

WARNING: California Has Listed ‘Wood Dust’ Under Proposition 65

By Sean M. Sherlock

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Each summer a non-profit arts organization in the city of Laguna Beach holds its Sawdust Festival, at which more than 200,000 visitors stroll through sawdust-covered paths to shop for local art. Now, under Proposition 65, that sawdust is carcinogenic. The state of California’s Office of Environmental Health Hazard Assessment (OEHHA) has listed “wood dust” under Prop. 65 as a chemical known to cause cancer. The listing will take effect on Dec. 18, 2010, and anyone representing clients in the construction or wood products business (or any other business in which wood dust is generated, used, or sold) needs to know about this.

Enacted by ballot initiative in 1986, Prop. 65 (Health & Safety Code Section 25249.5 et seq.) provides, among other things, that “[n]o 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...”

Proposition 65 applies to businesses having 10 or more employees, but not to city, county, state, or federal governments or their agencies. The state maintains a long list of chemicals “known to the state to cause cancer or reproductive toxicity,” and now “wood dust” has been added to the list.

Compliance generally entails providing a Prop. 65 warning. You have probably seen them. “WARNING: This area contains chemicals known to the State of California to cause cancer, birth defects and other reproductive harm.” – or some variation of that.

Prop. 65 is enforceable not only by the government, but also by “any person in the public interest.” This has spawned a cottage industry of private Prop. 65 enforcers, who send their investigators into the marketplace to find potential violations, file lawsuits, and obtain settlements typically involving consent judgments imposing injunctive relief, payment of civil penalties, and of course, payment of the enforcer’s attorney fees. Violations are punishable by civil penalties of up to \$2,500 per day, per violation.

Wood dust was added to the list in response to a 2009 order in an Alameda County Superior Court case, [*Sierra Club v. Schwarzenegger*]. In that case, a group of environmental and labor organizations sued the state to require the listing of a

chemical known as perfluorooctanoic acid, or PFOA. Their complaint also alleged that the state had failed to list other unspecified chemicals as required under Prop. 65.

In an order entered May 27, 2009, the trial court held as follows:

“the plain language of Health and Safety Code §25249.8 requires that the substances identified by reference in Labor Code sections 6382(b)(1) and 6382(d) be included on the list of chemicals known to the state to cause cancer or reproductive toxicity, and that the list, including the chemicals referenced in the Labor Code sections, be updated annually.”

Judgment was entered in accordance with this order, and because wood dust is among the substances identified by reference in the Labor Code sections, OEHHA listed wood dust on Dec. 18, 2009.

The exact impact of this listing is difficult to predict. But it is entirely likely that this will generate a surge of new Prop. 65 lawsuits against many unsuspecting businesses, and result in ominous warnings being posted in otherwise innocuous environs, and being placed on harmless products – but only in California.

“Wood dust” is not defined under Prop. 65. The U.S. Occupational Safety and Health Administration (OSHA) guidelines define wood dust as “pulverized wood wastes, or the dusts from cutting, shaping, drilling, sanding, or general handling of wood.” It further identifies synonyms for wood dust to include “finely divided wood particles, powdered wood, sawdust, wood flour, hardwood dust, wood shavings, softwood dust, wood dust.” Cal-OSHA guidance refers to wood dust as “wood particles resulting from processing or handling of woods.” Thus, if either of these definitions guides future regulations or court decisions, “wood dust” will be ubiquitous.

Although occupational exposure to wood dust is already regulated under federal and state occupational safety and health laws, Prop. 65 applies beyond the workplace to consumer and other environmental exposures. An “environmental exposure” is an exposure, either through inhalation, ingestion, skin contact, or otherwise, that may foreseeably occur as a result

of contact with an environmental medium, such as air, that contains the listed chemical. For example, an environmental exposure would include a situation in which customers or other passersby are exposed to wood dust in the air at or near a construction job site.

This issue has been on the radar of larger lumber and wood processing businesses, but its reach extends well beyond lumber mills. Any business that generates, transports, uses, or sells wood dust – even a product that may contain residual wood dust – is vulnerable to a Prop. 65 citizens’ suit, because under this law, there is no safe threshold of exposure. Prop. 65 provides an exemption from the warning requirement if a business can prove that the exposure poses “no significant risk,” assuming lifetime exposure at the level in question. The state has defined “no significant risk” levels for many Prop. 65 chemicals, but not for wood dust. Thus, if the citizen enforcer can prove [any] exposure to wood dust, the burden of proof is upon the defendant to prove that the exposure poses “no significant risk.” Perhaps some day through the regulatory or judicial processes a safe-harbor exposure threshold will be set. At least for the time being, however, even harmless commonplace exposure to wood dust could trigger a lawsuit. This forces the defendant to either spend the money necessary to engage experts and litigate the issue to judgment, or pay the settlement demand – often into six figures.

Complying with the law and avoiding litigation will be easier for some than others. One approach is to institute measures to assure that operations do not create any exposure to wood dust. Good luck with that. Another approach is to provide a Prop. 65 warning. Regulations promulgated by OEHHA prescribe various requirements for a proper warning. The method employed must be “reasonably calculated, considering the alternative methods available under the circumstances, to make the warning message available to the individual prior to exposure.” OEHHA has also promulgated a “safe-harbor” warning: “WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive

harm.” Or, for environmental exposures: “WARNING: This area contains a chemical known to the State of California to cause birth defects or other reproductive harm.”

In September, the attorney general’s office provided informal guidance to representatives of the wood products industry, opining that the following warning, used in conjunction with many other measures too numerous and complicated to address here, would be adequate: “WARNING: Drilling, sawing, sanding or machining wood products generates wood dust, a substance known to the State of California to cause cancer. Use a respirator or other safeguards to avoid inhaling wood dust.”

When the voters took to the polls in 1986 to enact Prop. 65, is this really what they intended to accomplish? Should a warning sign instructing them to wear respirators greet the patrons of the Laguna Beach Sawdust Festival? Should schools have to warn parents that their children will be exposed to carcinogens when they sharpen their pencils?

The proponents who wrote the voter guide arguments in favor of Prop. 65 invoked “toxic catastrophes,” and argued that “[t]hese new laws will not take anyone by surprise.” In the last 20 years, thousands of businesses – many of them smaller companies and out-of-state companies – have been taken by surprise. Given the ubiquitous nature of wood dust, the monetary incentives for bringing Prop. 65 lawsuits, and the lack of clear standards, this new listing of wood dust is likely to take many more by surprise. Prop. 65 is flawed because it does not draw a clear distinction – one that can be reasonably understood and relied upon by businesses and the public – between situations that pose a true risk, and those that do not. Currently, the only means of distinguishing between those situations is costly litigation.

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