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THE NEW FRONTIER OF NUTRITIONAL LABELING GUIDELINES

BY COURTNEY DANIELS

GROCERS, FOOD PRODUCERS, AND RETAIL FOOD ESTABLISHMENTS HAVE TWO NEW REGULATIONS THAT WILL SOON AFFECT THEIR BUSINESSES.

The two new regulations impact packaged food and foods for immediate consumption. This article highlights both regulations.

PACKAGED FOODS

On May 20, 2016, the FDA announced new requirements for the Nutrition Facts Label for packaged foods. The changes were initiated to update the look of the iconic food label; update the label to reflect changes in nutritional science; and update the serving size.

Updating the Look

The new label increases the type size of the calorie content, servings per container, and serving size information. Additionally, the calories per serving information must be bold. Manufacturers will also be required to declare not only the daily percentage, but also the amount of Vitamin D, calcium, iron and potassium in their products.

Finally, the "Daily Value" footnote at the bottom of the label will be amended to better explain the meaning. The new footnote will read: "*The % Daily Value tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice."

Changes in Nutritional Science

The FDA's study revealed that it is difficult to meet nutrient needs while staying within calorie limits if you consume more than 10 percent of your total daily calories from added sugar. To combat this, the FDA is requiring that manufacturers include the gram amount and daily value percentage of added sugars on each label.

The FDA is also updating the list of required nutrients on each label to include: Vitamin D, potassium, calcium and iron and the daily values for nutrients like sodium, dietary fiber and Vitamin D. Listing Vitamins A and C will no longer be required, but can be included on a voluntary basis.

Updating Serving Size

The amount of food people eat and drink has changed since the previous serving size requirements were published in 1993. The new requirements seek to update food labels to reflect the amounts of foods and beverages that people are actually consuming, instead of the recommended serving size.

For example, the serving size on a carton of ice cream was previously ½ cup and is now changing to a cup. Similarly, a can of soda will now reference a 12-ounce serving size compared to the previous 8 ounces.

Furthermore, the FDA has recognized that the size of food packaging has a direct effect on the amount of food that people consume.

So for packages that are between one and two servings, such as a 20-ounce soda or a 15-ounce can of soup, the calories and nutrients must be labeled as one serving for the entire package because people typically consume it in one sitting.

For some products that are larger than a single serving but can be consumed in one sitting or multiple sittings, manufacturers will have to provide "dual column" labels to indicate the amount of calories and nutrients on both a "per serving" and "per package"/"per unit" basis.

Manufacturers have until July 26, 2018, to comply with the new guidelines. The FDA has granted manufacturers with less than $10 million in annual food sales an additional year to comply.

IMMEDIATE CONSUMPTION FOODS

The impact of changes in our nutritional disclosure law is not limited to food manufacturers. The Affordable Care Act, signed into law by President Obama in 2010, created new menu-labeling requirements for restaurants that will go into effect as of May 5, 2017.

fda.gov

These labeling requirements currently apply to restaurants and similar retail food establishments that are part of a chain of 20 or more locations. A restaurant or similar retail food establishment is defined by the FDA as "a retail establishment that offers for sale restaurant type food, which is generally food that is usually eaten on the premises, while walking away, or soon after arriving at another location."

Although the rule seems simple enough, it can be difficult to decide what is a "restaurant" or "similar food establishment" under the law. For example, many grocery stores offer hot foods, coffee bars, and sandwich shops.

Although these venues do not fall under society's common perception of a restaurant, they function like a restaurant and therefore fall under the definition of a "similar food establishment."

The regulations require covered restaurants and similar retail food establishments to post on a menu or menu board the calorie information for standard menu items; a succinct statement concerning suggested daily caloric intake; and, a statement that written nutrition information is available upon request.

The calories contained in each standard menu item must be listed next to the name or the price of the associated item in a type size equal or larger to that of the name or the price (whichever is smaller) and in the same color, or a color at least as conspicuous as the rest of the menu. Similarly, the caloric information must use the same contrasting background or a background at least as contrasting as that used for the rest of the menu.

Enforcement of the regulation was originally expected to begin December 1, 2015, but has been delayed twice. In December 2015, Congress directed the FDA to push the law's enforcement date until one year after the agency published final guidance. Final guidance was published May 5, 2016, making the regulation enforceable on May 5, 2017.

Therefore, starting this May, the FDA may request that covered establishments provide information substantiating the nutrient values, including the method and data used to derive them.

