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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Calif.'s Prop 65: Is It Worth The Fight?

Law360, New York (November 02, 2009) -- California's Proposition 65 requires businesses to notify consumers that hazardous chemicals may be present in products they buy or places they go. Many of these alleged hazardous chemicals most likely present minimal risk of harm to any single person.

However, a person does not need to suffer any harm to win a lawsuit against a business that is not complying with Proposition 65's notification requirements. Companies that do not comply with Proposition 65 face a high risk of defending a lawsuit for noncompliance.

The cost of defending against these types of lawsuits, even if they are frivolous, can be very costly and debilitating to a business's financial stability.

Fortunately, a business can protect itself from the risks of Proposition 65 litigation by taking immediate cost-effective action, which includes complying with Proposition 65's warning requirements.

This article provides practical information for any business looking to learn about Proposition 65's requirements and minimizing its exposure to Proposition 65 lawsuits.

What is Proposition 65?

Proposition 65 is a California initiative that was approved by the voters and enacted as law in 1986. It protects Californians from the risks of undisclosed harmful chemicals that may be present in food, consumer goods and business premises.

Businesses that post a "safe harbor" warning about the risk of these chemicals can avoid liability for noncompliance with Proposition 65. The safe harbor posting must state: "WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm." (Regs., tit. 27, § 25603.2, subd. (a)(2).)

Are There Any Exceptions to Proposition 65?

Yes. Products that contain naturally occurring amounts of harmful chemicals are exempt from the law's requirements.

In the recent Tri-Union Seafoods case, several canned tuna companies were sued under Proposition 65 for failing to warn consumers that methylmercury was present in canned tuna. (People ex rel. Brown v. Tri-Union Seafoods LLC (2009) 171 Cal.App.4th 1549, 1559.)

Methylmercury causes cancer and it is one of the chemicals that California requires businesses to disclose under Proposition 65. (Id. at p. 1555.)

However, the tuna companies contended that the concentration of methylmercury in their product was only naturally occurring, and so canned tuna should be exempt from the law's labeling requirements. (Id. at pp. 1561-62.)

At trial, the court sided with the tuna processors, finding that canned tuna included only naturally occurring methylmercury. (See id. at p. 1562.)

In support of this finding, the trial court approvingly cited the defendants' experts' testimony, which contended that scientific studies showed that there has been no increase in the amount of methylmercury in ocean fish over the past 100 years (despite the rise in atmospheric mercury from human activity). (Id. at p. 1562.)

The plaintiffs appealed the trial court's decision, but the appellate court again sided with the tuna companies. (Id. at p. 1573.)

Simply stated, the tuna companies presented substantial evidence that supported the trial court's finding that the amount of methylmercury in canned tuna was naturally occurring and therefore, fell within the statutory exception. (Id. at p. 1573.)

Although the plaintiffs also presented expert testimony on this issue, the trial court found that the defendants' experts were more believable. (Id. at p. 1573.)

Why Should My Business be Concerned with a Proposition 65 Lawsuit if it Does Not Sell Chemically Hazardous Products?

That's what the tuna companies thought, too. Even though the tuna companies successfully defended the Tri-Union Seafoods case, they spent an enormous amount of money on attorneys' fees and expert witness costs.

If the tuna companies lost the case, they also would have been responsible for paying the plaintiff's attorneys' fees for investigating the issue and litigating the case through trial.

In addition, Proposition 65 does not only regulate products; it also applies to the emittance of hazardous chemicals in a business area or location.

Once a company has been sued for violating Proposition 65 regulations, the company will most likely need to hire attorneys and retain its own expert witnesses to prepare for the “battle-of-the-experts.”

Although the court of appeal in Tri-Union Seafoods noted that a trial court could retain its own experts to sort out the facts on important public health issues, prudent defendants should still retain their own experts in most cases. (See *id.* at pp. 1573-74.)

Courts that follow Tri-Union Seafoods and retain their own experts will increase the litigation costs for the defending businesses, because the defendant’s experts will need to rebut the plaintiff’s experts, and also critique the court’s experts.

The bottom line is: every business needs to be concerned with Proposition 65 and the consequences of noncompliance.

What Can My Business do to Manage These Risks?

A simple, cost-effective approach should mitigate a business’s exposure to Proposition 65 litigation. For instance, a company can post a sign on the wall of its premises, or on its products, that warns consumers of the potential for the presence of hazardous chemicals.

Proposition 65 even provides the exact wording for these warning signs: “WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.” Obviously, the cost of posting a sign is far less than the cost of defending a lawsuit.

Because most chemicals in commercial products and buildings are not naturally occurring, but anthropogenic (man-made), it is unlikely that the “naturally occurring” exception will apply to many businesses.

However, a case-by-case approach is necessary to determine the nature and extent of the chemicals in a business’s product and/or business location.

Turning a blind eye to Proposition 65 requirements does not make long-term economic sense, given the grim realities of costly litigation and harsh statutory penalties. It is important that a business weighs the costs and benefits of complying with Proposition 65.

This risk management can only take place after those in charge have a clear understanding of the requirements of Proposition 65, the risks associated with noncompliance and the costs of litigation.

--By Jason E. Fellner (pictured) and Steven A. Kronenberg, Murphy Pearson Bradley & Feeney PC

Jason Fellner and Steve Kronenberg are both associates with Murphy Pearson Bradley & Feeney in the firm's San Francisco office.

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