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WHAT ILLINOIS MANUFACTURERS NEED TO KNOW ABOUT CALIFORNIA'S "PROPOSITION 65"

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California's so-called "Prop 65" law is widely seen as a classic example of a good idea run amok in government regulation. Prop 65 is the common nickname for California's Safe Drinking Water and Toxic Enforcement Act of 1986. Prop 65 requires a set of specific and distinct warnings to be placed on "consumer products" that reveal whether the product contains any one of more than 900 chemicals on California's disclosure list (which is frequently updated and expanded), which the state believes cause cancer or reproductive harm, and to which consumers could be environmentally exposed. Note that Prop 65 itself is not a ban on any chemical, but it requires specific warnings to be provided to the consumer.

But what started out as a way to educate consumers about toxic chemicals that are contained in everyday products has increased compliance costs for manufacturers and transformed into a feast for private trial lawyers (colloquially known as "bounty hunters") who are authorized under the law to sue (and recover their attorneys' fees from) any company that fails to comply – whether such companies manufacture parts or products within California or not. The lack of clarity regarding when warnings are required and the substantial monetary penalties (up to $2,500/day) for non-compliance have unfortunately encouraged companies to default to slapping a Prop 65 warning on their products, required or not. This tends to reduce their effectiveness when everything one buys in California (from bicycles to extension cords) seems to have a warning. Recent amendments to the Prop 65 regulations last August did little to remedy confusion among manufacturers in the supply chain or reduce the compliance burden, but they did increase awareness of this law and the likelihood that customers (especially OEMs) will demand proof of compliance from their suppliers.

So, why does an Illinois-based manufacturer need to worry about Prop 65? Simply put, it affects not only goods or products produced in California for sale, but any such items produced anywhere else that end up being offered for sale in California. Thus, for example, an Illinois parts manufacturer that produces car components (say nickel-plated lug nuts) that get shipped to a customer in Kentucky to be incorporated into a car, which in turn is shipped to California to be sold to consumers, is – indirectly – subject to Prop 65. Of course, Illinois manufacturers who directly sell consumer products in (or ship them to) California are directly subject to Prop 65.

As a practical matter, the responsibility to comply with Prop 65 rests on the retail seller in California, not the out-of-state manufacturer of the component parts. What typically happens is that the end retailer who sells the product in California needs to comply with Prop 65, so the retailer in turn queries each of its suppliers and requests a 'certification of compliance.' Hence, Prop 65 compliance obligations "flow downhill," as they say.

The first time receiving one of these compliance certification requests from a customer can be an alarming experience. But panic need not ensue, if you understand the basics of what Prop 65 requires.

At its heart, Prop 65 is intended to provide warnings to consumers about possible exposure to toxic substances in their products. There are several steps to take in order to determine if your product qualifies and a warning is required to be provided (the form such warnings must take is discussed below). First, Prop 65 only applies to companies with 10 or more employees, so if your organization is very small, it technically may be exempt. However, as a practical matter, parts manufactured by small companies often are used in products sold to the actual consumer by much larger companies, which are clearly subject to Prop 65. These larger companies rely on their suppliers to provide information about their components that will be passed along to the consumer.

The next step is to ascertain whether the product contains any chemical listed on the California Prop 65 list. This list can be viewed on the website of the California Office of Environmental Health Hazard Assessment (OEHHA) at https://oehha.ca.gov/proposition-65/proposition-65-list and is regularly updated. If, based on testing or other reliable information, no chemical or substance listed on the Prop 65 list is contained in any detectable amount in your product, there are no disclosure or warning requirements (and you may then certify that to your customer, although the customer may ask for your proof or documentation). However, it's a good idea to periodically check the list at least annually to ensure that no chemicals have been added that might implicate your product. For example, two specific chemicals in the family of per- and poly-fluoroalkyl substances (PFAS) were just added to the Prop 65 list, which at one time were commonly used in fire-fighting foam, non-stick cookware surfaces and fabrics/carpeting.

