

Are You Ready for Proposition 65 Changes' Three Immediate Steps to Take.

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PRACTICES Retail, Environmental Litigation, Environmental

Proposition 65 is a 1986 California right-to-know law requiring businesses to provide “clear and reasonable” warnings of potentially harmful exposures to chemicals appearing on the growing list maintained by California’s Office of Environmental Health Hazard Assessment (“OEHHA”). New regulations, taking effect on August 31, 2018, detail required warnings specific to a wide variety of places and products, such as those for service stations, designated smoking areas, and enclosed parking garages, as well as those for food, prescription drugs, vehicles, and beverages.

To comply, all businesses whose products are sold or distributed to consumers in California should take a minimum of three steps to protect themselves from liability:

1. Compile, maintain, and inventory all the chemicals in their products, and determine whether any of the chemicals appear on the Proposition 65 list. If a chemical is listed, warnings are necessary.
2. If warnings are necessary, immediately update the warnings on the products (or add warnings if none are present), ensuring the warnings meet the new requirements no later than August 30. [View a full list of specific requirements.](#)
3. Finally, be watchful for future changes to the Proposition 65 list of chemicals and make sure to add and update warnings if warranted.

Additional requirements of the law apply to occupational exposure to listed chemicals and environmental exposure to the chemicals. And certain chemicals, such as diesel exhaust and wood dust, are specifically addressed in the rules, requiring use of unique warning language.

Why and how did California change the regulations governing safe harbor warnings?

Under the old regulations, a business generally fulfilled its duty to warn consumers of potentially harmful chemicals by stating that its product contains a chemical known to the State of California to cause cancer, birth defects or other reproductive harm—there was no need to specify the chemical known to cause cancer or birth defects or other reproductive harm. As a result, many businesses “over warned” by putting a label on every product stating: “WARNING: This product contains a chemical known to the State of California to cause cancer, or birth defects or other reproductive harm.” Moreover, the regulations were written before the rise of the internet and online shopping.

To curtail the “over warning” phenomenon and update the regulations to meet the realities of online merchandising, OEHHA made several changes to safe harbor warning regulations, including:

- **A specificity requirement added to the long-form warning**

The new long-form warning requires the business to include the word “**WARNING**” in all capital letters and boldface, accompanied by a symbol consisting of a black exclamation point in a black-outlined equilateral triangle. If the label or warning uses the color yellow, the interior

of the triangle must be yellow; otherwise, the interior of triangle must be white. Proposition 65 also requires the business to identify one or more of the listed chemicals for which the warning is provided, and to specify its effect, as noted in the Prop 65 list (cancer and/or birth defects or other reproductive harm).

Long-form warnings must be prominently displayed on a label, labeling, or sign with such conspicuousness as to render the warning likely to be read and understood by an ordinary individual under customary conditions of purchase or use. Thus, the warnings cannot be overwhelmed by other words, statements, designs or devices on the label, labeling, or sign.

The long-form warning may be used on a label or sign.

- **A new short-form, on-product warning**

The new regulations specify that a business can place a short-form warning that contains the word “**WARNING**” in all capital letters and boldface, accompanied by a symbol consisting of a black exclamation point in a black-outlined equilateral triangle. If the label or warning uses the color yellow, the interior of the triangle must be yellow; otherwise, the interior of triangle must be white.

The warning must be in a type-size no smaller than the largest type-size used for other consumer information on the product and, in no case, in a type-size smaller than six-point type. “Consumer information” under the regulations includes warnings, directions for use, ingredient lists, and nutritional information, but does not include the brand name, product name, company name, location of manufacture, or product advertising.

Short-form warnings can be affixed to or printed on a product or its immediate container or wrapper. Short-form warning may not be used on signs.

- **Translations into all languages appearing on a label or sign**

Under the new regulations, if a consumer product label or packaging contains consumer information in a language(s) other than English, the warning must be provided in that language(s) as well as in English.

- **Rules for internet and catalog sales**

Warnings must be made available to consumers prior to purchase of a product. When a business engages in internet sales, it must include either the warning itself or a hyperlink to the warning clearly marked with the word “**WARNING**” on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase. A business engaged in internet sales must include the warning in the catalog in a manner that clearly associates it with the item being purchased.

If the business provides the on-product, short-form warning on its label or packaging, it may use the same warning on its website or catalog.

- **Minimizing burdens on retailers**

To minimize the burdens on retailers, the new regulations clarify the obligations of supply chain parties, putting the primary burden on manufacturers, producers, packagers, importers, suppliers, and distributors, rather than retailers. A manufacturer, producer, packager, importer,

supplier, or distributor can comply either by providing a warning on the product, or by providing a notice and warning materials to the authorized agent for a retail seller and receiving an acknowledgment that the notice and materials were received. If the upstream business entity chooses the latter route, the retailer becomes responsible for placement and maintenance of the warning materials he/she receives from the product manufacturer, producer, packager, importer, supplier or distributor.

Examples of the new long form warnings maybe found in the attached appendix.

What can a business do to protect itself?

The amended requirements are not retroactive, so businesses need not update on-package warnings for items manufactured before the new regulations come into effect. Businesses do, however, need to finalize compliance plans immediately and implement them as soon as possible to avoid potential liability. In addition, businesses should develop a protocol that will keep them apprised of additions to the Proposition 65 list of chemicals so they can update their warnings in a timely fashion.

[View the current Proposition 65 list.](#)

If you have any questions about these steps, please contact Julie Domike, [Michael Scanlon](#) ([\[email protected\]](#) or 202.654.4570).

This alert was included in the SOCMA August newsletter.