Job Killer Mandates State-Only Beverage Labels

The California Chamber of Commerce has identified a new job killer bill that mandates state-only labeling requirements for sugar-sweetened drinks.

**SB 300 (Monning; D-Carmel)** establishes the Sugar-Sweetened Beverages Health Warning Act, which would prohibit a person from distributing, selling, or offering for sale a sugar-sweetened beverage in a sealed beverage container, or a multipack of sugar-sweetened beverages, in California unless the beverage container or multipack bears a health warning.

CalChamber has identified this as a job killer because this warning may lead to unfair competition violations and ultimately class action suits.

**Warning Label**

SB 300 requires this warning be placed on certain beverages: “STATE OF CALIFORNIA SAFETY WARNING: Drinking beverages with added sugar(s) contributes to obesity, type 2 diabetes, and tooth decay.” The bill is very specific.

See New Job Killer: Page 4

Road Repair/Transportation Investment Plan Unveiled

*CalChamber Joins Governor, Legislative Leaders*

California Chamber of Commerce President and CEO Allan Zaremberg joined Governor Edmund G. Brown Jr. and legislative leaders this week at a State Capitol news conference announcing a landmark transportation investment to fix roads, freeways and bridges across California and put more dollars toward transit and safety.

“Our transportation infrastructure is critical to California’s economy,” said Zaremberg. “The California Chamber of Commerce supports new revenue to repair and maintain our roads and bridges and to reduce traffic congestion. Every day, California drivers spend too many hours in choking traffic on deteriorating roads, while businesses face increased costs and falling productivity from congested highways.

“Raising additional revenues for transportation will not be an easy vote when the time comes, but doing nothing will only ensure deterioration in the system necessary to move people and goods. We look forward to our partnership with the Governor and the Legislature on this important issue as we work toward a comprehensive solution.”

**Accountability Provisions**

According to the Governor’s news release, the $5 billion-a-year program will cost most drivers less than $10 a month and comes with strict new accountability provisions to ensure funds can be spent only on transportation.

In addition, the Governor’s news release provided the following information:

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New Criminal Background Regulations Coming July 1

The California Office of Administrative Law (OAL) approved new regulations this week relating to the use of criminal background information in employment decisions.

These regulations will be filed with the Secretary of State’s office and take effect on July 1. Employers will have additional burdens under the new regulations.

As previously reported, the California Fair Employment and Housing Council (FEHC) proposed these criminal history regulations last year.

In addition to reiterating existing prohibitions on the use of criminal history information in California, the regulations require employers to demonstrate that any criminal history information sought is job-related and consistent with a business necessity.

**Job-Tailored Consideration**

Employers can demonstrate that the consideration of criminal history information is appropriately tailored to the job in one of two ways:

- Employers may conduct an individualized assessment of the circumstances and qualifications of applicants/employees excluded by the conviction screen.

See New Criminal Background: Page 4
Labor Law Corner
Rules for Pay During Suspension of Nonexempt Employee

What are the rules for paying a nonexempt employee during a suspension?
A nonexempt employee may be suspended without pay. This is true whether the employee is suspended for disciplinary reasons or suspended during an investigation into potential harassment or other misconduct.

Some companies may choose to provide pay to nonexempt employees during an investigatory suspension, or provide pay if the investigation results in a finding that there was in fact no wrongdoing on the part of the employee, but this is not legally required.

A nonexempt employee who is suspended without pay might request to use vacation pay for the days he or she is suspended. However, the law does not require an employer to allow employees to use vacation pay during a suspension, and many employers choose not to allow use of vacation pay so that the employee will feel the financial impact of the suspension.

On the other hand, some employers may wish to implement a policy requiring nonexempt employees to use vacation pay during a suspension, thus reducing an employee’s vacation bank for time off that might otherwise be available for taking a vacation in the future. Employers are permitted to have such policies.

Reporting Time Pay
When a nonexempt employee reports to work expecting to work a full shift, but is suspended and sent home early during that shift, reporting time pay obligations arise. An employee who is sent home as the result of a suspension is entitled to pay for half the scheduled shift.

Thus, an employee who normally works an eight-hour day but is suspended and sent home three hours into the shift would be entitled to pay for the three hours worked plus one additional hour of reporting time pay.

