

FOCUS on Proposition 65

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FOCUS ON PROPOSITION 65

Proposition 65, the California Safe Drinking Water and Toxic Enforcement Act of 1986, requires businesses to provide a “clear and reasonable” warning before exposing people to the approximately 1,000 “Listed Chemicals”¹ known to the State of California to cause cancer, birth defects or other reproductive harm. A “right to know” law as opposed to a safety law, Prop 65 does not ban the use of any chemicals, but is intended to ensure the public is informed as to its exposure to these chemicals. While Prop 65 was enacted more than 30 years ago, there has been an increase in the number of lawsuits seeking to prosecute those businesses – inside and outside of California – which don’t abide by the law. An out-of-state business whose products are sold and distributed within California (including sales via the internet or by catalog) may be liable for failing to provide adequate warnings on products that contain Listed Chemicals.

WHO IS SUBJECT TO PROP 65? IS IT ONLY BUSINESSES IN CALIFORNIA?

Prop 65 affects companies located inside and outside California. The Prop 65 warning applies to exposures from consumer products, emissions from facilities and workplace exposures in California, and applies to any “person in the course of doing business” with ten or more employees, including companies located outside California. The term “person” is defined broadly to include any individual, trust, firm, joint stock company, corporation, company, partnership, limited liability company and association. “In the course of doing business” means any act or omission by an employee that furthers the purpose or operation of the business, whether or not the act or omission is for profit.

The law requires that a business provide a warning with its product if it is reasonably foreseeable that a person in California will buy or receive the product. When a warning is given by a business, it means one of two things: (1) the business has evaluated the exposure associated with its product and concluded that intended use of the product exceeds the “no significant risk level”; or (2) the business has chosen to provide a warning based solely on its knowledge that the product or one of its components contains a

Listed Chemical, without attempting to determine whether intended use results in a significant exposure or because there is no clear guidance on how to establish that exposure is insignificant. Litigation in California has shown it to be very difficult for producers to defend their product, even if the producer believes it has scientifically valid reasons to defend its position. Many businesses have decided that the potential legal repercussions of not providing a warning outweigh the costs of providing the notice.

IF SUPPLIERS SELL AND DISTRIBUTE A PRODUCT CONTAINING A PROP 65 LISTED CHEMICAL, WHAT ARE THEY REQUIRED TO DO?

A business must provide a warning with its product if it is reasonably foreseeable a person in California will buy or receive the product. This warning may appear (1) on a product, its packaging or written materials accompanying the product, (2) at the retail outlet through shelf labeling or signs, or (3) through a system of signs, public advertising identifying the system and toll-free information services, provided that the warning is “clear and reasonable.” The State Attorney General has also advised that the warning must be provided prior to purchase for internet or mail order sales, or the supplier must offer free return shipping.

¹ <https://oehha.ca.gov/proposition-65/proposition-65-list>

WHAT ARE THE REVISED CLEAR AND REASONABLE WARNINGS?

In August 2017, the California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA) issued a revised Article 6 Clear and Reasonable Warnings.² These new regulations are effective August 30, 2018, although businesses can begin using warnings that comply with the new requirements at any time. The regulations require for the first time that a warning list the name of at least one chemical known to the State of California to cause cancer, and one chemical known to the State of California to cause birth defects or other reproductive harm if a product contains a chemical listed in those categories. Only one chemical in each category is required, and it can be the same chemical for both. The warning also requires the use of a symbol involving an exclamation point in an equilateral triangle and must include OEHHA'S website on Prop 65.



ARE THERE EXCEPTIONS TO THE PROP 65 WARNING REQUIREMENT?

A business is not required to provide a warning if it can prove the exposure to any Listed Chemical present in the product resulting from its normal, intended use does not pose a "significant risk" to the average user. Unfortunately, while the State of California has identified so-called "safe harbor" exposure levels for approximately one-third of Listed Chemicals, there is little regulatory guidance to determine whether or when the use of a product results in exposure below those levels and thus poses no significant risk to the average user. Because Prop 65 places the burden on the business to prove that intended use of a product poses no significant risk, many businesses choose to provide a warning out of an abundance of caution.

Just some of the businesses that have been sued for failure to provide a Prop 65 notice on a product include grocery stores, drug stores, garages, hardware suppliers, car dealerships, medical facilities, retail stores and amusement parks.

WHERE ARE PROP 65 WARNINGS FOUND?

There are many commonly used consumer products and items that contain Listed Chemicals and may require warnings under Prop 65. Prop 65 warnings are common throughout California in a wide range of settings, including hospitals, restaurants, bars, hotels, schools, grocery stores, amusement parks and on a wide variety of consumer products. Some of the product categories sold in California that require Prop 65 warnings include shoes, belts, fabric, coated fabrics, children's and pets' toys, decorated glassware and ceramics, synthetic and non-woven material, foam, medications, beauty products, tools and garden equipment.

ARE WORKERS/EMPLOYEES/CONSUMERS USING PRODUCTS WITH A PROP 65 WARNING AT RISK?

A Prop 65 warning does not mean the product is unsafe; however, employees and consumers should be made aware of and heed all product handling and use warnings. A Prop 65 warning does not mean the product will actually cause cancer or other reproductive harm when used in its intended manner. Prop 65 standards for warnings are often very stringent; for example, for reproductive toxicants, the level for warnings is 1,000 times lower than the lowest level at which animal studies reported no reproductive health effect.

WHO ENFORCES PROP 65?

Prop 65 gives authority to the State Attorney General and local governments (district attorneys, city attorneys and county counsel) to take enforcement action against businesses that violate the law. The statute provides for a court to impose penalties of up to \$2,500 per day against a business for each day of exposure to a product sold or distributed by that business without a required warning. Prop 65 further authorizes injunctive relief requiring warnings be provided on future sales and distribution of products containing Listed Chemicals and directing market withdrawal of products that do not have such warnings.

The Prop 65 warning requirement is widely known in California and to the California legal community. The statute includes a private enforcement mechanism that allows private citizens to bring enforcement actions against those businesses they believe have failed to meet the warning requirements. Successful private enforcers, typically law firms, are allowed to recover their attorney's fees and costs of investigation as well as 25 percent of any penalties. In the 30 years since Prop 65 was adopted, these private enforcement actions have far exceeded state enforcement initiatives and resulted in thousands of settlements involving millions of dollars paid. The vast majority of Prop 65 litigation in California today is brought by private plaintiffs represented by a handful of law firms that specialize in this type of litigation.

HOW DO I PROTECT MYSELF FROM BOUNTY HUNTERS? WHAT ARE MY NEXT STEPS?

Contact a supplier for more information regarding the chemical composition of products, product components and raw materials supplied to you. Check the Safety Data Sheet that accompanies any raw materials used in your own processes. Regardless of your location, if you don't have a Prop 65 strategy and your product can end in a sale in California, you may want to consider consulting a Prop 65-knowledgeable lawyer.

² <https://oehha.ca.gov/proposition-65/cmr/notice-amendment-article-6-clear-and-reasonable-warnings-adoption-sections>