

ARMA Proposition 65 Seminar

Understanding How Proposition 65 Affects Your Business!!

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TOPICS

- *Overview of the Law*
- *Enforcement Trends and Issues*
- *Compliance Options and Strategy*

History of the Act

- **Ballot Initiative 1986**
 - **Sponsored By Environmental Activist Community and Democratic Party as a „Right-to-Know“**
- **Ballot arguments:**
 - **safe Drinking water**
 - **warning Before exposure**
 - **tougher enforcement through Private Citizens**

o verview of L eGislation

- 1) Establishes a list of chemicals known to the state to be carcinogens or reproductive toxicants.**
- 2) Prohibits discharges into drinking water.**
- 3) Establishes warning requirements for exposures to any chemical that is known to the state to cause cancer or reproductive toxicity.**
- 4) Enforced by lawsuit by public prosecutors and private parties, who get 25% of all civil penalties.**
- 5) Places the burden of proof on Defendant.**

The Proposition 65 List

- Updated (at least) annually
- Contains approximately 800 items, including:
 - Chemicals (e.g., Benzene, toluene, crystalline silica)
 - Mixtures resulting from a chemical reaction (e.g., Diesel exhaust; cigarette smoke)
 - Elements *AND* any compound containing the element (e.g., mercury and its compounds and Chromium and its compounds)
 - „Families“ of chemicals (e.g., residual [heavy] fuel oils, „soots, tars, mineral oil“)
 - Items characterized by a specific use: (e.g., methyl Bromide used as a structural fumigant)

The Warning Requirement

- *No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.*

HSC § 25249.6

Warning Requirement

- **E l e m e n t s o f t h e W a r n i n g R e q u i r e m e n t**
 - *“In the course of doing business”*
 - *“Knowingly and Intentionally”*
 - *“Expose”*
 - *“Individual”*
 - *“A chemical”*
 - *“Known to the State to cause cancer or reproductive toxicity”*
 - *“Clear and Reasonable Warning”*

Elements of the Warning Requirement

“Knowingly and Intentionally”

- **Knowingly** refers only to knowledge of the fact that a discharge of, release of, or exposure to a chemical listed pursuant to [Proposition 65] is occurring.
- **No knowledge** that the discharge, release or exposure is unlawful is required.
- **A person who through misfortune, or accident *and* without evil design, intention or negligence, commits an act or omits to do something which results in a discharge, release or exposure has not violated [Proposition 65].**

22 CCR § 12201(b)

Elements of the Warning Requirement

“Expose”

Expose means “to cause to ingest, inhale, contact via body surfaces or otherwise come into contact with a chemical.”

Includes contact through water, air, food, consumer products and any other environmental exposure as well as occupational or workplace exposures.

22 CCR § 12201(f)

Elements of the Warning Requirement “Clear and Reasonable Warning”

- The Act does not define „clear“ or „reasonable“
- Implementing Regulations provide

The method employed to transmit the warning must be reasonably calculated, considering the alternative methods available under the circumstances, to make the warning message available to the individual prior to exposure.

The message must clearly communicate that the chemical in question is known to the State to cause cancer, or birth defects or other reproductive harm.

22 CCR § 12601(a)

Exemptions from the Warning Requirement

- *An exposure for which federal law governs warnings in a manner that preempts State authority.*
- *An exposure occurring less than 12 months after the listing of the chemical.*
- *An exposure for which the person responsible can show that the exposure poses:*
 - *“no significant risk,” assuming lifetime exposure at the level in question for carcinogens;*
 - *“no observable effect,” assuming exposure at one thousand (1,000) times the level in question for reproductive toxicity.*

Three Types of “Exposures” That Require A Warning

Cal. Code Regs. tit. 22:

§ 12601(b) “Consumer Product” Exposures

§ 12601(c) “Occupational” Exposures

§ 12601(d) “Environmental” Exposures

“SAFE HARBOR” WARNING

WARNING: This [product] [area] contains a chemical known to the State of California to cause [cancer] [birth defects or other reproductive harm].

Enforcement Provision

Enforcement only through LAWSUITS!

- Allows for civil lawsuits by the Attorney General, District Attorneys and certain City Attorneys, and Private Persons acting "in the Public Interest" Cal. Health & Safety Code Section 25249.7

What Happens If an Individual is Exposed Without a Proposition 65 Warning?

- **Because of the way Proposition 65 was drafted:**
 - *Any detectible* exposure to a listed chemical is sufficient for plaintiff to file and maintain an enforcement action (one molecule theory)
 - Defendant may avoid liability by showing:
 - An adequate warning was given;
 - The level of exposure was below the mandatory warning level; or
 - The claims are not actionable under Proposition 65

Enforcement

The "Bounty Hunter" Clause
California Health and Safety Code
Section 25192(a)(2)
Twenty-five % of any civil penalty
imposed



Bounty-Hunter Enforcement

- Anyone can bring a Proposition 65 lawsuit against a business
 - File 60-day notice
 - If State doesn't sue, Bounty Hunter cannot be stopped
- Separate liability for each party in commerce:
 - Manufacturer
 - Packager
 - Distributor
 - Retailer
 - Owner, Operator, Manager

Enforcement

Who pays the Plaintiff's attorneys?

