

The Impact the New Prop 65 Warning Regulations on Commercial Property Owners

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Introduction

The Safe Drinking Water and Toxic Enforcement Act of 1986 (“Prop 65”)¹ is an expansive “right to know” law which requires businesses to provide warnings before exposing people to certain chemicals. Specifically, it requires businesses with ten or more employees to provide a “clear and reasonable” warning before exposing people to chemicals which are known by the State of California to cause cancer or reproductive harm. The Office of Environmental Health Hazard Assessment (“OEHHA”) maintains the list of over 950 chemicals (the “listed chemical” or the “listed chemicals”) which are known to cause these harms.

The presence of a listed chemical does not automatically necessitate a warning. Rather a warning is only required if there is an *exposure* to one of the listed chemicals above a certain threshold level. The OEHHA has not established threshold levels for most of the listed chemicals, and therefore property owners are left to determine what the threshold levels are for most of the listed chemicals. If challenged, property owners must go through the difficult and expensive process of proving in court that exposure to the listed chemical will not rise above the threshold level.² Practically speaking, this means that if a business exposes someone to a listed chemical, a warning is required unless the business can prove that the exposure will not rise above the Prop 65 threshold level.

If a warning is necessary, Prop 65 requires that the warnings be “clear and reasonable”. Prop 65 does not specify what is considered clear and reasonable, but it provides guidelines for a “safe harbor”. Using the safe harbor language and content is not mandatory but warnings that fail to use it are presumptively non-conforming while warnings that use the safe harbor language and content are automatically clear and reasonable.

Prop 65 was amended in August 2016, and the new requirements came into effect on [August 30, 2018](#) (the “regulations”). The regulations implement three major changes to Prop 65: (i) changes the safe harbor warning requirements, (ii) creates “tailored” warnings for specific exposures/products; and (iii) for consumer products, clarifies which party is responsible for providing the warning.³


Regulations

A. General Categories of Exposure

The main take-away is that the regulations require new warning signs to qualify for “safe harbor” protection. The regulations have made the warning requirements more specific in terms of content and method of transmission. The regulations also

specify warning appearance guidelines including font requirements, sign size requirements, sign location requirements, and a “foreign language requirement”. The foreign language requirement states that if the property has signs in any language other than English, the Prop 65 warning sign must be in English and in the other non-English language.

The regulations’ safe harbor requires the following language and content:

1. The word “**WARNING**” in all caps and in bold print
2. The warning symbol  to the left of the warning text
3. The URL to the Prop 65 website
4. The name of at least one listed chemical for each risk category (i.e. cancer or reproductive toxicant), or one listed chemical that is listed as a carcinogen and a reproductive toxicant
5. Name a source of exposure (only for environmental exposures)

Below is an example of how the warning will appear for an environmental exposure sign which lists a known carcinogen:



WARNING: Entering this area can expose you to chemicals known to the State of California to cause cancer, including [name of listed chemical], from [name of one or more sources of exposure]. For more information go to www.P65Warnings.ca.gov.

Two key points to note regarding the requirement to name a listed chemical: First, business owners are only required to list *one chemical per risk category* (i.e. cancer or reproductive toxicity), or one chemical which may result in both risk categories. Even if a business owner is aware that its property exposes people to five listed chemicals, the owner is only required to list *one* chemical for each risk category. Therefore, if a sign includes a listed carcinogen and a listed reproductive toxicant the sign will not need to be changed if any new chemical is added to the listed chemicals. Second, a business owner has broad discretion to choose which chemical it lists on the warning. The listed chemical *does not need* to be the chemical with the highest exposure level, it simply has to be a chemical that a customer will be exposed to above the threshold level.

B. Tailored Categories of Exposure

The regulations also add new requirements for specific chemical and area exposures (“tailored warnings”). The tailored warnings have specific warning language that is different from the general

warning required for environmental exposure, consumer products, and occupational categories. If a tailored warning is identified in the regulations, the business owner will need to use the tailored warning in the specified situation to qualify for the safe harbor.

