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State Initiative the Wrong Chemical Reaction

By JOHN KABATECK

IN 2008, then-Gov. Arnold Schwarzenegger signed into law a program that identifies “chemicals of concern” in consumer products. The Green Chemistry Initiative is designed to protect California consumers from harmful chemicals and, on the surface, sounds very reasonable. But not so say employers who don’t question the importance of protecting the public’s health, but challenge the science and process that will regulate all products sold in California.

In comparison to Proposition 65, which regulates only two hazard traits and 800-plus chemicals, the Green Chemistry Initiative regulates more than 40 hazard traits and more than 3,000 chemicals, prompting the California Chamber of Commerce to declare that the state is on a path to adopting “the most aggressive chemical management system in the world.”

While Schwarzenegger had made exporting California’s progressive green values worldwide his mission, doing so without increasing consumer costs and harming California’s economy didn’t prove so easy.

So, several drafts and years later, Gov. Jerry Brown has just released draft regulations that empower a relatively obscure department with imposing overly costly and onerous regulations that will not only delay California’s economic recovery, and invite a bonanza of drive-by lawsuits, but also increase costs for all employers, small-business owners in particular.

If small businesses are dismayed by the large number of frivolous lawsuits associated with Proposition 65 regulations, the onslaught that the Green Chemistry Initiative might bring will make Proposition 65 look quite tame – and frivolous lawsuits have the ability to close a business faster than any tax increase.

Here’s why. The Department of Toxic Substance Control, responsible for enforcing these regulations, is a relatively small department and is overwhelmed with the task of serving as a chemical “clearinghouse” for every product in the world sold in California. Therefore, the department must rely on in-

formation from other nations and states to identify so-called “chemicals of concern.”

As a result, its findings might be divorced from actual science and create uncertainty as to which chemicals are permissible, all the while subjecting California businesses and retailers to fines of up to \$25,000 a day and, perhaps, even criminal prosecution. So even if a drive-by lawyer finds a product commonly found on most any merchant’s shelf that is 99.9 percent free of a chemical and deemed safe by federal regulators and other states, severe penalties could still be applied.

California’s new standards will also have a profound impact on interstate commerce and international trade. Manufacturers may simply find California’s new environmental standards so onerous that they will simply stop trading with California and this will certainly come at a significant cost to the ports of Los Angeles and Long Beach, which support more than 1 million California jobs and \$89 billion in state trade each year.

While these proposed regulations will expose many employers to lawsuits and deny consumers access to safe and affordable products, many business owners are fearful to raise their concerns publicly. This is due in large part because DTSC announced that it will roll out the chemicals to be regulated incrementally and apply them to a handful of products, sending a subtle message that those first to raise concerns may be among the first regulated. So fear ensures silence, at least in the short term.

Long term, former DTSC director Maureen Gorsen, now an attorney with the firm of Alston & Bird, has been following development of the regulations and, together with many other stakeholders, believes “the requirements imposed not only lack rational, scientific justifications but will discourage manufacturers from doing business in California and importing their products no matter their safety record, and this threat is even greater for small and emerging businesses who can’t afford enormous compliance costs or the legal exposure.”

While several states with business-friendly environments

are actively recruiting California businesses to move, the Governor’s Office continues to dismiss the notion of a California exodus as a “myth.” But it is very real and even more so for companies soon to be regulated by Brown’s creation of a bureaucracy to review the ingredients of every consumer product for sale in California, with unlimited fee authority to charge businesses for the privilege of this bureaucratic review.

Rather than exporting failed green values that will harm every business in the world that sells products in California, our state should start importing good business practices that seek sensible policies that encourage entrepreneurship and protect the public’s health without going so far as to threaten jobs and drive up the cost of common household products.

It is time for the governor to shelve regulations that undermine California’s ability to be competitive in a global economy. Bad regulations will only expedite the great migration of California employers to business-friendly states. And this is no myth.

John Kabateck is the executive director of the California chapter of the National Federation of Independent Business. The NFIB represents small businesses in public-policy issues. It has offices in all 50 states.

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