Proposed Prop. 65 Regs Equal Less Help and More Hurt (and Litigation)

THOUGH ORIGINALLY INTENDED TO WARN THE PUBLIC ABOUT HARMFUL CHEMICALS IN THE PRODUCTS THEY USE, PROPOSITION 65 WARNINGS HAVE BECOME SO UBIQUITOUS THAT THEY ARE LARGELY IGNORED.

And, the burdens on grocers from onerous warning requirements and frivolous lawsuits have overshadowed any potential benefits to the public. Proposition 65 has long been in need of reform.

However, so far, meaningful changes to Prop. 65's regulations and warning requirements have remained out of reach despite the hard work of the California Grocers Association and others.

The recent proposed changes to Proposition 65's warning regulations fall well short of meaningful reform, and, instead likely will increase the burden on grocers and the number of frivolous lawsuits filed against them. CGA will be preparing comments on the proposed new warning regulations, which were released on Jan. 12, 2015, by the Office of Environmental Health Hazard Assessment (OEHHA).

The draft regulations have two components. The first creates a website, operated by OEHHA, that will collect information from parties responsible for products containing Proposition 65 listed chemicals, and others regarding potential exposures from these products. The second component is a complete regulations overhaul that dictate what information must be included in a Proposition 65 warning given to the public.

A few of the key problems with the draft regulations for grocers include:

1. Grocers will have greater burdens for providing Proposition 65 warnings because the draft regulations permit manufacturers to foist that responsibility on grocers without their consent. Under new Section 25600.2, a manufacturer, packager, importer or distributor can shift responsibility for placement and maintenance of a Proposition 65 warning to a grocer by simply providing the grocer with written notice that a warning is required, identifying the exact product at issue, and either including all warning materials or offering to provide them.

   Such a shift in responsibility and liability for Proposition 65 warnings should never occur without the grocer's explicit consent to assume that responsibility and liability. Anything less is directly contrary to OEHHA's stated intent to "minimize the burden on retail sellers of products" under Proposition 65.

2. Grocers will be expected to provide warnings for products where any reliable source of information indicates that a warning may be necessary. New Section 25600.2 subdivision (d)(5)(c) defines when a grocer has actual knowledge that a particular product requires a Proposition 65 warning, and must provide such a warning.

   Actual knowledge is defined to be specific knowledge that the product may cause an exposure that the grocer receives from "any reliable source." The term "any reliable source" is too broad and vague, as statements in the media or posted on websites could potentially be considered reliable sources, and a grocer would suddenly be required to monitor all information in the media and elsewhere about all of the products it sells or risk being held liable for failing to provide a warning for a product where a "reliable" source provided information suggesting the product may cause an exposure to a Proposition 65 listed chemical.

   This new Section should be revised to make clear that the grocer must either receive information from the manufacturer of the product or from a 60-day Proposition 65 notice before it is deemed to have actual knowledge that a warning is required.

3. The time for a grocer to provide a warning after receiving a 60-day Proposition 65 notice is so short, retailers may be unable to timely comply and face even more frivolous lawsuits. Under new Section 25600.2(d)(5)(C), a grocer is deemed to have actual knowledge that a product requires a warning within only two business days after it receives a Proposition 65 notice for that product.

   This means that for products where there is no manufacturer subject to Proposition 65's requirements or the manufacturer is a foreign person, the grocer must begin providing a warning for that product no later than two business days after it receives a Proposition 65 notice. It is unrealistic and impracticable for a grocer to comply with these warning requirements within two business days. As a result, there will likely be a flood of new lawsuits against grocers when they are unable to comply on time.

   OEHHA could solve this problem by extending the time between receipt of a Proposition 65 notice and when a grocer is deemed to have "actual knowledge" to 90 days after receipt. That amount of time would enable a grocer the time to post warnings, or pull the product from its shelves.

4. Grocers may have to provide warnings in multiple languages with no guidance from OEHHA regarding how to translate the warnings. When combined with new Section 25600.2(d)(5), new Section 25603(d)'s multiple language requirement creates greater burdens for grocers. This is because grocers will be held responsible for warning requirements when a manufacturer is a foreign person.

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> If the grocer has actual knowledge that the product may expose a consumer to a Proposition 65 listed chemical, and the product label is in multiple languages, the grocer will have to provide warnings in those other languages. This will likely expose grocers to even more lawsuits premised on either a failure to warn in other languages or inadequate warnings in those languages. OEHHA should remove the multiple language requirements from these Draft Regulations until it can provide more complete guidance regarding the contents of foreign language warnings.

OEHHA is aiming for the end of 2015 or early 2016 to issue final regulations. Once final the regulations will become effective in two years.

While the draft regulations, as drafted, will not provide much relief to grocers from the burdens of Proposition 65, some recently introduced pieces of legislation could. Assembly Bill 543 would benefit grocers by reducing the number of failure to warn suits against them. It defines the "knowingly and intentionally" element of Proposition 65 to clarify when a manufacturer or retailer is knowingly and intentionally exposing the public to a Proposition 65 listed chemical.

Under AB 543, an alleged exposure to a Proposition 65 listed chemical would not be "knowing and intentional" if an exposure assessment has been conducted by a qualified scientist on the product at issue, and the assessment concludes that the alleged exposure is below the levels that would require a Proposition 65 warning.

Also under AB 543, grocers could rely on exposure assessments performed by manufacturers of products sold in their stores to show that they had no duty to warn. And, grocers could require its manufacturers to conduct an exposure assessment for private label products containing Proposition 65 listed chemicals, preventing suits against grocers for any alleged failure to provide a warning for those products.

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Proposition 65. Under Proposition 65, businesses with 10 or fewer employees are not required to comply with Proposition 65. The bill would expand that exemption to businesses with 25 or fewer employees. Expanding this exemption could benefit many smaller grocers in California currently burdened by Proposition 65 regulations and lawsuits. ■

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