On a final note, there has been speculation as to whether the new regulations will stay in place in the event that the Affordable Care Act is repealed. It is likely that the FDA has the authority to regulate and require these nutritional disclosures absent the Affordable Care Act.

However, a repeal could cause a further delay in enforcement. Furthermore, California's current laws and regulations incorporate the requirements set forth in the Affordable Care Act. Therefore, a repeal of the Affordable Care Act may require California legislators to enact new laws and guidelines absent federal regulation.

In conclusion, the new laws are focused on promoting health by better informing the public. However, the new laws put the burden on the food provider to do so. With enforcement on the horizon, food producers, restaurants, and grocers would be well advised to plan to be in compliance before May 5, 2017. ▪

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Post publication note: On May 1, 2017 the FDA extended the compliance deadline for menu nutrition labeling to May 7, 2018. Please refer to Downey Brand's Legal Alert of May 2, 2017.

PRACTICAL ADVICE ON AVOIDING PROP. 65 ENFORCEMENT

BY LEILA BRUDERER AND SOPHIA BELLOLI
DOWNEY BRAND LLP

CALIFORNIA'S PROPOSITION 65 HAS LONG BEEN A THORN IN THE SIDE OF CALIFORNIA GROCERS.

It was originally passed as a consumer right-to-know law with the intent that it would result in the public receiving warnings about harmful chemicals in the products they use. In practice, some would argue that consumers are no more informed after the passage of Proposition 65 because Proposition 65 warnings have become so ubiquitous, and are largely ignored. The real effect of Proposition 65 has been to subject grocers and food manufacturers to frivolous lawsuits over the last 25 years.

Much of the time, grocers are put in the tenuous position of trying to determine whether to provide a warning for a particular product. But, unlike the manufacturer, grocers do not have access to product information that would enable them to determine whether a warning is actually required.

Below, we have outlined some common scenarios that a grocer may face, and provided some practical suggestions for how a grocery company can protect itself from Proposition 65 liability.

SCENARIO 1

A grocer has received a 60-day notice that a particular product allegedly contains a Proposition 65-listed chemical, and the particular product was sold without a warning. The grocer carries other brands of that same or a similar product.

1. Should the grocer assume that the other brands of the product also contain the Proposition 65-listed chemical? And, if so, should the grocer provide a Proposition 65 warning for the other brands to avoid enforcement?

Once a grocer receives a 60-day notice that a particular product allegedly contains a Proposition 65-listed chemical, the grocer may be attributed with knowledge that a Proposition 65 warning is required for that particular product.

If the grocer sells other brands of the same product, it should contact the manufacturers of the product at issue, and of the other brands, advise them that the grocer has received a 60-day notice for the same types of products, and demand that the manufacturers provide a statement that their products are in compliance with Proposition 65 or provide a warning if the product is not in compliance.

At the same time, the grocer should notify the manufacturers that if they do not respond within 30 days, the grocer will post Prop. 65 warnings for the manufacturers' products or ask the manufacturer to recall non-compliant products, and specify that the grocer will only accept Prop. 65 compliant products from the manufacturer.

2. If the grocer provides a Prop. 65 warning for the other brands, how should it do so?

The grocer can provide the Prop. 65 warning through a shelf tag, at the point of sale or with a label on the product itself, though this last option is likely burdensome for the grocer. Regardless of how the grocer provides the warning, it must be specific to the products and brands at issue.

For example, if the grocer received a 60-day Prop. 65 notice for a particular brand of apple cider vinegar, and wants to provide a warning for all other brands of apple cider vinegar, the warning must state, "Warning – [insert brand(s)] of apple cider vinegar may contain chemicals known to the State of California to cause [cancer and/or reproductive harm]."

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◂ *Continued from page 84*

3. Could the grocer face liability for placing a Proposition 65 warning on the other brands?

If there is any indication that the product at issue is not Prop. 65 compliant (i.e. other grocers have received 60-day Prop. 65 notices for other brand(s) of the same product), it is prudent for the grocer to provide a Prop. 65 warning for that product until it can determine through communications with the manufacturer the compliance status of the product.

The biggest risk a grocer could face from providing a warning for other brands of a product covered by a 60-day Prop. 65 notice is up-stream with the distributor or manufacturer who may not want a warning placed on their product.

But, if the grocer notifies the distributor/manufacturer before providing the warning, and gives the distributor/manufacturer the opportunity to advise whether their product is Prop. 65 compliant before the warning is posted, any risk of liability to the distributor/manufacturer should be significantly reduced.

