

What's Next for Prop. 65?

By: [Anne Marie Ellis](#)

It has now been over a week since the changes to Prop. 65 took effect on August 30th! A review of notices of violations filed in the past week, indicate a trend toward food products and consumer household goods. For example, notices with the following chemicals and products have been filed with the California Attorney General:

- Acrylamide in nut butters;
- Arsenic in dietary supplements;
- Cadmium, lead and lead compounds in powdered dietary supplements and breastfeeding supplements;
- Lead in psyllium husk powder, chocolate and energy shakes;
- Lead in brass towel rings, towel racks and holders;
- Phthalates in wallets and purses, migraine wraps, bike hangers, cosmetic bags, USB cables, plastic placemats, dish racks, sofa covers, gardening sets and curtain rods.

Even if your industry has not yet been targeted, you can assume it will be soon. I anticipate that the first products that plaintiffs will target are those without labels since those are the most “low hanging fruit”. After that, I believe plaintiffs will target websites and catalogs without warnings or with improper warnings. Finally, I predict that plaintiffs will start to target products with incorrect or inaccurate labels in an effort to demonstrate that the chemicals or endpoints are incorrectly stated.

In other recent news, the Office of Environmental Health Hazard Assessment (“OEHHA”) is considering nickel and nickel compounds for possible listing by the Developmental and Reproductive Toxicant Identification Committee. Nickel and nickel compounds are currently listed as associated with cancer. OEHHA is also proposing a regulation that drinking coffee does not pose a significant cancer risk, despite the presence of chemicals created during the roasting and brewing processes that are listed under Prop 65 as known carcinogens.

As a reminder, the new regulations require you to list at least one specific chemical or chemicals in the warning, require reference to www.P65warnings.gov, and require an image of an exclamation point in a yellow triangle to the left of the word “WARNING.” Companies that sell products through the internet and in catalogs must also comply with specific warnings and formatting set forth in the regulations. Manufacturers have the primary responsibility for providing Prop 65 warnings, but all entities in the chain of commerce can be liable for a Prop 65 violation.

If your company is not compliant with Prop 65, it is not too late. If you are interested in attending another webinar, or one specific to your company or industry, I am happy to discuss options with you. In the meantime, I will continue to monitor recent developments and notices of violation that are filed, and will keep you updated.



[Anne Marie Ellis](#) is a Senior Counsel in the Firm's Orange County office. She focuses her practice on product liability, commercial litigation, regulatory compliance and client counseling. She has significant experience defending all types of consumer products including motor vehicles, motorcycles, off-road vehicles, sporting goods equipment, power tools, exercise equipment, restaurants and amusement park venues. She can be reached at (949) 224-6223 or aellis@buchalter.com