

PROPOSITION 65 FACT SHEET

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The purpose of this Fact Sheet is to provide general, background information about Proposition 65 to businesses operating in California. This Fact Sheet is not intended nor is it useful as a substitute for legal advice.

FACT SHEET: PROPOSITION 65 --COMPLIANCE AND DEFENSE

In light of the recent increase in the number of lawsuits brought under California's Proposition 65 (AProp. 65" or the "Act"), we prepared this summary of the law.

Prop. 65 is among the most comprehensive toxic chemical control statutes in the nation. It prohibits the release by businesses with more than 10 employees of any listed carcinogen or reproductive toxicant into any drinking water source. It also requires that any person exposed to one of the chemicals on the list first receive a warning that the state has determined that the chemical may cause cancer and/or reproductive toxicity.

Enforcement

Prop. 65 provides for aggressive enforcement due largely to the Act's Abounty hunter@ provision. That provision allows private persons and organizations to bring actions against alleged violators of the Act on behalf of the Ageneral public,@ after providing the California Attorney General or local prosecutors with an opportunity to intervene and take control of the enforcement action. If the Attorney General does not take action within 60 days after the notice, the private party may file suit.

Violations of Prop. 65

Failure to comply with Prop. 65's tough mandates can lead to fines of up to \$2,500 per day per violation, with Abounty hunters@ keeping 25 percent of the amounts received. Plaintiff=s are usually entitled to reimbursement of their costs of bringing a Prop. 65 suit, including their attorney fees, which is often the real reason private parties bring these actions. Furthermore, along with a Prop. 65 cause of action, many plaintiffs bring a claim under the California Unfair Practices Act, which prohibits unfair competition. If the Attorney General brings the unfair practices claim, a Prop. 65 defendant can be required to pay additional penalties of up to \$2,500 per day. Private Prop. 65 plaintiffs are not entitled to these additional penalties. However, courts may grant injunctive relief and restitutionary damages, directing the defendant, among other things, to disgorge all profits from its sales or activities conducted in violation of Prop. 65. In sum, the financial liability facing a business not complying with the mandates of Prop. 65 can be onerous.

Exemptions

- * Businesses with fewer than 10 employees (including part-time workers) are exempt from the Act.
- * Releases and exposures below certain statutorily defined levels are also exempt, however, these thresholds are exceptionally difficult to meet.

Compliance with Proposition 65

Any effective compliance strategy must begin with a thorough audit of a business' operations to determine what, if anything, it is doing in violation of Prop. 65.

To avoid exposure to liability, a business should determine if it is releasing any listed chemicals which might find their way into a drinking water source. If it is, the business should desist causing such releases. For those products that the State has provided "safe harbor" language, the use of these warnings should be sufficient. If no safe harbor language is available for a particular exposure, it is extremely important that a business receive expert assistance drafting and implementing an adequate warning.

Although the implementation of this compliance strategy will not necessarily immunize a business for past violations of Prop. 65 it will minimize the accrual of any additional potential liability for non-compliance and may even serve as a useful means of discouraging a court from granting restitutionary damages pursuant to an Unfair Business Practices claim.

Defending Against a Proposition 65 Lawsuit

A business targeted by aounty hunter@ for a Prop. 65 enforcement action will first receive a 60-Day Notice of Intent to Sue Under Prop. 65, which is intended to give the Attorney General or local prosecutor the opportunity to intervene in the enforcement action. The Act delineates specific requirements for a 60-Day Notice. Notices must be scrutinized carefully for defects because a plaintiff will be required to begin the entire notification process anew if a court holds that the Notice was defective. This could dramatically affect a business' potential liability, especially if the business implemented an effective compliance strategy immediately upon receipt of the first Notice.

After the Notice has been analyzed, the validity of the plaintiff's claims must be examined to determine viable defenses. Where there are no viable defenses, it is critical to negotiate proper settlement terms including gaining protection against suits from others. If there are viable defenses, litigation strategies must be analyzed and litigation goals must be established.

Businesses must be careful as they walk the minefield of California environmental compliance; with effective assistance, businesses can avoid Prop. 65 headaches.

Environmental Practice Group Experience

The Jeffer, Mangels, Butler & Marmaro LLP Environmental Group has substantial expertise handling Prop. 65 matters, whether it be in developing compliance strategies, negotiating settlement agreements or defending suits brought. Although each Prop. 65 situation presents unique challenges, the Environmental Practice Group is able to call upon its substantial experience in this area to meet the unique needs of each of its clients.