SCENARIO 2

A manufacturer enters into a court-approved consent judgment for a product that a grocer sells. The consent judgment requires the manufacturer to label its product sold after the Effective Date with a Proposition 65 warning.

The grocer still has old stock of the product that is not labeled on its shelves, and the manufacturer has not provided new labels for those products. Should the grocer provide a warning for the old stock of the product that is still on shelves in its stores?

If the consent judgment does not specifically address how a warning is to be provided for the products that will be sold to consumers after the Effective Date of the consent judgment, but were manufactured and sold to grocers prior to the effective date of the consent judgment, and the manufacturer has not provided the grocer with labels for those products, the grocer should post a warning for the product.

In addition, the grocer should contact the manufacturer and request that the manufacturer provide labeling for its product or recall the product, and issue the grocer a refund. This assumes that the consent judgment does not include a release in the public interest that covers the grocer.

Some Prop. 65 consent judgments include downstream releases covering the sellers of the product at issue. These downstream releases should bar future suits against those sellers based upon the same product and chemical. If there is a downstream release in the consent judgment, the grocer should be protected from future liability for the product and chemical at issue in the consent judgment.

We selected some common dilemmas facing grocers related to Prop. 65, but there are a myriad of issues and concerns that this burdensome statute and regulations create for grocers, and recognize that specific concerns may not have been addressed. For more information, or clarification, contact the authors through Downey Brand. ▪

Editor's Note: Leila Bruderer (Sacramento, California) and Sophia Belloli (San Francisco, California) are Counsel at Downey Brand LLP, and practice in the areas of environmental litigation, environmental compliance and Proposition 65.

GMO Labeling: Coming Soon To California and the Rest of the Country

IN LATE JULY, PRESIDENT BARACK OBAMA SIGNED INTO LAW A BILL THAT WILL REQUIRE LABELING OF GENETICALLY MODIFIED INGREDIENTS, CREATING A NATIONWIDE SOLUTION THAT WILL AVOID A STATE-BY-STATE PATCHWORK OF LAWS.

Following the rejection of Proposition 37 in California in 2012, the hot-button issue of labels for food containing genetically modified (or engineered) organisms (GMOs) took a back seat to other issues for many California food producers and retailers.

However, for GMO-labeling proponents, the focus merely shifted to other states. Maine, Connecticut and Vermont passed laws that would require GMO labeling, and – as of July 1 – the Vermont law became the first such state law to take effect.

Shortly afterwards, Congress took action and created a nationwide GMO-labeling standard that will preempt the Vermont law and all other state regulation in this area – and that will directly apply to food sold in California.

Background

Vermont may be one of the smallest of the 50 states, but the impact of its GMO-labeling law has been felt across the nation. For food producers and retailers with customers in Vermont, this state law created a de facto nationwide obligation, because labeling all goods in compliance with the Vermont law would be less onerous than ensuring non-compliant products don't end up in Vermont.

This might not be so bad in the short run, but what happens when similar – but not identical – laws take effect in other states? Food producers and retailers faced the prospect of several states imposing different labeling requirements for the same product.

Such a byzantine web of regulation – with massive compliance costs – is clearly bad for the food industry, and could only be avoided by Congress passing a law that creates a nationwide GMO-labeling standard that preempts state requirements. Until recently, efforts at the federal level had not been fruitful. However, the fact that the Vermont law was coming into effect catalyzed Capitol Hill.

The Vermont GMO Law

On July 1, 2016, Vermont's GMO-labeling law went into effect. It required specific labeling for products that are entirely or partially genetically engineered and offered for retail sale in Vermont. This obligation attached to both manufacturers and retailers, depending on how the products are packaged.

The law required the use of specific phrases (e.g., "may be produced with genetic engineering"), and precluded use of the word "natural," and other derivations, to describe GMO-containing foods. Violations of the Vermont law would have resulted in potential penalties of up to $1,000 per day, per product.

The Federal GMO Law

Previously, Congress had attempted several times to preempt state GMO-labeling laws with federal legislation, but each attempt had stalled. However, with the Vermont law about to take effect, an agreement was reached in the Senate to move forward with S. 764, a bill implementing a national standard.

The Senate passed the bill on July 7 by a vote of 63-30, and the House of Representatives passed it one week later by a vote of 306-117.

On July 29, 2016, the president signed S. 764 into law. Effective immediately, the new law preempts Vermont law and all other state GMO-labeling laws, and the Secretary of Agriculture will have two years to establish a mandatory national disclosure standard for "bioengineered" foods.

