

Proposition 65 Warning Proposal Warning: OEHHA Misses the Mark



Malcolm C. Weiss

Partner

Hunton & Williams LLP

mweiss@hunton.com

www.huntonPROP65.com

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Regulatory Reform?

- More useful information for the public?
- Reduce frivolous lawsuits?
 - Nos. of reported settlements 338, 437, 352 over past 3 years.
 - 2011 \$16,286,000 (73% to P's lawyers)
 - 2012 \$22,560,000 (69% to P's lawyers)
 - 2013 \$17,409,000 (73% to P's lawyers)

Settlements Breakdown


| | 2011 | 2012 | 2013 |
|-----------------------------|------------|---------------|------------|
| Private | 327 | 397 | 350 |
| Attorney General | 11 | 40 (7) | 2 |
| <hr/> | <hr/> | <hr/> | <hr/> |
| Totals | 338 | 437 | 352 |

Governor's Goals



- ✘ • Cap or limit attorney's fees
- ✘ • Require stronger demonstration by plaintiffs that they have information to support claims
- ✘ • Require greater disclosure of plaintiff's info.
 - Provide the State with the ability to adjust the level at which warnings are needed
- ✘ • Require more useful information to the public regarding exposures and protections

Overview of Proposed Changes

- Among other requirements, warnings must:
 - Be provided prior to purchase, rather than prior to exposure - § 25603(a)
 - State that the product “can expose you to a chemical...” and include graphic  - § 25604(a)
 - Give the warning in multiple languages, if any label or sign is also in multiple languages - § 25603(d)
 - Identify each of 12 specific chemicals if present – § 25602

Regressive Consequences

- Big vs. Small Companies
 - Wherewithal to test and/or reformulate
- In California vs. Out of state
- Less than 10 employees still get hit
- Enhanced citizen confusion and further desensitized
- Retailers in worse position

CalChamber Comments



November 14, 2014
 Monet Vela
 Office of Environmental Health Hazard Assessment
 P. O. Box 4010
 Sacramento, California 95812-4010

Sent Electronically to: P65Public.comments@oehha.ca.gov

SUBJECT: POTENTIAL REGULATORY ACTION

Dear Ms. Vela:



Below-listed organizations (hereinafter, "Coalition") thank regarding the Office of Environmental Health Hazard Assessment's participation on Potential Regulatory Actions. Our Coalition is comprised of state-based and national organizations and businesses of every major business sector that will be impacted by potential OEHA ultimately elect to pursue them.

Potential regulatory action, if addressed appropriately, could have led to reforms, announced in May 2013. Specifically, while the warning requirements appear to be aimed at protecting the public is warned about dangerous chemicals," the issue is still an issue of debate), many of the proposed 'shake-down' lawsuits and strengthen the scientific basis

to help guide OEHA as it determines whether and how potential regulatory actions are in line with the Governor's proposed reforms, whether it would be appropriate for OEHA to address the reasons for our position, and (3) provide general guidance also propose three additional issues for OEHA's Request for Public Participation.

Whether a potential regulatory action for certain issues depends greatly on the science behind this end, if OEHA elects to address an issue that we support, but does so in a way that undermines the Governor's efforts to raise objections to such efforts during the pre-regulatory

Warning Prior to Purchase

- A product warning must be given “at each point of display of the product” or electronically, “prior to or during purchase of the product”
 - Increased litigation risk
 - Manufacturers may not have control over the final display or packaging of a product
 - May be liable for products sold in bulk with a proper warning, but repackaged

“Can Expose You to A Chemical”

- Proposed warning text:



WARNING: This product can expose you to a chemical known to the State of California to cause cancer

or

“ WARNING: Cancer” -- § 25604(b)

Unlikely to be utilized, as it is unnecessarily alarming

– Increased Litigation

- Any deviation from this language will invite a suit

– Increased Economic Burden

- Existing warnings must be replaced

Multiple Languages

- “If any label, labeling or sign about a product” is provided in another language, the warning must also be given in that language
- Increased litigation
 - Labels added down the stream of commerce in other languages, by a distributor, retailer, etc...
 - Opportunity for bounty hunters to find snippets of Non-English and bring suit

Listing of Specific Chemicals

- Must warn for 12 specific chemicals by name
 - Elevates certain chemicals over others
 - Who knows a phthalate from chlorinated tris?
- Increased Litigation
 - Otherwise compliant warnings would be subject to suit for failing to identify one of the “dirty dozen”.
- Economic Burden
 - Will require increased testing of products to determine whether a specific chemical must be warned for.
 - Door is left open for additions to the list, potentially requiring existing signs to be continually updated.

Conclusions

- The proposed requirements:
 - Do little to provide the public with more useful information
 - Increase the economic burden on businesses by requiring increased testing, increased oversight, and requiring warnings that do not accurately reflect the actual exposure risk
 - Give “bounty hunters” untold opportunities to bring more frivolous lawsuits and extract settlements from business
 - Fails to carry-out Governor Brown’s intent to positively reform Proposition 65

Other Recent Developments

- Mateel Env. Justice Foundation v. OEHHA
 - Mateel seeks to eliminate *any* safe harbor level for lead
 - Could result in huge upswing in litigation for lead exposures
 - If successful, any detectable amount of lead will be enough to support a notice letter
 - In 2014, out of 1,394 Prop. 65 notice letters, 412 focused on lead exposures

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