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The Impact the New Prop 65 Warning Regulations on Multi-Family Apartments and Other Prop 65 Updates

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There have been recent developments in the enforcement of the California Safe Drinking Water and Toxic Enforcement Act of 1986 (also known as Proposition 65 or Prop 65) that require businesses with 10 or more employees to provide “clear and reasonable” warnings to people entering their properties before exposing them to chemicals known to the State of California to cause cancer, and/or reproductive harm.ⁱ

The Office of Environmental Health Hazard Assessment (OEHHA), the agency who oversees Prop 65, has added new regulations for residential rental property owners that will go into effect on **July 1, 2019**. The new regulations apply to “residential rental properties” (which includes apartments, houses, duplexes, triplexes, condominiums or other dwellings, but excludes hotels).

New Written Warnings Required to All Known Adult Occupants

Previously, owners of multi-family apartment properties could post signs on the property warning tenants of their exposure to chemicals known to cause cancer, and/or reproductive harm. These regulations have been modified to require that a landlord give its tenants direct notice of the exposure through a letter, through the lease, or through email. Posting a sign will no longer be sufficient to comply with the regulation. The notice is required to be given to “each known adult occupant of the property at the time of renting, leasing...and each year thereafter”.

The regulation provides property owners with guidelines, including “safe harbor” language and content, which states how property owners should provide these warnings to tenants in order to comply with the regulation. The “safe harbor” warning language and content is as follows:

- The word “**WARNING**” in all caps and in bold print with this warning symbol .
- The warning notice must state: “Talk to your landlord or the building owner about how and when you could be exposed to this chemical [or “these chemicals”] in your building.”
- Name one or more sources of exposure (e.g. building materials and fireplaces) which are located on the property or within a rental unit.
- The name of a chemical in each risk category (cancer or reproductive harm) to which the tenant is being exposed.
- The URL to the Prop 65 website.

Additional Required Warnings

Although landlords may no longer post signs to fall within the safe harbor for warnings to tenants in residential properties, landlords are still required to post signs to provide tenants with warnings for (i) enclosed parking facilities and (ii) designated smoking areas. These warnings are in addition to the property owner’s duty to give residential tenants the written warning noted above.

Open Issues

The concern raised by these regulations is that the warning states a tenant may “talk to your landlord or the building owner about how and when you could be exposed to these chemicals in your building”. This appears to put a duty on landlords to know, and give advice on, what chemicals are located in their building. It is unclear what the ramifications are of giving incomplete or unclear advice, and it is unclear what scope of advice a landlord is required to provide. The other concern is that the warning requires a “source of exposure” to be named. It is unclear how specific a property owner must be in identifying the source of exposure.

Reminder of New Signage Requirements for Commercial Properties

Commercial property owners should already be aware of the new signage requirements for their properties that went into effect on August 30, 2018. The new environmental exposure signage requirements notably differ from the previous requirements because the signage must (i) identify and name at least one listed chemical for each risk category (i.e. cancer or reproductive toxicant), (ii) name the source of exposure, and (iii) include the URL to the Prop 65 website. There are additional font requirements, sign size requirements, and sign location requirements which were not present in the previous requirements.

ⁱ There is an exception for businesses that can show that the anticipated exposure level will not pose a “significant risk of cancer” or that the reproductive toxicant will have “no observable effect” on people. But, it is difficult, and may be costly, to make this showing. As such, most property owners comply with the Prop 65 requirements.

Conclusion

Both commercial and residential property owners have additional requirements to remain compliant with Prop 65 including giving their tenants proper Prop 65 notices. Residential property owners may wish to consider modifying their leases to insure that those executed after **July 1, 2019** include the proper Prop 65 notice, and should provide tenants with an annual Prop 65 notice.

Please call Manuel Fishman or Lotus Fung if you want to discuss the impact this may have on your property.



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