Exempt Employees
Note the rule for paying salaried exempt employees during a suspension differs from the rule for nonexempts. Salaried exempt employees in California may be suspended without pay only if the suspension is for the duration of the employer’s full seven-day workweek. No salary deductions may be made for partial workweek suspensions for exempt employees.

The Labor Law Helpline is a service to California Chamber of Commerce preferred and executive members. For expert explanations of labor laws and Cal/OSHA regulations, not legal counsel for specific situations, call (800) 348-2262 or submit your question at www.hrcalifornia.com.

CalChamber-Sponsored Seminars/Trade Shows

More at www.calchamber.com/events.

Labor Law
Leaves of Absence. CalChamber. April 6, Sacramento; April 25, Oakland; June 22, Huntington Beach. (800) 331-8877.
HR Boot Camp. CalChamber. May 11, Sacramento; May 25, San Diego; June 6, Santa Clara; August 24, Thousand Oaks; September 6, Beverly Hills. (800) 331-8877.
Preventing Discrimination in the Workplace. CalChamber. May 18, Live Webinar. (800) 331-8877.
Leaves of Absence: Making Sense of It All. CalChamber. August 18, Sacramento. (800) 331-8877.


International Trade
Startup Showcase Series 2017. Indo-American Chamber. April 19, Milpitas. (510) 841-1513.
World Trade Week Kickoff Celebration. See CalChamber-Sponsored: Page 4
Governor, CalChamber Chair to Speak at Sacramento Host Breakfast

The annual Host Breakfast provides a venue at which California’s top industry and government leaders can meet, socialize and discuss the contemporary issues facing businesses, the economy and government.

The breakfast, together with the Host Reception the evening of May 31, provides networking opportunities for business leaders from all industries in California to discuss key issues facing the state.

Walters at Capitol Summit

Kicking off the Sacramento activities on May 31 will be the CalChamber Capitol Summit. The half-day summit will feature political insiders and Cal-Chamber policy advocates who will address national campaigns and state policy issues.

A featured speaker at the Summit will be longtime political columnist Dan Walters.

In his more than 50 years as a journalist, Walters has written numerous columns about California, first at The Sacramento Union and since 1984 at The Sacramento Bee. The column is carried by many California publications.

Register by May 19

May 19 is the deadline to register for the Sacramento Host Breakfast, Host Reception and Capitol Summit. The cost is $65. Space is limited.

For more information or to register, visit www.calchamber.com/2017summit-host.

Job Creator Bill Passes First Committee Hurdle

A California Chamber of Commerce-supported job creator bill providing small businesses with the tools and resources needed to comply with California’s regulations passed an Assembly policy committee this week with no opposing votes.

AB 912 (Obernolte; R-Big Bear Lake) recognizes challenges small businesses face in implementing state rules by allowing adjustment of civil penalties under certain circumstances.

California’s complex regulatory scheme is challenging for all employers, but especially small businesses. In recognizing this challenge, California has provided the Governor’s Office of Business and Economic Development (GO-Biz) as a resource for small employers to obtain information regarding various obstacles that small businesses face.

AB 912 would further assist small businesses in navigating the regulations in California so that they can comply and grow their business without facing costly enforcement actions for inadvertent mistakes.

Specifically, AB 912 will require state agencies that adopt regulations to help small businesses understand and comply with those regulations, adopt policies which consider specified circumstances—such as the small business cooperating with authorities and the violation not posing an imminent threat—in assessing penalties against small businesses when there has been a violation. This penalty relief will grant the small employer equitable relief from burdensome administrative penalties.

The growth of small businesses in California is a key component to maintaining a strong economy. By helping small businesses comply with California regulations, AB 912 will help ensure such growth.

Key Vote

AB 912 passed the Assembly Jobs, Economic Development and the Economy Committee on March 28, 6-0.

Ayes: Quirk-Silva (D-Fullerton), T. Allen (R-Huntington Beach), Berman (D-Palo Alto), Cervantes (D-Riverside), Grayson (D-Concord), Steinorth (R-Rancho Cucamonga).

Not voting: Rodriguez (D-Pomona).

