

Cleaning Product Right to Know Act of 2017

New Ingredient Disclosure Requirements for Manufacturers, Employers

Summary

On October 15, 2017, Governor Brown signed into law SB 258 (Lara; D-Bell Gardens; Chapter 830), also known as the Cleaning Product Right to Know Act of 2017. The Act requires manufacturers to disclose on their labels and websites a broad list of ingredients in various cleaning products sold within the State of California. Additionally, employers subject to the California Division of Occupational Safety and Health (Cal/OSHA) product safety data sheet requirements will be required to make the Act's ingredient disclosure information available to their employees in the same manner as the safety data sheets.

California is not the only state focused on enhanced ingredient disclosure. Other states considering similar initiatives and bills include New York, Connecticut, Massachusetts, Minnesota, Oregon, Rhode Island, and Washington. The extent to which these other states will enact laws or promulgate regulations consistent with SB 258 remains to be seen.

Manufacturer Requirements

Definition of Manufacturer

A “manufacturer” is defined as a person or entity whose name appears on the label as either the actual maker of the product or the branding distribution or retail entity for which the product is made, as identified on the product label. Accordingly, all entities in the supply chain, especially retailers, should evaluate their responsibilities under the Act.

Covered Products

SB 258's ingredient disclosure requirement is directed at “designated products.” A “designated product” is defined as “a finished product that is an air care product, automotive product, general cleaning product, or a polish or floor maintenance product used primarily for janitorial, domestic, or institutional cleaning purposes.” Some of these terms are further defined in the bill.

Certain products are excluded from the definition, including personal care products, such as toothpaste, shampoo, and hand soap; industrial products specifically manufactured for, and exclusively used in, oil and gas production, steel production, heavy industry manufacturing, industrial water treatment, industrial textile maintenance and processing other than industrial laundering, food and beverage processing and packaging, and other industrial manufacturing processes; and trial samples of designated products that are not packaged for individual sale, resale, or retail.

In addition, there are exemptions for designated products regulated under the Federal Insecticide, Fungicide, and Rodenticide Act.

Labeling Requirement Effective January 1, 2021

The on-label ingredient disclosure requirement applies to designated products sold in California on or after January 1, 2021. Manufacturers of the designated products must disclose the ingredient information on the product's label in one of two ways:

- A list of intentionally added ingredients, if those ingredients are included on any of 22 designated domestic and international regulatory listings, including Proposition 65; or
- A list of all intentionally added ingredients with some exceptions for confidential business information (CBI).

An intentionally added ingredient is “a chemical that a manufacturer has intentionally added to a designated product and that has a functional or technical effect in the designated product, including, but not limited to, the components of intentionally added fragrance ingredients and colorants and intentional breakdown products of an added chemical that also have a functional or technical effect in the designated product.”

If the product contains fragrance allergens at a concentration at or above 0.01% (100 parts per million) and the allergens are included on Annex III of the European Union (EU) Cosmetics Regulation No. 1223/2009 as required to be labeled by the EU Detergents Regulation No. 648/2004 on January 1, 2018, there are further labeling requirements under the two options. There also are further labeling requirements if the product label does not disclose all of the intentionally added ingredients.

Both on-label disclosure options provide a longer grace period for intentionally added ingredients known to California to cause cancer or reproductive toxicity that are included on the Proposition 65 list. Those Proposition 65 ingredients are not required to be listed on the product label until January 1, 2023. The longer grace period for Proposition 65 ingredients gives manufacturers an opportunity to reformulate their products with the goal of eliminating intentionally added Proposition 65 ingredients before the January 1, 2023 deadline.

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All designated product labels also must include the manufacturer's toll-free phone number and a website address where additional information about the chemicals can be found. If the label does not include a full list of intentionally added ingredients, the label must identify a website address where the consumer can obtain the full list.

Manufacturers generally have 18 months to update their labels after a chemical or ingredient is added to one of the 22 criteria lists identified in the Act.

Online Disclosure Requirement Effective January 1, 2020

The online disclosure requirement applies to designated products sold in California on or after January 1, 2020. Manufacturers of the designated products must disclose the following product information on their websites:

