition 65 warnings are required for even de minimis risks, they have become meaningless to consumers. While there is some truth that a few businesses currently over-warn with safe harbor language, regardless of chemical concentration, the reforms will not solve the problem. Until Proposition 65 requires warnings only when there is a known and established risk, based on content and a demonstrably hazardous exposure, the imposition of overbroad warning requirements will not serve their intended purpose.

Conclusion

OEHHA’s stated motivations for Proposition 65 reform are to provide more useful warnings to the public, establish warning sufficiency standards that will increase compliance certainty for businesses and reduce enforcement litigation. But the opposite is likely to result.

The real outcome will be lengthy warnings that are not understood or are ignored by the public and a website of chemical data that will be utilized principally by plaintiff lawyers and their expert witnesses. Even well-meaning businesses will face lawsuits if they unintentionally fail to warn about a chemical they did not know was present or do not comply to the letter with the amendments’ extensive data-submission provisions. This in turn will only increase the frequency of the shakedown lawsuits the reforms were meant to reduce.

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