The bill will be considered next by the Assembly Accountability and Administrative Review Committee.
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about the size of type, placement of warning and characters per linear inch on each product according to the amount of beverage contained. Vending machines, self-serve dispensers and sit down restaurants all must provide the warning.

CalChamber’s analysis finds that this bill exposes manufacturers and retailers of sweetened beverages to significant liability. Consumers would be able to sue for a violation of this new labeling requirement under California’s Unfair Competition Law. So not only could a business incur a civil penalty of up to $500; it also would have to defend against lawsuits.

It is conceivable that a class action suit would be brought based on the assertion that consuming these beverages contributes to a person’s obesity, diabetes and tooth decay, and that companies would be held liable for millions of dollars of awards for a person’s choice to consume the beverage. Manufacturers make and sell products nationwide and globally. SB 300 unfairly burdens these companies with the requirement to specially label products for the California market. Small ethnic businesses are especially vulnerable as more of their profits are from products made in other countries that may not choose to label for just the California market.

Action Needed

SB 300 will be heard in the Senate Health Committee on April 19. The CalChamber is asking members to contact their senator and members of the committee to urge them to oppose SB 300 as a job killer.


Staff Contact: Valerie Nera

New Criminal Background Regulations Coming July 1

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Before taking an adverse employment action, such as refusal to hire, the employer must give the individual notice of the disqualifying conviction and a reasonable opportunity for the individual to respond and demonstrate that the criminal history exclusion should not apply to his/her particular circumstances. The employer must consider this information and determine whether an exception is warranted.

• An employer may demonstrate that its “bright-line” conviction disqualification policy (one that doesn’t contain an individualized assessment of the facts) properly distinguishes between applicants and employees that do and do not pose an unacceptable level of risk and that the conviction being used has a direct and specific negative bearing on the applicant/employee’s ability to perform the duties or responsibilities necessarily related to the position.

Any bright-line rule that includes conviction-related information that is seven or more years old will be presumed to not be sufficiently tailored to meet a job-related/consistent with business necessity defense. The burden will be on the employer to rebut this presumption.

Notice Required

Regardless of whether an employer uses a bright-line policy or conducts an individual assessment, if the employer gets the criminal information from a source other than the applicant or employee (such as through a third-party background check), the employer must provide the individual with notice and the ability to challenge the factual accuracy of the information. This notice must be provided before any adverse action can be taken.

Even if the employer can show that a criminal history inquiry is job-related/consistent with business necessity, an individual can still bring a discrimination claim if he/she can show that there is a less discriminatory and more effective alternative means of achieving the business necessity.

The California Chamber of Commerce asked the OAL to reject the regulations on numerous grounds.

In addition to these new regulations, the California Legislature has introduced legislation (AB 1008; McCarty; D-Sacramento) that addresses the use of prior criminal history information in employment decisions.

Staff Contact: Gail Cecchettini Whaley

CalChamber-Sponsored Seminars/Trade Shows

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26th La Jolla Energy Conference. Institute of the Americas. May 24–25, La Jolla. (858) 964-1715.


Proposition 65 Compliance Challenges
Include Warning Rules, Litigation Threat

Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986, is the most far-reaching consumer “right to know” law in the nation. Although Proposition 65 prohibits listed chemicals from being discharged into sources of drinking water, the law is best known for its broadly crafted warning requirement.

Specifically, Proposition 65 requires businesses with 10 or more employees to provide a clear and reasonable warning before knowingly and intentionally exposing individuals to chemicals that the State of California, through the Office of Environmental Health Hazard Assessment (OEHHA), has determined cause cancer and/or reproductive toxicity.

The warning requirement applies to all products sold in California, even if they are manufactured in a different state or country. Since Proposition 65 was enacted, the list of chemicals has grown exponentially to approximately 950 chemicals, making Proposition 65 a consideration—and in many ways a significant burden—for companies in virtually every industry sector.

Original Intent Overshadowed

The original intent of Proposition 65 as a consumer “right to know” law has been overshadowed by provisions built in the statute, as well as subsequent regulatory developments, which together have prompted many both within and outside of the business community to criticize Proposition 65 as a well-intended law that, over time, has been utilized less by the consumer to make informed choices, and more by opportunistic private enforcers solely for personal financial gain.