Under that standard, manufacturers will need to provide a GMO label consisting of their choice of text, symbols, or electronic or digital links. However, the secretary will be obligated to study the efficacy of using electronic or digital links on labels. If the study determines that the digital and electronic links do not

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sufficiently inform consumers, the secretary must then provide additional labeling options.

The law specifically exempts foods from non-GMO animals that consume GMO feed from being considered "bioengineered" solely for that reason, but otherwise leaves to the secretary the discretion to determine how much of a bioengineered substance must be present in food for the disclosure requirement to be triggered. The law also exempts "very small food manufacturers" and all restaurants and other retail food establishments from the disclosure requirement.

Other provisions of the law require the secretary to:

- establish a procedure for requesting a determination regarding other factors and conditions under which a food is considered a bioengineered food;
- provide alternative reasonable disclosure options for small packages of food; and
- provide additional disclosure options for "small food manufacturers," including use of a telephone number or a company website, and provide such manufacturers with a delay of at least one year in implementing the disclosure standard, once it is finalized.

Finally, the law explicitly precludes the secretary from recalling food based on a violation of the disclosure requirement, and it does not require that the secretary impose monetary penalties for a violation.

Conclusion

Vermont may have led the way on GMO labeling, but its own law was short-lived: the new national labeling standard entirely supplants the Vermont law and all other state laws addressing GMO labeling.

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California Supreme Court Clarifies Day of Rest Rules

May 10, 2017

This week the California Supreme Court clarified several issues related to California's "day of rest" statutes in *Mendoza v. Nordstrom, Inc.* These provisions entitle employees to one day of rest each workweek, subject to certain exceptions. *Mendoza* involved the claims of two former Nordstrom employees who occasionally worked more than six consecutive days after being asked by supervisors or coworkers to "fill in" by working the shifts of absent coworkers.

The Court determined that the day of rest required by Labor Code sections 551 and 552 is guaranteed for each workweek and does not apply on a rolling basis to any seven-consecutive day period. This means that periods of more than six consecutive days of work that stretch across more than one workweek are not prohibited. This could occur when there is an early day of rest in one week and a late day of rest in the next.

Several exemptions to the day of rest rules allow employees to work on a seventh day. The Court ruled that the exemption provided by Labor Code section 556 — for employees working shifts of six hours or less — only applies if the employee works six hours or less on every daily shift worked in a workweek. This interpretation allows work on the seventh day only when both the weekly limit, requiring work of 30 hours or less, and the daily limit, requiring work of six hours or less, are satisfied.

Finally, the Court determined that so long as the employee is fully apprised of his or her entitlement to rest, an employer does not "cause" an employee to go without a day of rest if the employee independently chooses to work on the seventh day. The employer's obligation is to notify employees of the right to a day of rest and then maintain absolute neutrality as to the exercise of that right. It is unclear what "absolute neutrality" entails in light of the fact that most employers are responsible for work schedules. This standard will gain more clarity as the case develops, but the Court did note that the payment of overtime for seventh-day work is not considered an impermissible inducement to go without a day of rest.

Because the weekly standard impacts the payment of overtime and double-time for seventh day work, employers should make sure that they specifically define their workweek in policy materials and handbooks. Violating the day of rest rules may result in a Labor Commissioner citation or the imposition of civil penalties. Agricultural employers in particular should take note of this decision because AB 1066 recently removed the exemption from the day of

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rest rules long enjoyed by the agricultural industry. Though the effective date for the elimination of the agricultural exemption is ambiguous until Wage Order 14 is revised, the safest course of action for agricultural employers is to comply immediately with day of rest requirements.

OEHHA Adopts Unclear Amendments to the "Clear and Reasonable Warning" Regulations – Exacerbating Proposition 65 Problems

September 9, 2016

On September 2, 2016, the Office of Environmental Health Hazard Assessment ("OEHHA") adopted amendments to Proposition 65's clear and reasonable warning requirement. The adoption of these amendments comes nearly two years after OEHHA began the process of amending the clear and reasonable warning regulations in an attempt to reduce over-warning, consumer confusion, and reduce the number of frivolous lawsuits. Unfortunately, the amended regulations will not accomplish reform in any of these areas; instead, they will very likely exacerbate the problems of over-warning, misunderstandings by consumers, and rampant lawsuit abuse.