Impact on Commercial Property Owners

A. Applicable to All Commercial Properties

The regulations will most affect commercial property owners in the following categories:

1. Environmental Exposure - General Category.

Commercial properties often expose people to various listed chemicals through items such as carpets, paints, smoke, exhaust and other common building materials. If the exposure is above the threshold level, the owner will need to install signs which comply with the environmental exposure category of warnings. This requires that a warning sign be posted at all “public entrances” in a conspicuous manner.⁴

2. Enclosed Parking Facility Exposure Warnings – Tailored Warning.

A tailored warning is required for exposures in “enclosed parking facility[ies].” The inclusion of the word “enclosed” is intended to differentiate open parking lots from those which are underground, completely enclosed, or have partial walls which enable engine exhaust to accumulate, and this warning only applies to the latter categories. While not made clear, a multi-story parking garage with concrete or steel beams – but otherwise open air/unenclosed areas between floors is likely not subject to the tailored notice requirement. However, this will need to be considered on a case to case basis because the specific construction of the parking facility, including locations and heights of partial exterior walls, will determine whether this warning applies. The regulations’ approved safe harbor language is:

“Breathing the air in this parking garage can expose you to chemicals including carbon monoxide and gasoline or diesel engine exhaust, which are known to the State of California to cause cancer and birth defects or other reproductive harm. Do not stay in this area longer than necessary. For more information go to www.P65Warnings.ca.gov/parking.”

3. Designated Smoking Area Exposure Warnings – Tailored Warning.

Designated smoking areas require a warning to be located at the entrance to the smoking area, and within the smoking area. The regulations’ approved safe harbor language is:

“Breathing the air in this smoking area can expose you to chemicals including tobacco smoke and nicotine, which are known to the State of California to cause cancer and birth

defects or other reproductive harm. Do not stay in this area longer than necessary. For more information go to www.P65Warnings.ca.gov/smoking-areas.”

B. Shopping Centers and Retail Portions of Office Buildings

1. Alcohol Beverage Exposure Warning – Tailored Warning.

Prop 65 requires that consumers be warned of the potential risks which may result from consuming alcohol. The required warning method differs depending on the how the alcohol is being sold. For example, if the alcohol is being sold for consumption on the premises, the warning should be on the alcohol menu, but if it is being sold at retail, the warning should be at the point of sale or at the display. The regulations’ approved safe harbor language is:

“Drinking distilled spirits, beer, coolers, wine and other alcoholic beverages may increase cancer risk, and, during pregnancy, can cause birth defects. For more information go to www.P65Warnings.ca.gov/alcohol.”

2. Food and Beverage Exposure Warnings for Restaurants – Tailored Warning.

A warning is required at restaurants or facilities selling food or drink for immediate on-site consumption. The warning may be located on the menu, at the public entrance, or at the point of sale. The regulations’ approved safe harbor language is:

“Certain foods and beverages sold or served here can expose you to chemicals including acrylamide in many fried or baked foods, and mercury in fish, which 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/restaurant.”

Conclusion

Property owners should ensure that all areas of their property are compliant with Prop 65, in terms of the content, appearance and location of the Prop 65 warning sign(s). Although a Prop 65 warning is only required if the business exposes people to a listed chemical above the threshold level, businesses open themselves to risk if they do not warn or if they fail to provide proper warnings. Even if a property owner does a proper survey and determines that no warning is required, if someone sues the owner for failure to provide proper warnings, that owner has to prove in court that no warning was required. If it fails its burden, it could be fined up to \$2,500 a day. Therefore, if a business exposes people to any listed chemical, the recommended course of action is to give Prop 65 compliant warnings. Property owners should also review their leases to confirm retail tenants are required to comply with applicable law relating to Prop 65.



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¹ Proposition 65 or Prop 65 is codified at the Health and Safety Code § 25249.5 *et seq.*

² Prop 65 does not explicitly require business owners to conduct a survey to determine chemical exposure levels in the business, but the survey may assist in determining what listed chemicals people are being exposed to and may assist in determining the level of exposure. However, these surveys are often costly and cannot yield certain results especially if the chemical does not have an established threshold level.

³ This article will not delve into the consumer product exposure warnings.

⁴ Although the law also allows for other methods of warning including publication in a local newspaper, or mailing a notice to the people in the affected area, posting signage will most likely be used on commercial properties.