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Paper Or Plastic? Retailers May Be Losing Choice

Law360, New York (May 04, 2009) -- Concerns over plastic bag debris and its inability to break down in landfills have led a number of states and local communities to adopt legislation prohibiting or limiting the use of plastic bags at certain types of retail establishments.

Unfortunately, for national retailers, the legislation is not one-size-fits-all, and as a result, compliance can be confusing and difficult ... anything but in the bag.

For instance, a retailer may be required to implement a plastic bag recycling program at its stores in New York, but may be prohibited from using plastic bags at all at its stores in Malibu.

In other jurisdictions, if a plastic bag is thick enough to be reused, it may be excluded from the regulations. Meanwhile, legislation pending in Connecticut, Maryland, Massachusetts and Texas would place a tax on plastic bags used by consumers who carry out their goods from retail stores.

These proposed taxes range from 2 to 15 cents per bag. In 2002, Ireland adopted a tax on plastic bags that is equivalent to 33 cents per bag. Other countries, including Bangladesh, China and South Africa, have banned the use of plastic bags altogether.

Size Matters, So Does Type of Retail

Legislation also differentiates between the types of establishments subject to plastic bag requirements. Chicago and the state of New York have both passed legislation requiring certain retail establishments to implement plastic bag recycling programs.

In Chicago, only grocery and pharmacy stores are subject to these requirements. In New York, all retail establishments over a certain size must comply.

In 2006, the state of California adopted legislation to create a pilot program that requires large supermarkets and retail establishments with pharmacies to adopt in-store plastic bag recycling

programs.

Under the program, affected retailers are required to label plastic bags with a message to return the plastic bags to the store for recycling and provide reusable alternatives to the plastic bags.

In December 2007, San Francisco became the first city to adopt a ban on the use of plastic bags (applicable only to large supermarkets and chain pharmacy stores).

Different Rules for Different Locations

The result of this assortment of legislation is that national retailers subject to these requirements may be forced to implement different programs at different locations, or alternatively, attempt to institute a program at all locations to comply with the most stringent requirements.

Even that approach may create problems, however, as it may be difficult to stay current. As more communities consider similar legislation, there is no guarantee that new requirements will not be more stringent.

For example, Washington, D.C., recently introduced legislation that would ban the use of disposable, nonrecyclable plastic carryout bag and establish a fee of 5 cents per bag for the use of recyclable paper or plastic bags.

No fee would be charged for the use of a "reusable" bag. The proposed legislation includes an additional requirement that recyclable paper bags contain no old growth fiber.

Regulating the Message

If recycling is required, some communities require special labeling. This, too, can vary according to the community, creating more layers of rules for national retailers.

Some areas require stores to include a message on recyclable plastic bags encouraging the consumer to recycle the bag. In some cases, the legislation specifically states what message must be stamped on the bag. That message, like the rule that requires it, also can vary from state to state and city to city.

Staying Ahead of the curve

The "paper or plastic" decision is currently a moving target. As more of this legislation is adopted, more national retailers will find it difficult to comply with the varying requirements. Retailers should take a two-pronged approach to understanding and complying with regulations.

First, it's imperative that they keep up with legislative proposals on the local, state and even national level so they have a full picture of what is happening and what might happen in the future.

Second, they should get involved early in the legislative process to ensure consistency among the requirements. Because regardless of where retailers fall on the "paper or plastic" debate, one thing is certain when it comes to legislative compliance: They don't want to be the ones left holding the bag.

--By Kristin L. Watt (pictured) and Summer J. Koladin Plantz, Vorys Sater Seymour and Pease LLP

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