The amended regulations change what constitutes a clear and reasonable warning under Proposition 65. Among other changes, the amended regulations require a Proposition 65 warning to include:

- A symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline;
- The identification of at least one substance for which the warning is being provided for each endpoint, if there is more than one endpoint;
- The URL for OEHHA's new Proposition 65 website, which contains supplemental information on listed substances; and
- The warning in another language if any consumer information on the product sign, label, or shelf tag is provided in another language.

These changes do little to remedy one of the fundamental problems with Proposition 65 warnings – the labels fail to actually communicate risk to consumers, which was the original purpose behind Proposition 65. More importantly, these changes will worsen another fundamental problem with Proposition 65 -- the number of frivolous lawsuits filed against businesses selling products in California. For example, Section 25601(c)'s requirement that a business include the name of one or more listed chemicals for each endpoint (cancer or reproductive toxicity) where a warning is being provided for more than one endpoint is ambiguous. This provision creates the potential for "bad warning" lawsuits where a company

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provides a warning that lists a chemical for one endpoint (cancer), but chooses not to list another chemical, present in the product in small quantities, associated with the other endpoint (reproductive toxicity). In this context, the company may be sued for failing to identify the second chemical associated with reproductive toxicity, and be faced with settling or defending itself in prolonged, expensive litigation.

The amended regulations have a delayed effective date, taking effect on August 30, 2018. In the interim, businesses can choose to provide warnings compliant with the amended regulations or with the regulations prior to amendment. Practically, businesses from all industries will need to get up to speed quickly on the amended regulations, and how they impact the content and manner of Prop 65 warnings. For assistance in understanding how the amended regulations may impact your business, please contact us.

ICE Traffic Stops - Now What?

February 25, 2016

In the last several months there has been an increase in the number of reports throughout California that officers of the U.S. Immigration and Customs Enforcement ("ICE") have been stopping vehicles containing agricultural workers. After these initial stops, workers are being questioned and made to show documentation of their legal status. Significantly, many workers have reported that these stops appear to be based exclusively on their ethnicity. In light of these reports, this publication provides a brief overview of the legal standards that govern ICE Officers and the respective legal rights of a vehicle's occupants.

Standards Governing ICE Officers and the Rights of Non-Citizens

In order to stop a vehicle, ICE officers must reasonably suspect that the vehicle contains undocumented immigrants. Importantly, the officer's suspicions must be based upon specific, objective facts besides the occupants' physical appearance.

Once a vehicle is stopped, officers may briefly question its occupants about their immigration status if the officers reasonably suspect they are not legally in the United States. Officers, however, can only conduct a search of the vehicle when there is probable cause. In other words, in order to legally conduct a search, there must be a fair probability that it will uncover contraband or evidence relating to a crime.

Significantly, non-citizens generally have the same rights as U.S. citizens when they are stopped and questioned by law enforcement. Therefore, when ICE officers question someone who is a non-citizen, this person has the right to remain silent. Specifically, he does not have to answer questions regarding his immigration status, including whether or not he is a U.S. citizen. In addition, he does not have to consent to a search of his vehicle.

Following is a more detailed analysis of these standards.

ICE Officers Must Have Reasonable Suspicion to Stop a Vehicle

When ICE officers reasonably suspect that a vehicle contains undocumented immigrants, they can briefly stop the vehicle to investigate the circumstances that raised their suspicion.[1] Importantly, officers cannot rely on only a "hunch" when stopping a vehicle,[2] but instead, they must have an objective basis for suspecting that the vehicle contains undocumented immigrants.[3]

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The "totality of the circumstances" determines whether an officer has reasonable suspicion to stop a vehicle.[4] This "totality of circumstances" standard allows officers to rely on their experience and judgment when deciding whether to stop a vehicle. However, officers must still base their decisions on specific, identifiable facts.[5]

Several different factors help determine whether officers have a reasonable suspicion to stop a vehicle. Usually one suspicious factor by itself will not justify stopping a vehicle. However, when there are several suspicious factors present at once, this will bolster an officer's claim of reasonable suspicion.

