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ATTORNEYS AT LAW

Memorandum

To: Current and Former Proposition 65 Clients

From: Bruce Nye

Date: March 29, 2016

Re: OEHHA Publishes a Third Set of Proposed Warning Regulations

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Good morning, everyone.

Most of you have received one or more of our previous memos about the changes California's Office of Environmental Health Hazards has been proposing to the warning regulations applicable to Proposition 65. The agency has taken a third pass at these regulations, and opened a comment period to last through April 11. With one possible exception, our take is that this is the last time. Whether it is or not, it seems likely that the new warning regulations will take effect in the second half of 2018. In this memo, we will try to give you a short summary of the latest proposed changes to the consumer product regulations and what they will likely mean to our clients if they become effective.

The Language of the Safe Harbor Warning Changes Yet Again.

This is the biggest change, both from the existing regulations and the previous proposals.

Many of our clients protect themselves from Proposition 65 liability by using the current "safe harbor warning" language on labels, packaging, or use and care guides. The existing regulations provide that this language is deemed "clear and reasonable," meaning that if it is used, private party enforcers can't sue for a violation.

For chemicals listed as carcinogens: "WARNING: This product contains a chemical known to the State of California to cause cancer." For chemicals listed as reproductive toxicants: "WARNING: This chemical contains a chemical known to the State of California to cause birth defects or other reproductive harm."

Note that under the proposed new regulations (which will be effective two years after adoption), a product manufactured before the effective date that has one of the safe

harbor warnings from the current regulations will be deemed compliant regardless of when it is sold. In other words, the new regulations will not require sellers to go through their inventory and revise their warnings on old product.

While the existing regulations do not specify a "safe harbor warning" when products cause exposures to carcinogens and reproductive toxicants, many companies conflate the warnings (i.e., "WARNING: This product contains chemicals know to the State of California to cause cancer and birth defects or other reproductive harm"), and to our knowledge, no company gets sued for this warning.

It has been clear for the past year that the agency is determined to require that the safe harbor warning specifically name one or more chemicals. After two previous efforts in this regard, it has now proposed that to claim safe harbor status, the company's warning must "name one or more of the chemicals for which the person [i.e., the company] has determined a warning is required." If there are one or more carcinogens and one or more different reproductive toxicant, at least one of each must be listed. So there will not be a requirement that the company list every chemical, or even that the company select the right chemical, as long as the company lists the carcinogen and the reproductive toxin for which it "has determined a warning is required." And the new safe harbor consumer product warnings are these:

> "⚠**WARNING:** This product can expose you to chemicals such as [name one or more chemicals], which is [are] known to the State of California to cause cancer. For more information go to www.P65warnings.ca.gov/product." or,
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> "⚠**WARNING:** This product can expose you to chemicals such as [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65warnings.ca.gov/product."or,
>
> "⚠**WARNING:** This product can expose you to a chemicals such as [name of one or more chemicals], which is [are] known to the State of California to cause cancer and birth defects or other reproductive harm."

The ability to use the "truncated warning" remains the same:

> "⚠**WARNING:** Cancer -- www.P65warnings.ca.gov/product." or
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> "⚠**WARNING:** Reproductive Harm -- www.P65warnings.ca.gov/product." or

> "⚠**WARNING:** Cancer and Reproductive Harm -- www.P65warnings.ca.gov/product."

Font Size Requirements Have Mostly Been Eliminated

The last round of regulations required that the font size for the standard warnings above, when placed on labels, must be no smaller than the largest font used for other consumer information on the product, and in no case less than 8 points. Truncated warnings were also to be no smaller than the largest font used for consumer information, and in no case less than 6 points.

The new regulations eliminate font size altogether for the standard warnings, maintain the same requirement – i.e., no smaller than the largest font for consumer information or 6 points – but define "consumer information" as excluding "brand name, product name or product advertising."

