

Top 10 Things Everyone Should Know About the Upcoming Changes to Prop 65

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Today's Discussion

- Background regarding Prop 65
- 10 Things Everyone Should Know:
 1. Some things have not changed
 2. Other things have been updated or have been formalized
 3. Consumer product warning language: Long-form
 4. Consumer product warning language: Short-form

Today's Discussion Continued...

5. Consumer product warnings: Internet
6. Consumer product warnings: Catalogues
7. Responsibility to provide consumer product warnings
8. Ability to supplement warning text
9. Specific types of warnings
10. Compliance and timelines

■ Practical Considerations

What is Prop 65?

In 1986, California voters passed Prop 65 which requires businesses to provide consumers a “clear and reasonable” warning before knowingly and intentionally exposing the consumer to certain listed chemicals.



What Warnings Currently Look Like Under Prop 65

- Warnings must be “clear and reasonable”
- Warning language varies based upon risk of cancer and/or reproductive harm
- Current generally-accepted warning:



Prop 65 Listed Chemicals

- Regulations specify listing process
 - Governor must revise and re-publish list at least once per year
 - If a chemical is proposed for addition, that chemical must go through the following process:
 - Public notice that a chemical is under consideration for listing
 - A public comment period
 - Review of comments received
 - Notice of the final decision
 - Generally once a chemical is listed, it is not effective for one year
- Currently, over 900 chemicals listed
- List as of December 29, 2017:
https://oehha.ca.gov/media/downloads/proposition-65/p65122917_0.pdf

Levels of Chemicals

- OEHHA has developed safe harbor numbers for subset of Prop 65 listed chemicals
- NSRLs
 - “No significant risk level” → Carcinogens
- MADLs
 - “Maximum allowable dose level” → Reproductive Toxicity

Office of Environmental Health Hazard Assessment
Proposition 65 No Significant Risk Levels (NSRLs) for Carcinogens and
Maximum Allowable Dose Levels (MADLs) for Chemicals Causing Reproductive Toxicity

Below is a list of NSRLs and MADLs that provide “safe harbor” for businesses subject to the requirements of Proposition 65. These NSRLs and MADLs are established in regulation in Title 27, Cal. Code of Regulations, Sections 25705, 25709 and 25805. These safe harbor levels do not preclude the use of alternative levels that can be demonstrated by their users as being scientifically valid. A hyperlink is provided for those NSRLs or MADLs for which the documentation of their derivation is electronically available.

Chemical	NSRL (µg/day) ^a	MADL (µg/day) ^b
A-alpha-C (2-Amino-9H-pyrido[2,3-b]indole)	2	
Acetaldehyde	90 (inhalation)	
Acetamide	10	
2-Acetylaminofluorene	0.2	
Acrylamide	0.2	140

Prop 65 Enforcement

- Citizen suit case initiating document: 60-Day Notice
- Process:
 - Receive 60-Day Notice
 - Send 60-Day Notice to counsel
 - Review sales figures for noticed product and other similar products for one year prior to 60-Day Notice
 - Explore settlement:
 - In court
 - Out of court

Alleged Prop 65 Violations Can Be Costly

- In-court settlement figures
 - 2016: 760 reported settlements with \$30,150,111 in total settlement payments ranging from **\$3,000** to **\$677,700**. 72% of total settlement value went to plaintiffs' attorneys' fees and costs.
- Out of court settlement figures
 - 2016: 339 reported settlements with \$10,137,274 in total settlement payments ranging from **\$3,000** to **\$500,000**. 77% of the total settlement value went to plaintiffs' attorneys' fees and costs
- Your company can be exposed to bad press regardless of how or whether you choose to settle

Prop 65's 2016 Revisions

- On August 30, 2016, the Office of Administrative Law approved the adoption of amendments to Article 6, Clear and Reasonable Warnings, of the California Code of Regulations.
 - The new regulations are intended to improve the quality of the warnings being given while providing compliance assistance to businesses subject to the warning requirements.
- New regulations will take effect August 30, 2018
 - Between now and August 30, 2018, companies may comply with the "old" Prop 65 requirements (2008 revisions) or the new requirements

1. Some Things Have Not Changed

- Changes relevant to regulated community are generally in Article 6 – Clear and Reasonable Warnings
- Three types of exposure:
 - Consumer product
 - Environmental
 - Occupational
- Two “endpoints”:
 - Cancer
 - Reproductive harm

1. Some Things Have Not Changed

- Requirement to warn
- Listed chemicals
- Listing process
- Safe harbor levels (NSRLs/MADLs)
- 60-day notice for alleged violations and initiation of action

2. Other things have been updated or have been formalized

- Updates to language of prior warnings
 - Food warnings
 - Alcoholic beverage warnings
- Many requirements have been formalized
 - Online/catalogue sales
 - Specific product exposures (furniture)
 - Specific environments (enclosed parking)
 - Providing warnings in languages other than English

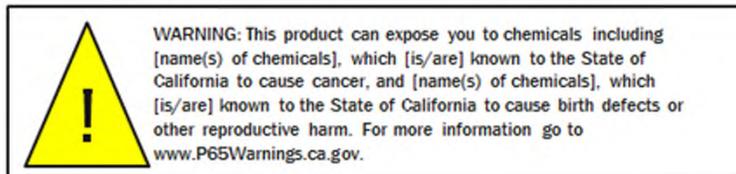
Consumer Product Warnings Generally

- Warnings must be prominently displayed on a label or sign
- The label/sign must be noticeable enough as compared to other labeling so as to be “likely to be read and understood by an ordinary individual under customary conditions of purchase or use.”
- Warning in the vicinity of product:
 - Posted sign, shelf tag, shelf sign located at each point of display of the product
- Must include link to website: www.P65Warnings.ca.gov
- Must provide warnings in languages other than English