On its own, a group's appearance as a work crew is not enough to create reasonable suspicion.[6] Similarly, an individual driving a pick-up truck in an agricultural area is not enough to create reasonable suspicion.[7] While the racial or ethnic appearance of a vehicle's occupants cannot alone establish reasonable suspicion, their appearance is a relevant factor that officers may generally consider.[8] However, when the vehicle is in an area where a substantial part of the population is Hispanic, its occupants' appearance is no longer considered relevant.[9]

Similarly, an inability to understand English cannot by itself justify stopping someone.[10] However, if members of a group only speak to each other in Spanish and cannot understand English, this can support an officer's reasonable suspicion that a person might be an undocumented immigrant.[11] In addition, someone's nervous appearance and avoidance of eye contact when speaking to an officer can support a claim of reasonable suspicion.[12] On the other hand, when a vehicle's passengers do not turn to look at a passing officer's vehicle, this behavior alone will not create reasonable suspicion.[13]

Overall, the "totality of circumstances" standard creates difficulty in predicting when officers may or may not stop a vehicle based upon reasonable suspicion. However, it is well-established that someone's appearance alone cannot justify stopping his vehicle.[14] In addition, remaining calm when seeing or speaking to an officer can help minimize any claims of reasonable suspicion.

Once a Stop Occurs, ICE Officers May Question the Vehicle's Occupants When There Is Reasonable Suspicion About Their Immigration Status; However, Officers Can Only Search the Vehicle When There Is Probable Cause.

ICE officers may question individuals about their right to be or remain in the United States if there is reasonable suspicion regarding their immigration status.[15] However, in order to search the vehicle without consent, officers must have probable cause.[16] Like reasonable suspicion, probable cause is determined by the "totality of the circumstances."[17] But, the standard for establishing probable cause is higher than the standard for establishing reasonable suspicion. This means there must be a fair probability that an officer's search will uncover contraband or evidence relating to a crime.[18] Importantly, if an officer's stop and search of a vehicle are initially invalid, subsequent discovery of undocumented immigrants will not excuse the officer's unlawful conduct.[19]

A Lengthy Detention of the Vehicle's Occupants Must Be Based on Consent or Probable Cause, and the Vehicle's Occupants Do Not Have to Answer Questions Concerning Their Immigration Status.

If the officers possess reasonable suspicion, they may only briefly stop a vehicle and question its occupants about their immigration status.[20] Any further detention or search of the vehicle and its occupants must be based upon consent or probable cause.[21] Importantly, non-citizens in the United States generally have the same rights as citizens when they are stopped by law enforcement officers.[22]

Therefore, non-citizens have the same right to remain silent that U.S. citizens have, unless they are at ports of entry, such as airports and borders. Accordingly, non-citizens do not have to answer questions regarding where they were born, where they live, where they are from, and whether they are a U.S. citizen. They also do not have to answer any other questions about their immigration status. Furthermore, even when someone has chosen to

answer some questions, he may later change his mind and decide that he does not want to answer any more questions.[23]

Generally, when a driver's vehicle is stopped by law enforcement, he must show his driver's license and registration upon the officer's request. However, no one in the vehicle is required to answer questions concerning his immigration status. Similarly, unless there is probable cause, the vehicle cannot be searched without consent. Therefore, if someone does not want his vehicle searched, he should clearly state that he does not consent to the officer's search.[24]

Finally, if someone does not possess valid immigration documents, it is almost always beneficial to speak with a lawyer before answering questions about his immigration status. In addition, one should never falsely claim U.S. citizenship or show an officer false immigration documents because this will increase the likelihood of being arrested.[25]

Conclusion

Although ICE officers may rely upon their judgment and experience when deciding whether to stop a vehicle, they do not have unlimited discretion. Instead, they must have reasonable suspicion—based upon specific facts—that indicates a vehicle may contain undocumented immigrants. Importantly, ICE officers cannot justify stopping the vehicle based upon the occupants' appearance alone.

Once a vehicle is stopped, ICE officers may briefly question its occupants about their immigration status if there is reasonable suspicion to suspect they are undocumented. However, officers can only conduct a search of the vehicle when there is probable cause. Lastly, if ICE officers decide to question someone who is a non-citizen, this person possesses the right to remain silent and does not have to answer questions regarding his immigration status.

This is a complex area of the law. Agricultural employers and their workers should consider consulting with a knowledgeable immigration attorney for a more comprehensive discussion of these standards.

