

## A Primer on the New Requirements of Proposition 65

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### What Is Proposition 65?

Proposition 65 (often referred to as “Prop 65”) was enacted in California in 1986 as the “Safe Drinking Water and Toxic Enforcement Act.” Despite this official title, the scope of Prop 65 regulates far more than just water pollution. The purported goal of Prop 65 is to protect Californians from exposure to substances known to the State of California to cause cancer or reproductive harm. California’s Office of Environmental Health Hazard Assessment (“OEHHA”) is tasked with publishing a list of chemicals and updating the list at least annually to include any chemicals known to cause cancer or reproductive toxicity. To date, there are over 900 chemicals listed by OEHHA, which can be found at <https://www.p65warnings.ca.gov/chemicals>.

Prop 65 not only prohibits the introduction of such chemicals into the water, but also requires businesses to provide warnings to Californians about significant exposures to listed chemicals in products, homes, workplaces, or in the environment. Because Prop 65 is so expansive, this primer will focus primarily on complying with product labeling issues, as opposed to other locations where exposure can occur.

Since Prop 65 took effect in 1986, warnings were simply required to state that a chemical may be present that could cause cancer or reproductive harm. There was no requirement to identify the chemical or provide specific information about how a person may be exposed, or ways to reduce or eliminate exposure to a chemical. In 2016, OEHHA adopted new regulations that will take full effect on August 30, 2018. The new regulations do not substantively change the purpose of Prop 65, but instead change the suggested language and form of warnings, and shift the responsibility to warn to those higher up in the supply chain. These new requirements are described in detail below.

### When Prop 65 Warnings Are Required

Prop 65 requires businesses with 10 or more employees (businesses with less than 10 employees are exempt) to provide “clear and reasonable warnings” for “exposure” to chemicals that are known to cause cancer and reproductive harm at locations within California and for goods sold in California. The warning requirement applies to all companies in the chain of distribution—manufacturers, distributors, and retailers, including online retailers such as Amazon.com.

While there are over 900 chemicals listed by the state of California, some of the most common ones found in everyday

products are lead, DEHP, DINP, acrylamide, arsenic, benzene, cadmium, carbon monoxide, chlorinated tris, formaldehyde, hexavalent chromium, mercury, methylene chloride, and phthalates. A list of chemicals including “fact sheets” for each chemical can be found at [www.p65warnings.ca.gov/chemicals](http://www.p65warnings.ca.gov/chemicals). The prevalence of these chemicals means that it is increasingly important for all businesses that operate in California or sell products that may be shipped to California to understand exactly what chemicals are found in their products.

The mere existence of an enumerated chemical does not automatically mean a warning is required, as the regulations provide safe harbor levels for many chemicals, meaning that there is an allowable amount of exposure before a company is required to provide Prop 65 warnings. Companies should be diligent about determining what is in their products, and the amounts of each chemical present. Testing is available to determine how much of a given chemical is in a product, which is typically stated in “parts per million.” The bigger issue is determining what the exposure to the chemical is by use of the product, which is measured in “micrograms per day.” The exposure analysis depends upon the nature of the product, and how it is intended to be used.

However, if a company does not know or needs to determine whether a product exceeds the safe harbor levels, there are testing services available. This testing is often costly, but is sometimes necessary to provide guidance on whether to warn, reformulate, or to defend against a Notice of Violation filed by a plaintiff against a product.

As such, we recommend that businesses stay vigilant and actively conduct risk assessments for all products, and to consider whether to test, warn, or reformulate as appropriate. It is important to note that if a product does not contain a chemical listed by the State of California, or if the product contains a chemical that does not exceed the No Significant Risk Levels (“NSRLs”) and/or the Maximum Allowable Dose Levels (“MADLs”), these regulations do not require that a warning be provided, and the upcoming amendments do not change that fact. On the other hand, the upcoming amendment recognizes that many businesses have been “over-warning,” and the intention of the amendment is to prevent businesses from doing so.

### New Warning Label Requirements

In the event a product contains a chemical that exceeds the NSRL or MADL limits, the regulations require that clear and reasonable warnings be provided in several ways. OEHHA created “safe

harbor warnings” or warnings for consumer product, environmental, and occupational exposures that are guaranteed to be deemed in compliance with Prop 65 regulations. While a business is not required to use the safe harbor warnings, it is highly recommended to avoid possible litigation challenging any unique warning methods.

