

Proposition 65 Amendments Require Re-evaluation of Products and Warnings

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alifornia's Safe Drinking Water and Toxic Enforcement Act of 1986, more commonly known as Proposition 65, requires consumer warnings for products that contain one or more of numerous "listed" chemicals that are known by the State to cause cancer or reproductive harm. As many companies have discovered the hard way, the law is not limited to businesses physically located in California. Rather, it applies to all products that knowingly and intentionally result in exposures to persons in California. If your product could make its way to California, Proposition 65 may affect you.

The law may be enforced by the California Attorneys General, district attorneys, or city attorneys in larger cities. Importantly, a citizen suit provision in Proposition 65 allows for private enforcement by individuals. Penalties for violating Proposition 65 by failing to provide a required product warning for example, can be as high as \$2,500 per violation, per day. In private party actions, the person bringing the action may retain 25% of any settlement and is entitled to attorney's fees and costs. In an enforcement action, the plaintiff must merely show that a listed chemical is present in the product and the burden



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then shifts to the defendant to demonstrate compliance. Private party enforcement of Proposition 65 compliance remains an active and viable threat. For example, in 2016 private parties collected over \$21,000,000 in attorney's fees and costs alone related to Proposition 65 suits.

Proposition 65 was substantially amended in August 2016. Among other things, the amendments repealed and revised all of Article 6 which mandates the "Clear and Reasonable Warnings" requirements. Although the amendments do not take effect until August 30, 2018, given the lead time required for companies to change product packaging and labeling, many are re-visiting their compliance with Proposition 65 requirements well in advance of the effective date.

The Article 6 amendments alter the methods of transmission and form and content of warnings for compliance with Proposition 65. The following contains a brief overview of the current warning requirements in effect since 2008 for certain labels which, as noted above, will change on August 30, 2018.

The current warning requirements for product labels require the following so-called "Safe Harbor" language for consumer product warnings. Safe Harbor levels are those developed by the regulators for many of the listed chemicals that trigger the actual warning requirement.

Current Warning Requirements for Product Labels:

- A. **Carcinogens** – "WARNING: This product contains a chemical known to the State of California to cause cancer."
- B. **Reproductive Toxicants** – "WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm."

The word WARNING must all be in capital letters. The warning language can appear on the "label" or "labeling" or an identification of the product at the retail outlet which provides a warning through shelf labeling, signs, menus or any combination of those methods. There is no express font size requirement, but the warning language must be "prominently placed upon a product's label or other labeling. . .with such conspicuousness, as compared with other words, statements, designs, or devices in the

label, labeling. . .as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.”

The amended regulations contain several new requirements for the Safe Harbor warnings for consumer products, in addition to warnings for other exposures. For consumer products, where a label on the product packaging is used as the method of compliance there are two options: a label or an “on-product” warning. A warning provided by a label must now include three new elements: (1) a yellow and black warning triangle; (2) the name of at least one chemical for each endpoint (cancer or reproductive harm); and, (3) a link to the state’s Proposition 65 Internet site (www.P65Warnings.ca.gov).

The warning triangle must look like the image to the right. It can also be black and white IF the label for the product does not use the color yellow. The warning triangle symbols can be downloaded here: <https://www.p65warnings.ca.gov/warning-symbol>. The triangle symbol must be placed to the left of text of the warning, and be no smaller in height than the word “WARNING,” which must all be in capital letters and bold.

Amended Warning Requirements for Product Labels:

A. Carcinogens - “⚠️

WARNING: 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.”



B. Reproductive Toxicants -

“⚠️**WARNING:** 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.”

C. Multiple Chemicals Where one is a Carcinogen and Another is Reproductive Toxicant -

“⚠️**WARNING:** 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.”

D. Single Chemical That is Both a Carcinogen and Reproductive Toxicant - “⚠️**WARNING:**

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.”

Thus, a sample warning for the chemical Bisphenol A (BPA) which is compliant with the amended warning requirements for item B above would read like this:

⚠️**WARNING:** This product can expose you to chemicals including Bisphenol A (BPA), which is known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

The “on-product” option mentioned above is essentially a form of a label, but is placed on the product itself, on the product packaging, or both. This alternative Safe Harbor method was developed by the State in response

to concerns that some consumer product packaging is so small that there is not enough room for the full label warning. The on-product option allows a consumer product to carry a short-form version of the Safe Harbor warning.

Warning Requirements for On-Product Labels:

- A. **Carcinogens** - “⚠️**WARNING** - Cancer – www.P65warnings.ca.gov.”
- B. **Reproductive Toxicants** - “⚠️**WARNING**: Reproductive Harm – www.P65warnings.ca.gov.”
- C. **Both Carcinogens and Reproductive Toxicants** - “⚠️**WARNING**: Cancer and Reproductive Harm – www.P65warnings.ca.gov.”

If an on-product warning is used, the word “WARNING” must appear in all capital letters and in bold. Additionally, the font size must be no smaller than six point font or the font size of other “consumer information” provided on the product or product packaging, whichever is larger. “Consumer information” means warnings, directions for use, ingredient lists, and nutritional information, but does not include the brand name, product name, company name, location of manufacture, or product advertising. The State believes that vast majority of Proposition 65 warnings will utilize the longer Safe Harbor warning and that the short-form option will be used when the longer version will not fit on a label on the actual product.

Finally, if the product label includes consumer information in a language other than English, the warning must also be provided in that language in addition to English.

While a general overview concerning label and on-product warnings is discussed in this article, businesses

Proposition 65 Settlement Summary

Year	Attorney’s Fees and Costs
2016	\$21,561,113
2015	\$17,828,941
2014	\$21,047,746
2013	\$12,731,262
2012	\$15,588,767
2011	\$11,941,919
2010	\$7,806,539
2009	\$9,035,123
2008	\$14,607,965
2007	\$6,740,856
2006	\$8,230,459

should also be aware that there are numerous other requirements in the Proposition 65 amendments concerning specific categories of goods such as canned and bottled food and water, recreational vehicles, furniture, wood products, prescription drugs, and alcoholic beverages. Similarly, information about products that appear on the Internet or catalogues is also subject to specific requirements set forth in the new requirements.

Businesses should be aware that Proposition 65 is a California consumer warning law that may affect you and your company if your products are ultimately sold in California. Private party enforcement for non-compliance with this law continues to flourish and may result in legal costs, significant penalties, and out of court settlement costs. Companies should review product inventories, distribution networks, and marketing tools to determine if Proposition 65 applies to them. Businesses that are already acquainted with Proposition 65 should quickly become familiar with the new

requirements that go into effect on August 30, 2018, or discuss any questions with legal counsel, to avoid unnecessary regulatory compliance issues.

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