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[1]See *United States v. Manzo-Jurado*, 457 F.3d 928, 934 (9th Cir. 2006).
[2]Id.
[3]Id.; *United States v. Avalos-Ochoa*, 557 F.2d 1299, 1301 (9th Cir. 1977).
[4]*Manzo-Jurado*, 457 F.3d at 934.
[5]*Avalos-Ochoa*, 557 F.2d at 1301.
[6]*Manzo-Jurado*, 457 F.3d at 937.
[7]*United States v. Sigmond-Ballesteros*, 285 F.3d 1117, 1125 (9th Cir. 2001).
[8]*United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975).
[9]*United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000).
[10]*Manzo-Jurado*, 457 F.3d at 936-37 (citing United States v. Contreras-Diaz, 575 F.2d 740, 745 (9th Cir. 1978)).
[11]*Manzo-Jurado*, 457 F.3d at 936-37.
[12]See *United States v. Leal*, 5 Fed. Appx. 608, 609-10 (9th Cir. 2001).
[13]*United States v. Bugarin-Casas*, 484 F.2d 853, 855 (9th Cir. 1973) (citing United States v. Mallides, 473 F.2d 859, 860-61 (9th Cir. 1973)).
[14]*Brignoni-Ponce*, 422 U.S. at 886-87.
[15]See *People v. Sanchez*, 195 Cal. App. 3d 42, 46-47 (1987); see also *Orhorhaghe v. I.N.S.*, 38 F.3d 488, 496 n.13 (9th Cir. 1994); *Cordon De Ruano v. Immigration & Naturalization Serv.*, 554 F.2d 944, 946 (9th Cir. 1977).
[16]*Bugarin-Casas*, 484 F.2d at 854.
[17]See *United States v. Fries*, 781 F.3d 1137, 1150 (9th Cir. 2015).
[18]Id.; *Cameron v. Craig*, 713 F.3d 1012, 1018 (9th Cir. 2013).
[19]*Chavez v. United States*, 683 F.3d 1102, 1111-12 (9th Cir. 2012).

[20]*Brignoni-Ponce*, 422 U.S. at 881-82.
[21]Id.
[22]American Civil Liberties Union, *Know Your Rights When Encountering Law Enforcement* (last accessed January 28, 2016), https://www.aclu.org/files/kyr/kyr_english.pdf.
[23]Id.
[24]Id.
[25]Id.

Natural Uranium Contamination in Central Valley Aquifer Linked to Nitrates

September 18, 2015

The presence of Nitrates in Central Valley groundwater is well known as documented by (Harter). And the fact that uranium is also present has been the subject of studies, including a recent report by USGS on July 16, 2015. But quite recently in a study reported on August 16, 2015 University of Nebraska scientists studying data on the Ogallala and California Central Valley aquifers linked the presence of nitrates and uranium stating that "these results indicate that nitrate, a primary contaminant, should be considered a factor leading to secondary groundwater uranium contamination," **and that's new**.

Dr. Thomas Harter documented the extent of nitrate contamination in his report entitled "Addressing Nitrate In California Drinking Water." While nitrates are naturally occurring in groundwater, the use of nitrogen based fertilizers and the operation of dairies are pointed to in this study as major contributors to high levels of nitrates well above drinking water levels (MCL – 30 ug/L), particularly in the Central Valley. Complicating matters is that the nitrate sources continue to move through the soil column into the groundwater and will do so for many years.

Source remediation such as pump and treat technologies are out of the question financially. However nitrates can be treated by removal and/or dilution at the well head/water treatment plant. But for smaller water companies, and for consumers relying on well water, these removal/treatment options may prove financially burdensome, impractical, or not available. In some rural and smaller communities there have been reports of potential health issues for those drinking water with levels of nitrates exceeding drinking water standards.

The presence of uranium in the natural environment is also well known, and has been reported in groundwater to exceed federal and state drinking water standards in certain areas of the San Joaquin Valley. In a 2010 USGS Study entitled "Effects of Groundwater Development on Uranium: Central Valley, California USA" uranium and arsenic were found at high concentrations in groundwater in several parts of the Eastern San Joaquin Valley. The authors stated that these levels were due to the presence of bicarbonate which oxidized and made soluble uranium otherwise held in the soil and sediment.

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The USGS study certainly raised concern about uranium, but what the University of Nebraska added to the equation was to find high concentrations of uranium in the groundwater where there are also high concentrations of nitrates, which are considerably more present than bicarbonate in many areas of the Central Valley. High concentrations of nitrates, as the authors indicate, are generally associated with the application of fertilizers, animal manure, and septic systems, and can be found not only in agricultural areas but also areas of past agricultural use that have since urbanized.

The Nebraska study found that approximately 78% of the areas studied where uranium levels were above the MCL were correlated to the presence of nitrates. The authors state that the results of their study indicate that nitrates should be considered a factor leading to secondary groundwater contamination. And this is because nitrates act as an oxidant that increases uranium solubility. In other words, the presence of nitrates renders otherwise insoluble uranium in the soil soluble, and that as a consequence as nitrate levels in groundwater increase so will the level of soluble uranium contamination.

