

CELLY SERVICES, INC.

Environmental, Health and Safety Services

Proposition 65 Update

January 10, 2002

During the last week of December, almost all the auto dealers in California received a "60-Day Notice of Intent to Sue Under Health and Safety Code (H&SC) Section 24249.6," a.k.a. Proposition 65. First, it is a legal document. You should have appropriate counsel review the document and give you guidance on responses to the letter in terms of compliance at your site and prepare reply to counsel for plaintiff if any is required now.

One of the basic tenets of Proposition 65 is that it prohibits any person in the course of doing business from knowingly and intentionally exposing any individual to a chemical, known to the State of California to cause cancer or birth defects, without first giving *clear and reasonable warning*. The State of California currently lists some 443 chemicals as carcinogens and 169 chemicals as reproductive toxins. Failure to give warnings is the basis of the 60-day notice.

H&SC Code Section states that the warning "need not be provided separately to each exposed individual and maybe provided by general methods such as ... posting of notices ... provided the warning is clear and reasonable." State regulations also specify that warnings posted "in a conspicuous place and under conditions that make it likely to be read and understood by its employees and other individuals prior to the exposure" are acceptable. Liability under Proposition 65 occurs when the business "knowingly and intentionally" caused or permitted the chemical exposure with no warnings. The 60-day letter alleges chemical exposure to employees at workplace and exposure to customers and general public from gasoline and combustion products.

Auto dealerships routinely use and sell chemicals that are on the State of California list requiring Proposition 65 warnings. However posting clear and reasonable signs at dealerships since 1997 or earlier at conspicuous places has been considered, in general, to be an effective means to comply with the need for *clear and reasonable warning*. Noteworthy is the fact that Proposition 65 does not require listing of all 442 chemicals on the state list on the warning sign. A general warning is considered sufficient.

Dealerships also provide Material Safety Data Sheets (MSDS) to employees as part of written Hazard Communication Program (required under another state law) and routine training to employees on workplace chemicals so as to warn them of the dangerous propensities of chemicals and means to protect themselves from harmful exposures. MSDS is a document prepared by chemical manufacturers under Federal laws, to outline chemical hazards and means to protect from the hazards.

Most dealerships have undertaken the training to employees. Employee training need not be provided on each individual chemical but the MSDS that indicates harmful of chemicals including cancer causing propensities are to be retained for each of the chemicals and made accessible to employees during their work turn. The 60-Day Notice letter accurately states appropriate California law as ... "California State Plan for Occupational Safety & Health...an employer may use any means of compliance in the general hazard communication requirements to comply with Proposition 65." See 2 nd last paragraph on Page 3. In summary, plaintiff counsel allegation that "occupational exposure" to Proposition 65 chemicals has occurred without employee notification is unsubstantiated. Rather with the posting of signs and employee training being conducted by the dealerships, it is merit less. Dealership should visit this issue with their legal counsel and review employee notification and training at their facility.

The second round of allegations stem from the fact that gasoline and other vehicle fuel have chemical ingredients that require warnings. Customers are usually not exposed to gasoline products while at an automobile dealership. However, during fueling operations at gas stations minor exposures to gasoline fumes are imminent and cannot be controlled under present dispensers approved by air pollution control regulations. This exposure triggers Proposition 65 requirements.

Almost every gas pump at gas station has a Proposition 65 label. If not, charges should be filed against fuel retailing facilities. Also, since the vehicle is designed and produced by manufacturers and not dealers, any product liability arising from improper design or insufficient labeling of automobiles would be an action against the manufacturers.

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Dealers should discuss manufacturer indemnity issue with their counsel. The dealer association in Sacramento is also analyzing this issue.

In a similar scheme of things, the 60-Day letter also charges that automobile exhausts contain Proposition 65 chemicals and warnings should have been provided to California residents. This may be subject to a legal challenge. If a court is to accept the plaintiff's preposterous idea of notification to public, the burden on business will be outrageous. Newspapers would hit Lotto. Every smoke/fume/gas emitter from burger griller to zoo animal caretaker including cigarettes, matches, lighter manufacturers can be subject to Proposition 65 requirements. In any case, your association and/or legal counsel should be able to provide you with information on newspaper ads or ads in other media.

Some signs are enclosed for your review and use. The dealership should review the attached signs and notification requirements with their legal counsel before posting them. Duplicate these signs if you need more than the ones enclosed. If the size of the signs provided is not clear and reasonable, please contact a sign company to provide you with larger signs.

The article was authored by Sam Celly of Celly Services, Inc. Sam has been helping automobile dealers comply with EPA & OSHA regulations in California, Nevada, Arizona, Hawaii & Idaho since 1987. Sam received his BS & MS in Chemical Engineering followed by a JD from Southwestern University. Sam is a Certified Safety Professional & a Registered Environmental Assessor (CA). Your comments/questions are always welcome. Please send them to sam@cellyservices.com.