

New Proposition 65 Regulations

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Most corporations selling products in California are now familiar with the California Proposition 65 warning signs and labels that are present on products ranging from tools to vitamin supplements and in locations ranging from restaurants and hotels to parking lots and gas stations. Prop 65 is a California initiative that was approved by voters in 1986 and enacted into law as the Safe Drinking Water and Toxic Enforcement Act of 1986. (Health and Safety Code Section 25249.5-25249.13).

Prop. 65 requires the State to publish a list of chemicals known to the state to cause cancer or reproductive toxicity. *Cal. Health & Safety Code §25249.8*. Chemicals are included on the Prop. 65 list if the State, based on various sources, determines that they may cause cancer or reproductive toxicity above certain threshold levels. Some thresholds have been set by the State and others informally through the settlement of claims in court approved settlements. The Proposition contains a head hunter provision that allows citizens and their attorneys to bring claims on behalf of the public. Most of the activity under Prop 65 is with respect to such claims against manufacturers, many of them unsuspecting out of state companies. These actions are initiated with a pre-litigation “Sixty Day Notice.”

There are currently more than 800 chemicals on the Prop. 65 list. The list contains chemicals, additives or ingredients present in many common products including certain toys, jewelry, furniture, appliances, tools, and food supplements. Many current cases are brought against the manufacturer of food products.

There are essentially three components to the statute, one is a labelling of consumer products, the second is the posting of notices in areas that the chemicals may be present, and the third involves discharges into water, which is not discussed in this article.

The main provision of the statute provides that

“No person in the course of doing business shall knowingly or intentionally expose an individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving a clear and reasonable warning to such individual, except as provided in Section 25249.10.”

Cal. Health & Safety Code §25249.6.

A consumer products exposure is in turn defined as “an exposure which results from a person’s acquisition, purchase, storage, or other foreseeable use of a consumer good, or any exposure that results from receiving a consumer service.” *Cal. Code Regs. 22 tit. §12601(b)*. The consumer exposure may result from dermal absorption, inhalation, mouthing, direct ingestion, and hand-to-mouth pathway.

The law applies to businesses with 10 or more employees. Prop. 65 actions usually involves companies that manufacture, distribute, or sell retail consumer or commercial products; companies and companies that have environmental or occupational exposures. Retailers with stores in California are affected by Prop. 65 as well as online (such as Amazon) and catalog sellers who sell to California residents.

The warning required before exposure, must be “clear and reasonable” as determined by the regulations.

The statute and regulations provided specific warning language that was considered safe harbor language and is presumed to be clear and reasonable. The warning language in the old regulations is:

For consumer products that contain an identified carcinogen.

"WARNING: This product contains a chemical known to the State of California to cause cancer."

For consumer products that contain an identified reproductive hazard:

"WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm."

For a product that contains a chemical that is both a carcinogen and a reproductive hazard:

"WARNING: This product contains a chemical known to the State of California to cause cancer and birth defects or other reproductive harm."

Over the years since these warnings were drafted there have been a number of lawsuits and criticisms concerning their utility, many relating to allegations that they were so vague as to not provide a warning that was useful to the consumer. Recently OEHHA revised the warning regulations and the new regulations go into effect in August of 2017. The consequence is that products manufactured after August of 2018 will need to comply with the new requirements absent an exception.

I. SUMMARY

- A. In summary, there is new safe harbor language, a new website for consumers, and language which attempts to clarify the liability as between manufacturers and retailers. Most significantly the new regulation asserts that for retailers to be liable actual knowledge must be imputed to them. This would not apply to companies those custom label products.
- B. Although the new regulations go into effect on August 30, 2018, new labels can however be used before that time, if the business desires. Products manufactured prior to that date do not require the new labels.
- C. The language required by earlier Consent Judgments is considered within safe harbor, even in the older format.
- D. The new labels contain language that requires the identification of at least one of the Proposition 65 chemicals in the product, and identifies the public website.
- E. The language for each of the types of warnings other than labelling (i.e. environmental vs. product) has also changed but are not addressed here.
- F. The emphasis in the regulations is for liability to the manufacturer for Proposition 65; along with additional duties placed on vendors.
- G. Labeling

- a. Safe Harbor Content and Methods
 - i. The name of at least one chemical in the warning.
 - ii. Named chemicals are those for which warning is being provided.
 - iii. Warning symbol
 - b. Provide non-English language warnings in certain situations where foreign language are used on the label.
- H. Phase In Effective date of regulation: August 30, 2018.
- I. Tailored Warnings; In Addition To The Specific Warnings Listed Above, The Code Has Modified The Warnings For The Following Categories:
- a. Environmental Exposure
 - b. Occupational Exposure
 - c. Alcoholic Beverages
 - d. Food and Non-Alcoholic Beverages
 - e. Prescription Drug Exposure and Emergency Medical or Dental Care Exposure
 - f. Dental Care
 - g. Raw Wood Products
 - h. Furniture Products
 - i. Diesel Engines
 - j. Vehicles
 - k. Recreational Vessels
 - l. Enclosed Parking Facilities
 - m. Amusement Parks
 - n. Petroleum Products
 - o. Service Station and Vehicle Repair
 - p. Designated Smoking Areas
 - q. Exposure to Bisphenol A from Canned and Bottled Foods and Beverages

II. SPECIFIC WARNING REQUIREMENTS

25603 Consumer Product Exposure Warnings – Content


Warnings must include ALL of the following elements:

- a) A symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline.

Safe Harbor Warnings: Comparison of Current and New Content

WARNING: This product contains a chemical known to the State of California to cause cancer.

Ex. 1 Current safe harbor warning

 **WARNING:** This product can expose you to chemicals including arsenic, which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.

Ex. 2 New safe harbor warning

- b) Where the sign, label or shelf tag for the product is not printed using the color yellow, the symbol may be printed in black and white.
- c) The symbol shall be placed to the left of the text of the warning, in a size no smaller than the height of the word “WARNING.”
- d) The word “WARNING” in all capital letters and bold print.
- e) CARCINOGENS: The following sentence must be used for exposures to listed carcinogens:

“This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.”

- f) REPRODUCTIVE: The following sentence must be used for exposures to listed reproductive toxicants:

“This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.”

- g) CARCINOGENS AND REPRODUCTIVE – MULTIPLE CHEMICALS:

“This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer, and [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.”

BOTH SINGLE CHEMICALS

Similarly for exposure to a chemical that is listed as both a carcinogen and reproductive toxicant, the following sentences must be used:

“This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.”

We have handled numerous Proposition 65 cases for a variety of retailers, manufactures and vendors in both the litigation and compliance context. Please feel free to contact us if you have any further questions.