The safe harbor warnings under previous regulations simply required that the business state that the product or location *contained chemicals known to the State of California to cause cancer, birth defects, or reproductive harm*. The new safe harbor warnings are far more specific, requiring the following:

- The warning must state that the product or location *can* expose a person to a Prop 65 chemical (as opposed to the old warning that it may simply contain such a chemical).
- The warning must specify at least one chemical for which the warning is provided, and if the warning is for both cancer and reproductive harm, a chemical must be specified for each.
- In the event a sign, label, or shelf tag for the product is provided in a language other than English, the Prop 65 warning must also be provided in that language.
- The warning must provide the URL “[www.P65warnings.ca.gov](http://www.P65warnings.ca.gov)” on the label.
- The warning must be typed in a size no smaller than the largest type used for other consumer information with a minimum of 6 point font.
- The word “WARNING” must be provided in bold caps.
- There must be an image of an exclamation point in a yellow triangle to the left of the warning in a size no smaller than the height of the word “WARNING.” However, if yellow is not a color elsewhere on the product or packaging, black and white is acceptable.
- The new regulations also add new tailored warnings that provide more specific information for certain kinds of exposures and places, provide specific requirements for products purchased over the internet or in catalogs, and clarify where the responsibility to warn falls within the supply chain.

### Example of Old Safe Harbor Warning

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

### Example of New Safe Harbor Warning



**WARNING:** This product can expose you to arsenic, a chemical known to the State of California to cause cancer. For more information go to: [www.p65warnings.ca.gov](http://www.p65warnings.ca.gov)

### Prop 65 and the Distribution Chain

The new regulations clarify that manufacturers have the primary responsibility for providing Prop 65 warnings. Manufacturers can choose whether to (a) affix warning labels on their products prior to shipping, or (b) to provide written notice to their distributors, importers or retailers that a product requires a warning, provide the warning signs or other warning materials, and get confirmation that retailers received the notice. Manufacturers can also enter into written agreements with retailers to modify their responsibility, so long as the consumer receives a clear and reasonable warning prior to exposure to a Prop 65 chemical. Even if manufacturers do not sell to any entity in California, if the product is sold by any distributor, importer, or reseller into the state, that manufacturer can still be held liable.

If a business receives products with Prop 65 warnings or received a Prop 65 notice, it is imperative that it maintain Prop 65 compliance to avoid being held liable. For instance, if a distributor removes Prop 65 warning labels and provides the product to a retailer, the distributor may be liable for taking the product out of compliance with OEHHA regulations. Alternatively, if a retailer is provided with adequate notice and labels, but chooses not to affix the labels to the products prior to the sale, the retailer may be held liable for the noncompliance. Despite the new allocation of responsibility, we recommend that all entities in the supply chain ensure compliance with Prop 65.

### Enforcement and Liability for Non-Compliance

While the California Attorney General's Office is tasked with the official enforcement of Prop 65, any district attorney, city attorney (for cities whose population exceeds 750,000), consumer advocacy group, private citizen, or law firm may also enforce Proposition 65. Penalties for violating Proposition 65 by failing to provide warnings can be as high as \$2,500 per violation per day, meaning private groups and attorneys are highly motivated to seek out Prop 65 violators.

### What To Do If You Are Served With a Notice of Violation

When a private firm or individual seeks to enforce a Prop 65 violation, they will issue a 60 day notice to the alleged violator, copying the Attorney General. The Attorney General then has until the end of the 60 day period to determine whether to pursue the action—which they rarely do. After the 60 day period, the private firm or individual can file a lawsuit.

When a private suit is filed, plaintiffs will often inform the business that they have conducted testing and determined the product at issue exceeds the safe harbor level of listed chemicals,

and demand to know how many of each product has been shipped to California. If the product count is high, high demands will likely follow.

Most Prop 65 enforcement actions are able to be resolved through settlement. In a settlement, the business must often pay substantial monetary fines and penalties for the violation, as well as agree to provide adequate warnings or reformulate the product moving forward. In the event the action does not settle and plaintiff is able to prevail at trial, in addition to the penalties for the violation (up to \$2500 per violation per day), plaintiff may recover attorney fees and costs. As you can imagine, the possible exposure for these violations can be astronomical, which is why it is imperative to comply with the new warning requirements before August 30, 2018. If you receive a 60 day notice of violation, contact an attorney immediately. A qualified attorney will be able to assess your level of exposure and minimize potential costs.

Prop 65 compliance is increasingly important with these new regulations. Failure to comply with Prop 65 can expose your company to significant financial and legal liability. If you have any questions regarding Prop 65 requirements or want to ensure your company is in compliance, contact Ms. Ellis and Ms. Swank today. Our office has experience handling internal audits to ensure Prop 65 compliance in every aspect of your business, and experience in minimizing liability once a notice of violation has been issued. Remember, these new requirements go into full effect on August 30, 2018—make sure your business is prepared.



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