It should be noted that many Illinois manufacturers simply physically fabricate parts from purchased raw materials, such as steel, without altering their chemical makeup, in which case the actual initial step is to contact your supplier of the raw materials to inquire about Prop 65-listed chemicals. Such information is typically readily available from the supplier and may simply be passed upstream to your customer. But many other manufacturers alter the raw materials in some way (e.g., chemically combining or reacting materials, plating parts, etc.), in which case the amount of chemicals in the product and the risk of exposure to the public from the

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product has likely changed.

So, what if a chemical contained in your product appears on the Prop 65 list? Small trace amounts of chemicals might not be subject to Prop 65, if the exposure levels fall under the "safe harbor" No Significant Risk Levels (NSRLs) for cancer-causing chemicals and/or the Maximum Allowable Dose Levels (MADLs) for chemicals causing reproductive toxicity. However, such levels have not been established for all chemicals on the list. (Further complicating these levels are that NSRLs and MADLs are provided in grams per day of intake, not in concentration of that chemical in the product.) For non-listed chemicals, the manufacturer must undertake an analysis of not only the levels of chemical in the product, but also the risk of exposure based on how the chemical is integrated into the product. This is because Prop 65 does not directly regulate the amount of chemical in a product, but rather risk of a consumer's exposure to that chemical.

For example, one product might have trace amounts of a chemical that is on the Prop 65 list, but the nature of the product is such that the chemical is bound very tightly within that product, and there is very little practical risk of exposure. In such a case, the product might not be subject to Prop 65, if it can be proven such the exposure risk is slight. The challenge is that performing such an analysis is fairly costly and time-consuming. As one might expect, technical and environmental consulting firms have begun specializing in such analyses, but it is also a good idea to involve legal counsel to protect such analysis under attorney-client privilege and related doctrines (as well as to ensure that the regulations are being applied correctly and the form of warning is appropriate). While companies can try to figure this out on their own (OEHHA provides 'fact sheets' and many other resources on its webpage, and trade groups and associations can also be helpful), those without significant in-house expertise do so at their peril.

Because ascertaining the actual exposure level in a Prop 65 chemical in any specific product requires a fair amount of effort, many companies opt to just provide a warning without performing such analysis (or reformulating a product to avoid Prop 65 chemicals, which may not be feasible). While such 'over-warning' is discouraged by the regulations, it is not illegal, and thus defaulting to proving the warning is often seen as the least costly, and safest, way to ensure compliance with the long arm of Prop 65.

However, Prop 65 warnings on a product can alarm consumers (especially those not from California where such warnings are ubiquitous), and so manufacturers (and their downstream customers) may be under pressure to avoid including warnings unless absolutely necessary.

Prior to the August 2018 revisions to the Prop 65 regulations, most Prop 65 warnings stated simply that the product contained a chemical that caused cancer or reproductive harm, but nothing more specific. Under the revised regulations (which easily can be accessed on the OEHHA website), a warning must contain a triangular yellow warning symbol to the left of the word "WARNING" in all caps and bold print. It also must include at least one specific chemical that prompted the warning; that the product can expose you to the chemical; the chemical is known to cause cancer and/or reproductive harm; and the Internet address for the OEHHA's new Prop 65 warning website, www.P65Warnings.ca.gov.

For example:

> ⚠ **WARNING**: This product can expose you to chemicals including [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. For more information go to www.P65Warnings.ca.gov.

There are other specific requirements for Internet-only sales, dealing with parts too small to bear individual warnings, non-English translations and a myriad of other details, even down to the size of the type used for the warning. Note that while retailers are not required to use the exact language recommended in the regulations, the warning provided must be "clear and reasonable" (and using the prescribed language provides a "safe harbor" that presumes compliance).

In sum, Prop 65 compliance is a confusing and often expensive exercise for out-of-state manufacturers, especially since non-California companies may have had limited or no previous Prop 65 experience. While simply providing a Prop 65 warning with every product may seem like the easiest path to compliance, push-back from customers and end users may dictate that testing and an exposure analysis be performed. In such cases, appropriate consulting and legal expertise should be retained to make sure that a Prop 65 "bounty hunter" does not turn its attention to your company (or your customers) next. Finally, if a dreaded "60-Day Notice" of non-compliance is received by your company from a "bounty hunter," it is important to retain experienced legal counsel immediately for help in responding and achieving compliance as quickly as possible. ◆