Proposition 65 contains a private right of action provision that allows private persons or organizations to bring actions against alleged violators of Proposition 65 “in the public interest.” This provision, combined with the extraordinarily low bar private enforcers must meet to bring suit, has resulted in an extremely active enforcement climate.

Private Enforcers Active

On average, private enforcers collectively serve almost three Notices of Intent to sue per day. In 2015 alone, there were 582 in-court settlements (out-of-court settlements are not included in the California Attorney General’s publicly available annual settlement report) totaling $26,226,761, of which $17,828,941, or nearly 70%, went into the pockets of plaintiff’s attorneys. One law firm had 211 in-court settlements in 2015 totaling $7,275,125. Remarkably, the firm’s attorney fees totaled $5,877,825, or 81% of its total settlements.

The aggressive enforcement climate under Proposition 65 is due in large part to the fact that determining when a warning is required under the law with scientific certainty is nearly impossible, making businesses vulnerable to challenge even when they elect not to provide a warning after conducting their legal and scientific due diligence.

Complex Determination

This is because “safe harbor” levels set by OEHHA (i.e., levels above which warnings are required to be provided) are expressed in terms of amounts of exposure to a chemical per day and not in terms of the amount of a chemical found in a product or facility.

Determining exposure levels is far more complicated than determining content levels. To do this, a business may need to engage experts to undertake this complex and expensive analysis, also known as an exposure assessment. Businesses that elect not to warn on the basis of an exposure assessment which concludes that no warning is required are nonetheless still at risk of being challenged by a private enforcer who argues that a warning is required based on competing science.

Private enforcers typically dispute a business’s exposure assessment concluding no warning is required. Accordingly, the practical reality facing businesses in today’s Proposition 65 climate is that they must either warn—even if such warning is not required by law—or be sued.

‘Overwarning’ Problem

When faced with this rather vexing reality, businesses often choose to provide a warning instead of risking a lawsuit because Proposition 65 statutorily places the legal burden on the business to prove that no warning is required, a burden which makes defending Proposition 65 cases expensive.

Rather than risk being embroiled in litigation involving a battle of the

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Prop. 65 Compliance Challenges Include Warning Rules, Litigation Threat

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at trial, businesses often will instead elect to voluntarily provide a warning out of an abundance of caution in order to shield themselves from the inevitable threat of litigation that would otherwise exist if they did not warn.

These types of prophylactic warnings have contributed to the oft-criticized “overwarning” problem under Proposition 65, wherein many Proposition 65 warnings are provided to shield off a legal challenge rather than to warn consumers of actual chemical exposures.

Despite being a criticized practice, overwarning often is the right business decision because it has historically been an extremely safe course of action from a liability standpoint.

Liability for Not Warning

Since Proposition 65 was enacted more than 30 years ago, legal challenges brought under the law have almost solely and exclusively challenged a business’s decision not to warn. Plaintiffs have rarely challenged the contents of a provided warning, in great part because the longstanding regulations regarding what constitutes a “clear and reasonable” warning have been relatively straightforward and thus, businesses that provide warnings are less susceptible to legal challenges.

OEHHA’s recent regulatory update to its “clear and reasonable” warning regulations is likely to open up an entirely new type of challenge under Proposition 65 wherein the contents of a warning are challenged as being inadequate. This regulatory development, combined with other developments and recent chemical listings, are likely to make compliance with Proposition 65 more difficult in the future and will almost certainly result in increased enforcement activity under the law.

More Information

For more information, read the full article on Proposition 65 in the California Chamber of Commerce 2017 Business Issues and Legislative Guide.
Flood Management Overview Report
Spotlights Need for Ongoing Efforts

Generating funding to maintain and upgrade California’s aged and extensive flood management infrastructure is a key challenge facing the state, according to a report this month from the Legislative Analyst’s Office (LAO).

The flood management infrastructure was not designed to account for evolving statewide goals, scientific knowledge or conditions, notes the March 22 LAO report.

The funding challenge is especially great at the local level where state constitutional provisions constrain the ability to generate additional tax and assessment revenues.

Balancing flood risk with expanding population and development is another key challenge for both state and local governments, the report comments. With state population growth comes a push to develop into new areas, but development in flood-prone areas increases the potential for flood damage.

