

Client Alert

July 2018



New California Proposition 65 Warning Regulations: What Businesses Need To Know Before August 30, 2018

What is California's Proposition 65?

California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop 65) is one of the most onerous chemical right-to-know statutes in the nation. It prohibits businesses with 10 or more employees, including businesses that merely ship products into California, from exposing people in California to listed chemicals without providing a "clear and reasonable" warning.

Why Should I Care?

Bringing a Prop 65 action is relatively easy and lucrative for private plaintiffs and their counsel. In 2017, there were nearly 700 cases settled with defendants paying more than \$25,000,000 in plaintiffs' attorneys fees and penalties. This does not include defense counsel fees, business interruption and other costs to comply.

OEHHA's Adoption of New Prop 65 Regulations

In August 2016, California's Office of Environmental Health Hazard Assessment (OEHHA) adopted new regulations that replaced Prop 65's "clear and reasonable" warning provisions. These new regulations, which allocate responsibility for providing warnings on consumer products sold in California and include new criteria for "safe harbor" warnings, become operative on August 30, 2018. Understanding and timely implementation of these new provisions can greatly decrease your company's chances of receiving a 60-day Notice of Violation and being embroiled in an enforcement action.

Companies do not need to wait to utilize the new "safe harbor" warnings, though, because the regulations expressly allow for their immediate use. Businesses should also be aware that *after* August 30, 2018, the prior warning regulations will no longer provide "safe harbor" compliance (subject to some exceptions, such as where there is a court approved judgment that requires specific warnings).

What Changed?

The new Prop 65 warning regulations (i) include new definitions; (ii) allocate responsibility for providing warnings when warnings are needed for a consumer product; and, most significantly, (iii) detail new "safe harbor" warning content and methods of delivery for consumer products, environmental, occupational and other specific exposures to 900+ Prop 65-listed chemicals.

These New Warning Methods Are Not Mandatory

The new "safe harbor" warning provisions do not impose mandatory obligations on businesses. The regulations expressly provide that nothing in the new regulations precludes a business from using other content and methods to provide "clear and reasonable" warnings when such warnings are required by Prop 65, but businesses that use other warnings may need to defend them in court. In short, proper compliance with the requirements specified in the new regulations provides "safe harbor" protection against enforcement actions (lawsuits).

What Does My Business Need to Know About the New Safe Harbor Warnings?

For companies selling consumer products in California or with operations in California, the new regulations specify the content and methods of delivery for warnings that relate to consumer products, environmental exposures, occupational exposures and warnings for specific products, chemicals or area exposures. Whether warnings are required at all depends on the nature of your business and the types of Prop 65 chemical exposures that may occur from your products or at your facilities. OEHHA has provided guidance for businesses about the new “safe harbor” regulations, which can be accessed [here](#).

Consumer Product Exposure Warnings

Under the new regulations, consumer product exposure warnings may, but do not necessarily, require naming a chemical found in the product. Instead, the regulations allow for either a long-form (which requires naming at least one listed chemical) or short-form “safe harbor” warning (which does not require naming a chemical). Businesses may choose which warning best suits their needs and still receive “safe harbor” protection. Further, both long-form and short-form consumer product warnings must identify the toxicological endpoint(s) being warned against (*i.e.*, cancer, reproductive harm, or both).

The new regulations address where warnings are to be located, sign size, font size, content and whether non-English warnings are required, among other things. Businesses should also provide product warnings for *catalogs* and *online* purchases to the extent they advertise or sell products through those media.

Examples of Specific Product, Chemical or Area Exposures

Depending on the nature of your business, more specific warnings may be needed in order to receive “safe harbor” protection. The specific exposure warning requirements are described in 27 CCR sections 25607.1–25607.33. Specific warning requirements apply to food products, alcoholic beverages, restaurants, wood dust, furniture, enclosed parking facilities, hotels, petroleum products and other types of exposures.

What Should My Business Do Now?

Businesses are able to take advantage of the new “safe harbor” warnings now and we encourage changing your warnings to comply with the new warning provisions. Businesses should review the new Prop 65 regulations at 27 CCR section 25600 *et seq.* and consider whether and how their employees and/or customers may be exposed to Prop 65 chemicals via products, processes or the environment. We also recommend that businesses review the Prop 65 guidance provided by OEHHA. Both the new regulations and OEHHA’s guidance materials may be found on OEHHA’s website [here](#).

For More Information

Please review our Prop 65 [brochure](#), visit our website at www.huntonakprop65.com or contact one of our experienced Prop 65 attorneys listed in the brochure for more information.

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