“[A] court may award attorneys' fees to a successful party...in an action which has resulted in the enforcement of an important public right affecting the public interest....”

**CALIFORNIA CODE OF CIVIL
PROCEDURE SECTION 1021.5**

What's at Stake

- **If the Plaintiff Wins at trial:**
 - **Penalties UP to \$2500 Per Day for each violation (each individual exposed is a single violation)**
 - **Injunction** • **must provide a warning**
 - **Attorneys fees and costs Paid By Defendant!!**
- **Regardless of who wins at trial • cost of defense is Paid By Defendant (not reimbursed by insurance and not Paid By losing Plaintiff).**



Enforcement is a Lucrative Business

- **Bounty Hunter files suit claiming**
 - a chemical was present (at any level); and
 - no warning (or an inadequate warning).
- **Defendant has the Burden of Proof**
 - exposure was „safe% (California standards)
 - warning was „clear and reasonable%”
- **Thousands of Products — only four trials to judgment**
 - **egregious discovery „abuses%”**
 - **sue industry segments in Phases — Pit manufacturer against retailer.**

Enforcement Trends and Issues

- *Asphalt Exposure Litigation*
- *Industry-Wide Settlements*
- *No “Res Judicata”*
- *Lack of Methodology and Standards*

Litigation Against Asphalt Industry

- ***Consumer Advocacy Group sends over 1000 Notices – 2001 & 2002***
 - *Roofs: employees, consumers, and passersby are exposed to asphalt, coal tar, when roofs are installed or repaired*
 - *Roofs: AG initially questions notice and issue validity. CAG provides exposure data showing exposure to installers.*
- ***Environmental World Watch, CAG send notices to Paving Industry 2001, 2002, 2004***

CAG v Asphalt Roofing Industry

- **AG files *People v Blues Roofing***
 - Only deals with Occupational Exposures
 - Does not prevent CAG from suing
- **CAG files second case *CAG v Blues***
 - Failing to warn consumer, homeowner, passers by.
 - Rather than litigate, NRCA develops strategy for industry settlement

- ***EWV, CAG Litigation v Asphalt Contractors***

- **AG takes case and brokers settlement**
 - **No standards or methodology for determining exposures**
 - **Create Exposure Reduction Program**

Pros and Cons of Industry Settlements

- **Lack of Standards and Test Methodology**
- **One size fits all?**
- **Allows first sued to get better resolution than later sued**
- **Very lucrative for both Plaintiffs and Defendants lawyers – Collusion?**
- **No *res judicata*?**

Compliance Options and Strategy

- (1) Warning Program**
- (2) Eliminate chemical or reduce levels**
- (3) Conduct an exposure assessment**
 - 22 CCR § 12700 *et seq.* (carcinogens)
 - 22 CCR § 12800 *et seq.* (reproductive toxins)
- (4) Obtain a “Safe Use Determination” from State**
 - 22 CCR § 12104