OEHHA Tries and Fails to Solve The "Label" vs. "Labeling" Problem

OEHHA's Safe Harbor Warning regulations have long held that warning language can appear on a "label" or on "labeling." "Label" is given the usually accepted definition, while the current regulations define labeling as "any label or other written, printed or graphic matter affixed
to or accompanying a product or its container or wrapper." In 2005, a California Court of Appeal held that this regulation meant what it said, and that a warning could be transmitted by placing it in written instructions accompanying the product.

The last round of regulations eliminated safe harbor status of warnings on the "labeling," which would be a serious problem for companies who provide the warnings with other safety information in their use and care guides, manuals, etc. The new regulations contain an ambiguity. On the one hand, new section 25601(d) provides that

> Consumer product exposure warnings must be prominently displayed on a label, *labeling* or sign, and must be displayed with such conspicuousness as compared with other words, statements, designs or devices on the label, *labeling* or sign, as to render the warning likely to be read and understood by an ordinary individual under customary conditions of purchase or use.

But then there is section 25602(a):

> (a) Unless otherwise specified . . . a warning meets the requirements of this article if it . . . is provided using on or more of the following methods:
> (1) A product-specific warning provided on a posted sign, shelf tag or shelf sign . . .

> (2) A product-specific warning provided via any electronic device. . . .
> (3) A label that complies with the content requirements in Section 25603(a).

And no mention of labeling!.

Our sense is that after this is pointed out during the comment period, OEHHA will have to make a correction.

Internet Warnings May Become Mandatory

As in the last version of the regulations, OEHHA seeks to make on-line warnings before Internet sales mandatory. We continue to find this odd.

OEHHA has always taken the position that its warning regulations do not specify the only way to provide a clear and reasonable warning, but that compliance with the regulations provides a "safe harbor," eliminating the need for case-by-case determinations of compliance if the regulations are followed. And yet, in its provision on Internet sales (section 25602(b)), the mandatory language seems to indicate that the warning provisions must be followed for all Internet sales"

> For Internet purchases, a warning that complies with the content requirements of Section 25603(a) must be provided by including either the warning on the product display page, or a clearly marked hyperlink using the word "WARNING" on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase. If an on-product warning is provided pursuant to Section 25602(a)(4), the warning provided on the website may use the same content as the on-product warning. For purposes of this article, a warning is not prominently displayed if the purchaser must search for it in the general content of the website.

In other words, OEHHA isn't just saying that this is a way to ensure warnings are clear and reasonable. It is purporting to require this warning mechanism for all Internet sales.

The Regulations Eliminate the Limitation on Supplemental Information

The last iteration of the new regulations included the following: "A person may provide information to the exposed individual that is supplemental to the warning. . . .In order to comply with this article, supplemental information may not contradict the warning."

We felt that this, together with a rather convoluted example OEHHA gave, violated First Amendment rights. Apparently, OEHHA agreed, eliminating the provision. In the new regulations, OEHHA only limits the use of supplemental information contained in the warning itself (section 25601(f)):

> The warning may contain information that is supplemental to the warning content required by this article only to the extent that it explains the source of the exposure or provides information on how to avoid or reduce exposure to the identified chemical or chemicals. Such supplemental information may not be substituted for the warning required by this article.

Very Little Relief to Retailers

The last version of the regulations provided that retailers were not responsible for warnings unless they sold the product under their own brand or trademark, they had knowingly and intentionally caused the chemical to be in the product, had covered, obscured, altered or failed to use the warning their supplier had or offered to provide them, or had "actual knowledge of the potential consumer product exposure requiring the warning, and there is no manufacturer, producer, packager, importer or distributor of the product who [has ten or more employees or has a business location or agent for service in California]."

This seemed fine until one got to the next section, stating that if the retailer received a sixty day notice, it would be deemed to have actual knowledge two days later if it continued to sell the product without warning. This understandably resulted in howls from retailers. OEHHA responded by changing two days to five, obviously not a significant change.

What's Next?

The public comment period remains open until April 11, and may be extended (there has been one request for extension for 30 days). Then OEHHA can either adopt this version, or propose another one. We still think the effective date will be sometime in late 2018.