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‘Made in USA’ Claims California Removes its Elevated Standard

In January 2015, we reported that California’s law on advertising “Made in USA” claims, Cal. Bus. & Prof. Code § 17533.7, had been interpreted as imposing a stricter standard than guidelines adopted by the Federal Trade Commission (FTC) on the same issue. Specifically, the California law had been interpreted to require that 100 percent of all labor and material in a product be domestic before the product could be advertised as “Made in USA.”

On Sept. 1, 2015, California amended its statute. The new statute allows a manufacturer to advertise a product as "Made in the USA" as long as (1) the foreign components of the product do not "constitute more than 5% of the final wholesale value" of the product, or (2) the manufacturer can show that it cannot obtain the foreign components of the product in the U.S. and those components "constitute not more than 10% of the final wholesale value" of the product. The amended statute takes effect Jan. 1, 2016.

The amended statute is now more in line with the FTC guidelines, which allow a product to be advertised as “Made in the USA” where “all or virtually all” the labor and materials in the product are domestic. In other words, both the state and federal standards allow a bit of flexibility for small amounts of foreign content to be present in a product manufactured and marketed as “Made in the USA.”

A key difference, however, is that the FTC guidelines do not quantify the permissible amount of foreign content. Many commentators have interpreted the FTC guidelines to allow only a truly *de minimis* amount of foreign content, which, ironically, now may be ***less*** than California’s 5 percent and 10 percent levels. Plus, it is not clear how to determine what the California statute means by 5 percent or 10 percent of "wholesale value," though the most straightforward approach would be to compare the manufacturer’s ***cost*** for the foreign component(s) to the price the manufacturer charges to sell the completed product.

It will be interesting to see if the FTC comes to accept California’s 5 percent and 10 percent standards for permissible foreign content. If so, the law will become unified nationwide at the California levels.

If not – and if one assumes that the permissible amount of foreign content under the FTC's guidelines is lower than California's 5 percent and 10 percent levels – then the law will still be unified nationwide, albeit at the FTC's case-by-case "all or substantially all" level rather than the California levels.

As a practical matter, many domestic manufacturers of products with mixed foreign and domestic content are likely to continue the current practice of softening or "qualifying" their "Made in USA" claims by disclosing, for example, that the product is made in the U.S. with foreign and domestic materials. Doing so is generally regarded as acceptable under both federal and state laws and avoids the need to worry about quantifying the exact amount of foreign content.

In sum, the recent California amendment removes the prior problem of possibly needing 100 percent domestic content to make a standalone "Made in the USA" claim in California. But it may not change the FTC's approach and therefore isn't likely to have much impact, if any, for national advertisers. In the limited case of a company distributing a product solely inside California, the California standard would govern. In all cases, manufacturers must continue to be careful about how they advertise products as being "Made in USA."

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