3. Consumer Product Warning: Long-Form

- Warning symbol required
- The name of “one or more” of the listed chemicals must be included in the text of the warning
- If a product contains one chemical known to cause cancer, and a different chemical known to cause reproductive toxicity, both chemicals must be explicitly enumerated
- If a product contains a chemical known to cause cancer and reproductive toxicity, need only list one chemical to give both warnings

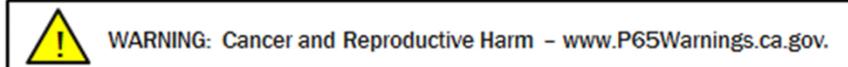
3. Consumer Product Warning: Long-form



4. Consumer Product Warning: Short-Form

- The short-form warning has several benefits including brevity and the fact that it does not require explicit reference to a chemical or chemicals
- Warning on the product label:
 - The font's warning must be as large as the largest type for other consumer information on the product, and no smaller than 6 point
- The short-form warning cannot be used on a sign, it can only be used "on-product"
- "The short-form warning can be affixed to or printed on a product or its immediate container or wrapper."
- "OEHHA's intent in adding the short-form, truncated warning to the safe harbor methods and content was to provide an alternative that could be used on small products or where space was limited. There is no express prohibition, however, on using the short-form warning on larger products."

4. Consumer Product Warning: Short-form



5. Consumer Product Warning Location: Internet

- Internet warning requirement options:
 - 1: Place compliant warning clearly associated with the product in a prominently displayed location prior to purchase; or
 - 2: Place hyperlink to warning in a prominently displayed location prior to purchase.
- A business cannot place the warning symbol next to a product on the internet or in a catalog and use it as a reference to a full consumer product warning provided elsewhere in the catalog or website.
- If you use the short-form warning on the product itself, you can use the short-form warning on the website
- Full Prop 65 compliance can be challenging for internet and catalog purchases

6. Consumer Product Warning Location: Catalog

- Warning must be provided in the catalog in a manner that clearly associates it with the item being purchased
- A business cannot place the warning symbol next to a product on the internet or in a catalog and use it as a reference to a full consumer product warning provided elsewhere in the catalog or website.
- If you use the short-form warning on the product itself, you can use the short-form warning in the catalog
- Full Prop 65 compliance can be challenging for internet and catalog purchases

7. Responsibility to Provide Consumer Product Warnings

- The new regulations emphasize that the “manufacturer, producer, packager, importer, supplier, or distributor of a product” has the burden to warn before the retailer is charged with the duty to warn
- These entities (referred to here as the “Manufacturer”) must place the warnings, *unless* (1) the Manufacturer is exempt from Prop 65 for some reason, or (2) directs the retailer to place the warnings.
- If the retailer is to place the warnings, the Manufacturer must:
 - Notify the retailer of the chemical(s) in the product and include the warning materials (labels, shelf signs etc.);
 - Confirm the retailer’s receipt of the Manufacturer’s notice. Such notice must be provided every year and/or within 60 days after a new chemical is listed (if the new chemical is present in the product)

7. Responsibility to Provide Consumer Product Warnings Continued

- Retailers have a responsibility to warn if:
 - 1. The retailer is selling the product under its own brand or license;
 - 2. The retailer knowingly introduces a chemical into the product;
 - 3. The retailer obscures the Manufacturer’s warning;
 - 4. The Manufacturer provides the warnings to the retailer
 - 5. The retailer knows the product requires a warning but the Manufacturer is not subject to Prop 65.

8. Ability to Supplement Warning Text

- “The warning content may contain information that is supplemental to the content required by this subarticle *only to the extent that* it identifies the source of the exposure or provides information on how to avoid or reduce exposure to the identified chemical or chemicals. Such supplemental information is not a substitute for the warning content required by this subarticle.” 27 C.C.R. 25601(e)

9. Specific Types of Warnings

- Product-specific regulations apply to:
 - Canned and bottled food and beverages that contain bisphenol A (BPA);
 - Food (including dietary supplements);
 - Alcohol;
 - Prescription drugs;
 - Urgent medical or dental care;
 - Dental care;
 - Raw wood products (wood dust);
 - Furniture;
 - Diesel engine exhaust (except passenger vehicle engines);
 - Passenger or off-road vehicles;
 - Recreational vessels; and
 - Petroleum products.
- Location-specific regulations apply to:
 - Enclosed parking facilities;
 - Amusement parks;
 - Service station and vehicle repair facilities; and
 - Designated smoking areas.
- If you sell any of these products or control any of the listed locations, we would be happy to discuss the applicable regulations with your company.

10. Compliance and Timeline

- The revisions allow products *manufactured* prior to August 30, 2018 to use the “old” Prop 65 safe harbor
 - It remains to be seen how plaintiffs will react beginning on August 31, 2018
- Court-ordered settlement vs. out-of-court settlement
 - Warnings given pursuant to the requirements of a *court-ordered settlement* will be sufficient, but warnings given pursuant to the requirements of an *out-of-court settlement* will not be

Practical Considerations

- Understand your company’s role in the production/distribution/retail scheme
- Evaluate available information, and costs of obtaining additional information
- Consider tools to manage potential liability

Questions?

- Questions? Please feel free to type them in the Q&A widget on your screen.
- CLE questions? Please contact Kayla Huven at khuven@foley.com.

Contact Us

Foley & Lardner would be happy to help your company strategize regarding compliance with the revised Prop 65 standards.



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Thank You.

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