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PERSPECTIVE

Lessons for New York from 3 decades of Prop 65 in California

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As the New York Legislature considers Gov. Andrew M. Cuomo's proposed Consumer Right to Know Act, California's costly and often convoluted implementation of Proposition 65 offers a cautionary tale. The New York proposal, announced in January, would authorize the New York Department of Environmental Conservation, in consultation with the Department of Health and the Department of State, to develop regulations establishing on-package labeling requirements for designated products indicating the presence of potentially hazardous chemicals, including carcinogens.

If passed, the New York law may parallel California's Safe Drinking Water and Toxic Enforcement Act of 1986, known as Prop. 65. Generally, Prop. 65 requires the state to compile and publish a list of chemicals "known" to cause cancer or reproductive toxicity (Cal. Health and Safety Code Section 25249.8) and requires private businesses to provide "clear and reasonable" warnings to Californians who may be exposed to the listed chemicals within products. Id. Since Prop. 65 was enacted, businesses with 10 or more employees have been required to provide reasonable warnings to consumers on products containing any chemical listed by the state governing agency Office of Environmental Health Hazard Assessment for causing cancer, birth defects or other reproductive harm.

Rather uniquely, Prop. 65 allows consumer advocacy groups to bring lawsuits to help enforce the law. This citizen-suit provision attempts to limit the state's costs of enforcement but allows groups to sue large numbers of retailers and manufacturers without requiring those groups prove that they have been injured by the presence of a chemical at issue. Companies doing business in California have lamented the ease with which groups can bring frivolous, or "bounty hunter," lawsuits. According to the California attorney general's office, from 2000-2018 businesses paid more than $345 million in settlements in these cases.

Prop. 65 has cost California businesses hundreds of millions in settlements, spawned a cottage industry for plaintiffs' lawyers seeking to cash in on citizen suits, and often unnecessarily alarmed consumers about the safety of products they use and consume. If New York were to adopt a Prop. 65-like law, the same could happen there. Businesses could face the burdensome prospect of bi-coastal enforcement in the two of the largest markets in the U.S. and lawsuits in two different jurisdictions. New York might avoid such unfortunate and likely unintended consequences by modifying some key aspects of the California law, including the list of chemicals requiring a warning, what the required warning label looks like, which products will require a warning, and what level of exposure will trigger a warning requirement.

Of course, if the two state laws differ, it may only compound the difficulties businesses face as they try to navigate compliance with two different regulatory regimes. If the New York Legislature seeks to provide effective consumer warnings without damaging the state's economy, the following practical measures merit consideration:

Omit the Citizen-Suit Provision

Nearly 68 percent of the more than $345 million paid in citizen-suit settlements went to plaintiffs' attorneys as "attorney fees and costs." The significant profit that has been made from Prop. 65 lawsuits clearly demonstrates the driver of enforcement efforts.

Limit Penalties to Injunctive and Declaratory Relief

In almost all instances, an alleged violator does not willfully include one of the more than 900 chemicals listed by the state of California as requiring a Prop. 65 warning in their product. Rather, due to supply chain limitations or the naturally occurring presence of certain chemicals within certain materials, a product may end up containing one of the 900 listed chemicals. If a business can demonstrate that it did not willfully violate Prop. 65, that company should not be required to pay monetary penalties or incur litigation and settlement expenses if the company is willing to immediately comply with the law.

Only Require Warnings for Indisputably Harmful Chemicals

The California list contains a wide range of naturally occurring and synthetic chemicals, including additives or ingredients in pesticides, common household products, food, drugs, dyes or solvents. Chemicals may be added to the California list in four ways:

(1) if listed by the World Health Organization's International Agency for Research on Cancer as causing cancer in humans or laboratory animals;

(2) if identified by one of two committees formed by the California governor to identify chemicals for listing;

(3) if identified by the U.S. Environmental Protection Agency, U.S. Food and Drug Administration, National Institute for Occupational Safety and Health or the National Toxicology Program of the U.S. Department of Health and Human Services as causing cancer or reproductive harm; or

(4) if a warning label is otherwise mandated by a California or federal law.

In many instances, the authoritative bodies agree that a given chemical causes cancer or reproductive harm. But in many other cases the authoritative bodies disagree. Nonetheless, because California law includes a chemical on its Prop. 65 list if just one of the authoritative bodies finds that it should be included, the list has become over inclusive. The list leads to over-warning for products that are generally recognized as safe, such as aloe vera, and products containing caramel coloring, such as chocolate and baked goods.

This listing process can also raises First Amendment issues because government compelled warnings "must be factually accurate and not misleading." *Nat'l Ass'n of Wheat Growers v. Zeise*, 309 F. Supp. 3d 842, 853 (E.D. Cal. 2018).

Given the uncertainty over Gov. Cuomo's proposal, national retailers, distributors and manufacturers of consumer products, businesses should closely evaluate their existing Prop. 65 compliance strategies to preemptively prepare for bi-costal Prop. 65 enforcement.

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