- A list of all intentionally added ingredients contained in the product (excluding fragrance ingredients and ingredients protected as confidential business information) in descending order of predominance by weight—except that Proposition 65 ingredients are not required to be listed until January 1, 2023;
- A list of all “nonfunctional constituents” present at a concentration at or above 0.01% (100 parts per million)—a nonfunctional constituent is defined as one of a list of 34 substances that is an incidental component of an intentionally added ingredient, a breakdown product of an intentionally added ingredient, or a byproduct of the manufacturing process that has no functional or technical effect on the designated product—except that: a) if the nonfunctional constituent is known to California to cause cancer or reproductive toxicity, is included on the Proposition 65 list, and triggers a product warning under Proposition 65, it must be listed regardless of concentration, and b) 1, 4 dioxane must be listed if it is present in the finished designated product at a concentration at or above 0.001% (10 parts per million);
- The Chemical Abstracts Service (CAS) number for all intentionally added ingredients and nonfunctional constituents;
- The functional purpose served by each intentionally added ingredient;
- Electronic links to designated regulatory lists on which all intentionally added ingredients and nonfunctional constituents appear, and any fragrance allergen included on Annex III of the EU Cosmetics Regulation No. 1223/2009 as required to be labeled by the EU Detergents Regulation No. 648/2004, or subsequent updates to those regulations;
- A link to the hazard communication safety data sheet for the designated product; and
- Additional information related to fragrance ingredients and allergens.

Manufacturers of designated products regulated under the California Occupational Safety and Health Act also must make the above information available in an easily printable format or may include it in the product safety data sheet.

Manufacturers generally have six months to update their websites after a chemical or ingredient is added to the 22 criteria lists identified in the Act.

Disclosure Requirements Triggered When Products Sold, Not When Manufactured

The disclosure requirements are triggered by the date of sale of the product, not the date of manufacturing. This is an important factor to consider for purposes of complying with the Act's requirements, because it would require manufacturers to make changes to their labels and websites well in advance of the triggering sale dates. Notably, designated products manufactured before the triggering sale dates will be deemed in compliance with the Act, if the product displays either the date of manufacture (month, day, year) or a code indicating the date of manufacture.

If a manufacturer uses a code to indicate the date on the product, the manufacturer must provide a statement on its website that the information may be obtained by calling a toll-free phone number and must provide the toll-free phone number, or post on the manufacturer's website how to determine the date from the code on the designated product.

Manufacturers should consider adding the date of manufacture or the code to products in the pipeline given the difficulty in managing and ascertaining when products are sold (especially for products with a long shelf life).

Concerns/Litigation Risk Associated with Disclosure of Chemicals on Proposition 65 and Non-California Designated Lists

Requiring disclosure of Proposition 65 chemicals and chemicals on non-California designated lists raises several concerns.

Proposition 65 requires businesses to warn consumers before knowingly and intentionally exposing them to a listed chemical, if the level of exposure exceeds certain thresholds. Accordingly, the warning required under Proposition 65 is not triggered by the mere presence of a chemical in a product; rather, it is triggered by the level of exposure. By requiring disclosure of the existence of a Proposition 65 chemical, businesses open themselves up to bounty-hunter lawsuits for failure to warn—because Proposition 65 places the burden on the defendant to show that the level of exposure does not trigger the warning requirement. Thus, a business would be placed in the position of weighing litigation risk versus the effect of placing a Proposition 65 warning on the product. In practice, this may result in Proposition 65 warnings being placed on products even when the level of exposure does not meet the pertinent threshold, merely in order to avoid bounty-hunter lawsuits, which undermines and undercuts the science-based approach under Proposition 65.

A similar concern arises with regard to chemicals listed on non-California designated lists. Many of these lists identify associated exposure levels, doses, reference concentrations, notification levels, and contaminant levels. Requiring disclosure of the mere presence of a listed chemical rather than the associated exposure level negates the fact that the risks associated with the chemical may

depend upon the potency of the chemical and the magnitude, duration and frequency of exposure to the chemical. Additionally, questions arise regarding the scientific bases for the listing of such chemicals and whether such lists have been peer reviewed.

Employer Requirements

The Act provides that an employer required under the California Occupational Safety and Health Act to maintain safety data sheets and ensure that those safety data sheets are readily accessible to employees must, in the same manner and to the same employees, make readily available the printable information for designated products provided by the manufacturers in accordance with the Act.

This will require employers subject to the requirement to determine:

- whether its employees use designated products in its workplace; and
- whether the manufacturer included the disclosure information in the product safety data sheet or whether an additional document must be printed from the manufacturer's website to be included with the other safety data sheets when a designated product is purchased.

CalChamber Position

The California Chamber of Commerce supports efforts by the public and private sectors to educate Californians about product ingredients to reduce potential adverse impacts to human health and the environment. The CalChamber believes that the pertinent product information should be made available in the most efficient and effective manner while taking into account the valuable “real estate” on product labels, the protection needed for confidential business information, practical time and cost constraints related to label updates, and the potential for overwarning. When warnings are ubiquitous and contain so much information that consumers are numb to their contents, critical safety information may be overlooked. Manufacturers must have flexibility to inform consumers and workers of hazards and use directions in a clear and meaningful manner.

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