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PROP. 65 CONFERENCE FOCUSES ON COMPLIANCE WITH NEW WARNING AND SETTLEMENT REGULATIONS

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The Prop. 65 Clearinghouse held its annual conference in San Francisco recently, and the speakers and panelists had a number of recommendations for both retailers and manufacturers following the adoption of Proposition 65's new warning regulations.

The New Warning Regulations

As we reported on [September 7th](#), the Office of Environmental Health Hazard Assessment (OEHHA) has adopted new [warning regulations](#) which take effect in two years on August 30, 2018.

Businesses can choose to comply with either the current or new regulations in the interim, but all retailers and manufacturers who sell products in California should review their Prop. 65 compliance protocols to ensure that they will continue to comply.

The new regulations seek to put the primary responsibility for providing warnings on product manufacturers or suppliers, who must either label their products with any required warnings or provide notice and warning materials to retailers.

The regulations expressly provide, however, that parties can continue to contractually allocate who has responsibility for providing warnings. Retailers should therefore analyze and consider revising their terms and conditions to clarify who is responsible for providing warnings and in what manner, whether retailers will accept and post shelf warnings provided by vendors, and to whom the notice and warning materials should be sent.

Complying With New Warning Regulations

The first panel – which included the chief counsel of OEHHA, the presidents of two enforcement groups, an industry lobbyist, and a defense attorney – focused on some of the challenges that the new regulations will impose on retailers and manufacturers, and how they envision the new warning requirements being implemented.

The panelists predicted that many retailers will refuse to post shelf warnings provided by vendors, and will instead contractually require vendors to put any required warnings on product labels or

packaging. The consensus among all of the panelists was that this process of contractual allocation of the compliance obligations will be an important part of how these new regulations are actually implemented.

Some panelists also expressed concern that there will be disagreement between retailers and their suppliers as to whether to comply with the current or amended regulations prior to the effective date, and recommended that this issue also be resolved contractually.

One of the biggest changes under the new regulations is that each warning must specify one or more chemicals for which the warning is being given. Carol Monahan-Cummings, chief counsel for OEHHA, emphasized that although the warning must list at least one chemical, it does not necessarily have to include all listed chemicals included in the product.

The panelists also discussed whether a manufacturer can be liable for unauthorized third-party sales into California. Ms. Monahan-Cummings indicated that this is a problem that OEHHA has considered since Proposition 65 was first enacted, but that ultimately, the law applies to everyone in the chain of commerce. The question turns on whether the sale into California is “knowing,” and the panelist had different opinions on that point. One enforcement group felt that every business should assume that their products will be sold in California, and should always provide warnings. Another argued that no liability would attach to a manufacturer who did not know about the sale in California. This important question remains open, and will depend significantly on the facts of each case.

Complying With Settlement Regulations

The California Attorney General has amended the regulations concerning settlement terms, penalty amounts, and attorney’s fees in Prop. 65 enforcement actions brought by private parties, and a second panel spoke on complying with these [amended regulations](#), which take effect on October 1.

The amended regulations require that private settlements resolving a notice of violation without the filing of a complaint or court approval of the settlement must be submitted to the Attorney General’s office within five days of reaching the settlement.

Current regulations allow attorneys’ fees to be paid to the plaintiff where a “significant benefit” has been conferred on the public, and provide that a settlement requiring a product to be sold with a warning or reformulated confers such a benefit. The amended regulations require documentation that at least some of the products at issue contained chemicals in levels that exceeded the agreed-upon reformulation standard.

The regulations continue to require that at least 75 percent of any penalty be paid to OEHHA. Importantly, the amended regulations impose limits and requirements on “additional settlement payments” – payments that are not penalties paid to OEHHA, reimbursement of costs, or attorneys’ fees. Where a settlement provides for such a payment to the plaintiff or a third party, the plaintiff

must demonstrate to the court that it is in the best interest of the public. Therefore, such payments should not be included in any settlement that is not subject to court approval.

The amended regulations require plaintiffs to clearly specify the activities that will be funded by additional settlement payments, and such activities must have a “clear and substantial nexus” to the alleged violation. Plaintiffs must disclose any relationship between the plaintiff or plaintiff’s counsel and entities or individuals receiving payments. Finally, plaintiffs must document how the money was spent, and provide such records to the Attorney General within 30 days of request. Some panelists expressed concern that plaintiffs will raise their overall settlement demands in order to cover the additional documentation and accounting costs.

OEHHA's New Website Concerning Warnings

Another panel discussed the requirement in the new Prop. 65 regulations that all safe harbor warnings include a link to OEHHA's warnings website. As we reported on [June 23rd](#), the website is intended to provide more information to consumers about Prop. 65 warnings, listed chemicals that may be present in products, and how to reduce potential exposure.

The industry representatives raised concerns that the information on the website might legitimize prophylactic warnings (e.g. warnings where there may not be a chemical present) based on the additional information available on the website. To address that issue, a spokeswoman for the American Chemistry Council advocated for business to be able to provide some factual context to the warnings. That context could include a description of where the chemical is located and how a consumer might be exposed to it, references to other agencies’ determinations about the safety of the product or chemical, or other factual information that the manufacturer or retailer thinks is relevant. The new warning regulations only allow information on the source of the chemical and how to reduce exposure to be added to the safe harbor warning, and the enforcement groups had serious concerns that these “context” statements would be used to detract from the effectiveness of the warnings.

Overall the consensus was that the website simply needs more content in order to be effective, but that when it does, it will provide a useful tool for consumers.

MEET THE TEAM



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