The report also cites “overlapping and fragmented” flood-related responsibilities among local, federal and state governments for complicating flood management efforts and making implementation of flood projects “especially protracted and difficult.”

2017 Flood Damage

Earlier this year, the Governor declared a state of emergency in 52 of the state’s 58 counties due to damage from winter storms and flood.

As the report points out, exceptionally high precipitation caused localized flood-ing, mudslides, flood warnings and road damage throughout the state. Erosion to the main and backup spillway at Oroville Dam led to a risk of catastrophic flooding and evacuation of nearly 200,000 residents.

Since 1992, every county in the state has been declared a federal disaster area at least once due to a flood. Estimates are that 7.3 million people (1 in 5 Californians), $575 billion worth of structure and crops valued at $7.5 billion are located in areas that have at least a 1 in 500 probability of flooding in any given year, according to the LAO report.

Benefits of Floods

Floods can have beneficial impacts for both humans and the environment in some cases. Examples cited in the report include replenishing groundwater basins, creating habitat for fish and wildlife, carrying and depositing sediments that improve agricultural productivity, and improving water quality by flushing out contaminants.

Flood management strategies often incorporate leaving floodplains undeveloped and encouraging flooding in certain areas.

Flood Management Approaches

Local, federal and state agencies have developed a variety of physical structures to convey and control water flows and floods. These structures include levees, weirs, detention basins, dams, seawalls and bypasses.

In West Sacramento an effort is underway to enhance floodplain capacity. Setting back 4 miles of the existing levee along the Sacramento River through the Southport project will not only expand the river’s width and allow greater access to its original floodplain, but also will create 152 acres of new riparian habitat.

Among strategies used by the Napa River/Napa Creek project was incorporating a dry bypass channel to provide a shortcut for fast-moving water that historically had overtopped the normal pathway of the river. The bypass, completed in 2015, flooded for the first time in February 2017, helping prevent a repeat of the widespread flooding in downtown Napa that occurred during the 2005 storms.

Funding Needs

It has been estimated that between $2 billion and $3 billion is spent each year statewide on flood management activities. The majority of the funding is generated and spent by local government entities, which hold the primary responsibility for managing flood risk. The federal and state governments each provide several hundred millions of dollars annually for flood management activities.

Several studies have estimated that reducing flood risk across the state will cost tens of billions of dollars above current expenditure levels over the next couple of decades:

- A 2013 report from the state Department of Water Resources (DWR) and U.S. Army Corps of Engineers estimated it will cost $52 billion for 836 flood management improvements and projects across the state that were in the planning or implementation stages at that time. The estimate did not include a time frame for the expenditures. The report also estimated another $100 billion might be needed to address unanticipated flood risks for which specific projects are not yet in the planning or implementation stages.

- The American Society of Civil Engineers in 2012 gave the state’s levees and flood control infrastructure a “D.” Authors of the report card estimated it would cost an additional $2.8 billion a year for 10 years to make statewide levees and flood control systems safe enough to earn a “B.”

- In a 2017 update prepared by the DWR for adoption by the Central Valley Flood Protection Board (still in draft form), a portfolio of prioritized statewide capital improvement is estimated to cost between $13 billion and $17 billion over 30 years. Another $5 billion is estimated as being needed over the same period for ongoing annual activities, such as planning, emergency management, and operations and maintenance.

The LAO report concludes that continuing the ongoing investment in flood-related efforts is essential as the state seeks to better manage its flood risk.

The full report is available at www.lao.ca.gov.

Staff Contact: Valerie Nera
LIVE WEBINAR: THURSDAY, APRIL 20, 2017 | 10:00 - 11:30 AM PT

Are Drug-Free Workplaces in California Up in Smoke?

Even with the recent passage of Proposition 64, also known as the Adult Use of Marijuana Act, employers can still prohibit drug use, possession and impairment at work, and test for drug use when appropriate.

The challenges facing employers won’t be maintaining your drug-free workplace policies and practices, but rather properly communicating and consistently enforcing these policies and practices—now that adults can legally use marijuana for recreational purposes.

Cost: $199.00 | Preferred/Executive Members: $159.20

LEARN MORE at calchamber.com/april20 or call (800) 331-8877.