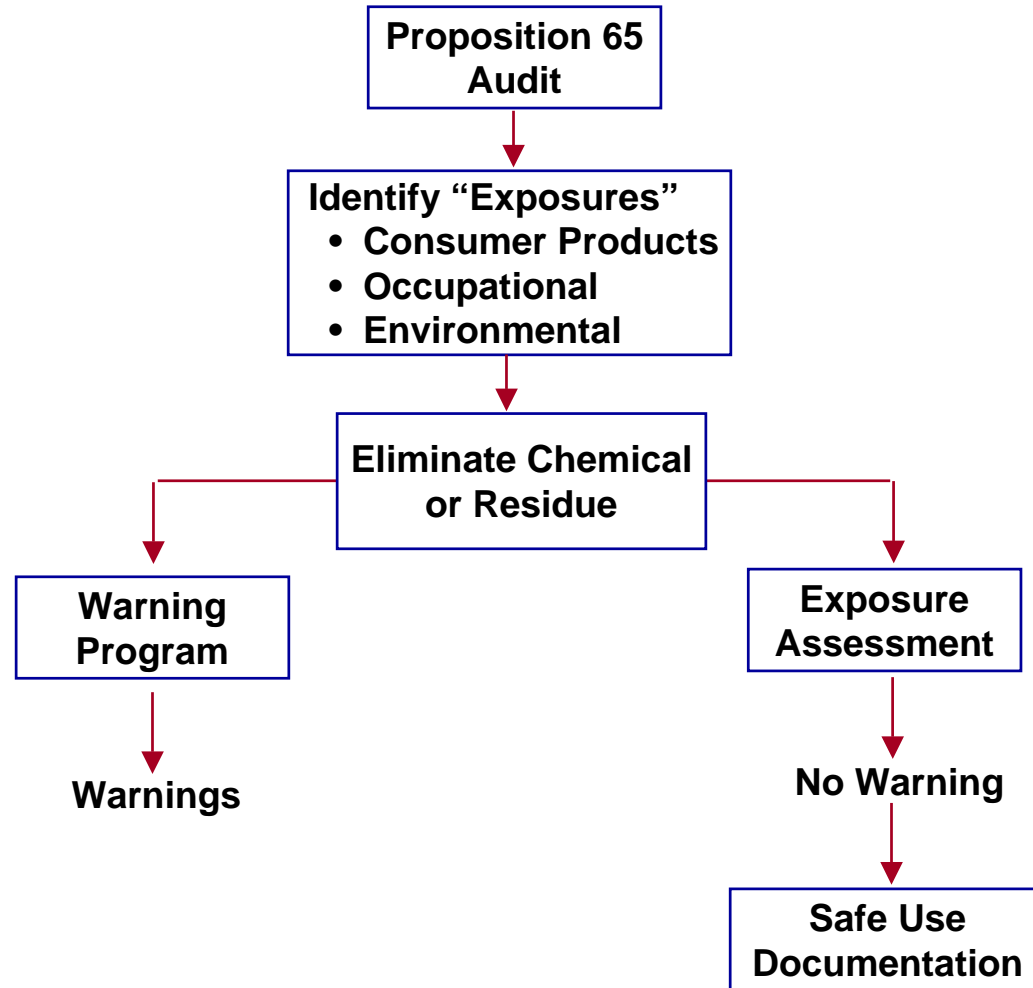
To Warn

- *Warnings are far and away the best way to prevent litigation.. . but*
 - *Warnings must be “received” by exposed classes of individuals*
 - *Warnings should cover all chemicals and exposure types.*

Or Not to Warn

- **Warnings Create concern outside of California.**
- **Safe Use Determinations issued by OEHHA but . . .**
 - **Can Take Years**
 - **Hampered by lack of state standards and methodology**

Audits – Developing Solutions



Program for Assessment of Product Compliance

STEP 1: PRODUCT IDENTIFICATION

- IDENTIFY PRODUCTS THAT CONTAIN LISTED CHEMICALS
- INCLUDE KNOWN PRODUCT IMPURITIES AND CONTAMINANTS, AND CHEMICALS FORMED UPON USE

Program for Assessment of Product Compliance

Step 2: Use identification

For products identified in Step 1:

- Identify use patterns and exposures
- Identify common factors:
 - types of workers, consumers
 - types of exposures (routes, intensity)
 - exposures during product use/following product use

Program for Assessment of Product Compliance

STEP 2: Use identification: *(continued)*

For Products identified in Step 1:

- Identify “worst case” and “average” exposures
 - Typical conditions of use
 - Frequency
- **A typical uses / Products**



Program for Assessment of Product Compliance

STEP 3: SCREENING level risk assessments:

For each representative use pattern:

- **Determine triggering levels of listed chemicals: where chemicals above “triggering levels” may be “significant” under Proposition 65**
- **Goal of screening-level risk assessment is to remove as many products as possible from consideration under Proposition 65**

Program for Assessment of Product Compliance

Step 3: Screening level risk assessment (continued)

Simple „worst case% assumptions used in
„screening%o

- discharge example
- fishing tackle example
- food consumption example

Program for Assessment of Product Compliance

Step 3: Screening level risk assessment (*continued*)

- Most products pass screening level (cost savings)
- Advantage: can be routinely used when new product formulations are considered or new chemicals are added to proposition 65 list or chemicals arise
- Advantage: used as documentation of compliance program in legal challenges
- Advantage: can be used to assure customers and retailers

Program for Assessment of Product Compliance

STEP 4: Refined risk assessments

- Only used on products which don't pass screening level assessments
- More realistic (detailed) assumptions used
- Often results in significantly lower exposures

Program for Assessment of Product Compliance

Step 5: Identification of products that trigger Proposition 65 requirements:

- Refined risk assessments identify product uses that trigger Prop 65 action
 - Compliance (“clear and reasonable” warnings, discharge prohibitions)
 - Change product’s normal use (change directions)
 - Change product formulation (reformulation - repackaging)
 - Develop further data on exposure and / or risk

“Exempt Exposures”

Exposure Assessment Program Identifies -- an exposure for which the person responsible can show that the exposure poses:

- **“no significant risk,” assuming lifetime exposure at the level in question for carcinogens**
- **“no observable effect,” assuming exposure at one thousand (1,000) times the level in question for reproductive toxicity**

Post Evaluation Implementation

- **Goal: Implement a "Program" for:**
 - 👉 each Proposition 65-listed chemical used or emitted;
 - 👉 each warning category (consumer, occupational, environmental);
 - 👉 each product, emission, or facility.

Safe Use Determination

- *File a Petition with the Department of Environmental Health Hazard Assessment*
- *Use Exposure Assessment as the basis for determination*