The study includes excellent maps of the Central Valley showing the extent of the presence of uranium in the groundwater.

As Harter's study indicates there are not only significant nitrate levels in ground water in the Central Valley, but there is a good deal more in the soil column that over time will migrate into the groundwater. And that would suggest that uranium contamination in the groundwater may increase over time.

There are, of course, limitations to this study. It's a mega study based on data gathered from many sources, and its conclusions are based on finding correlations. We can expect more studies going forward. But what this study suggests is that in addition to nitrates in the groundwater we are likely to see more of a focus on uranium contamination of groundwater supplies in the Central Valley.

The major issue that this may present to water supply companies and those who rely on well water is that the cost of dealing with the treating water with uranium over the MCL is likely to be considerably more expensive and difficult in comparison to simply dealing with nitrates.

Products with Antimicrobial Claims May Need to Be Registered as Pesticides

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In recent months, the California Department of Pesticide Regulation ("DPR") and the United States Environmental Protection Agency ("EPA") have increasingly penalized retailers and manufacturers for selling products claiming to have antimicrobial properties. These administrative actions typically allege violations of federal and state pesticide registration laws and regulations because the products are not registered as pesticides. In many cases, the offending products are everyday household items such as shower curtains, pillow covers, cleaning gloves, and mops that have been treated with chemicals to protect the product by combating the growth of bacteria, mold, fungus, and other microorganisms. If such products are not appropriately labeled and registered with DPR and the EPA, then retailers, distributors, and manufacturers alike face substantial fines and penalties for their sale into or within California, including fines of up to $10,000 per violation under state law.

Although the average American would be unlikely to equate an antimicrobial shower curtain with a "pesticide," both California and federal law broadly define "pesticide" to encompass any substance or mixture of substances intended for "preventing, destroying, repelling, or mitigating any pest," including any fungus, bacterium, virus, or other microorganism. Importantly, it is unlawful for any person to sell or deliver into or within California a pesticide that is not appropriately registered with DPR and the EPA, with certain limited exceptions. Liability is not limited to the manufacturer of the offending product, but also extends to retailers and distributors.

In an effort to avoid rigorous and expensive registration requirements, many manufacturers, distributors and retailers rely on the so-called "treated articles" exemption. This exemption, set forth in 40 CFR section 152.25(a), pertains to any article or substance "treated with, or containing, a pesticide to protect the article or substance itself…, if the pesticide is registered for such use." In other words, the regulation provides an exemption from the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") for articles or substances treated with, or containing a pesticide, if: (1) the incorporated pesticide is registered for use in or on the article or substance, and; (2) the sole purpose of the treatment is to protect the article or substance itself.

Despite the broad language of the "treated articles" exemption, both the EPA and DPR have adopted a narrow view of the exemption,

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relying on a guidance document from the EPA entitled “Pesticide Registration Notice 2000-1.” The agencies have taken the position that to qualify for the “treated articles” exemption, the product name, label, and marketing materials (including statements on any brochures and websites) must not make any implicit or explicit “public health” claims. Generally speaking, product claims that either directly or impliedly suggest that the antimicrobial properties of the product will protect *people*, as opposed to the product itself, are “public health” claims. The EPA and DPR require that all references to a product’s pesticidal properties be accompanied by qualifying statements that clearly and affirmatively identify their *non-public health* use—for example: to prevent the growth of mildew on the treated article; to preserve the treated article from spoilage or fouling; or to inhibit offensive odors in the treated article. These qualifying statements must be in the same location and in the same font size, style, and color as the pesticidal claim, or the product could be categorized by the EPA/DPR as falling outside the “treated articles” exemption.

Because the claims made on the packaging and marketing materials of a product with antimicrobial properties play a key role in determining whether that particular product fits within the “treated articles” exemption, retailers should periodically audit their product lists and associated marketing materials to ensure that any antimicrobial claims conform to applicable legal guidelines. Retailers should further take steps to ensure that products received from manufacturers are in compliance with federal and state pesticide laws and regulations *before* they are selected for sale and/or distribution. Finally, retailers should include in their agreements with manufacturers specific representations and warranties to the effect that the products are properly registered and labeled for sale in California.

Being aware of these laws, and taking steps to ensure all products offered in stores comply, will help retailers avoid the unpleasant experience of a DPR enforcement action.