

New Prop 65 Warning Requirements Are Coming On Aug. 30 – Are You Ready?

The regulations requiring warnings to California consumers about significant exposures to chemicals are very detailed, and businesses should carefully review the regulations to make sure they are in compliance.

By **Albert M. Cohen**

The California Safe Drinking Water and Toxic Enforcement Act of 1986, commonly referred to as “Proposition 65,” requires entities doing business in California to provide warnings to consumers about significant exposures to chemicals that have been identified by the state to cause cancer, birth defects or reproductive harm. In 2016, the California Office of Environmental Health Hazard Assessment (OEHHA) promulgated new consumer warning regulations that take effect on Aug. 30, 2018 (27 Cal. Code Reg. Section 25600 et seq.). It is important that anyone selling, supplying or distributing products in California re-evaluate what they are doing to comply with Proposition 65. This article highlights some of the key consumer warning provisions. However, the regulations are very detailed, and businesses should carefully review the regulations to make sure they are in compliance.

These new regulations are not technically binding. Rather, they provide a “safe harbor,” and a business can choose to use other warning methods and content (Section 25600(a)) instead. However, by doing so, the entity risks having to defend challenges claiming that the alter-

native warnings are not sufficient. Therefore, it is in the interests of most businesses to comply with the specific warning requirements set out in the regulations.

A business is not required to provide a warning, of course, if the product does not contain a listed chemical, and the law does not require that a business test its product to determine whether a warning is required. However, unless a business knows with certainty that its product does not contain any listed chemicals, it should consider having the product tested. When doing so, it is important that the testing be done by a reputable laboratory. There have been instances where the laboratory used by the company did not report the presence of Proposition 65 chemicals but testing by a party bringing a claim against the company, as well as subsequent confirmation sampling, did identify such chemicals.

If a listed chemical is present, a warning is not required if the business can show that the exposure poses no significant risk, assuming lifetime exposure for substances known to the state to cause cancer, and that the exposure will have no observable effect, assuming exposure at one thousand times the level in question for substances known to cause repro-



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ductive toxicity. OEHHA has developed safe harbor exposure levels for over 300 Proposition 65 chemicals. However, because the levels are based on exposure, rather than content, they are often of limited value. Private enforcers often bring claims as long as the product contains a listed chemical, and it is often more efficient to settle the claim than to attempt to prove that the exposure will not pose a significant risk. Therefore, it is prudent to consider providing warnings for any product that contains Proposition 65 chemicals.

CONSUMER PRODUCT WARNINGS

The new regulations clarify that the primary responsibility for providing

product warnings falls on the manufacturer, producer, packager, importer, supplier or distributor (collectively, producer) rather than the retailer (Section 25600.2). The new regulations, however, allow the producer to shift the responsibility to the retail seller by either placing on the product a warning that complies with the regulations or providing the retailer with notice and warning materials as provided for in the regulations (Section 25600.2(b)). Note that the regulations are very specific on how notice must be provided, and the notice must be renewed after six months during the first year and annually thereafter (Section 25600.2(c)). Because a producer can shift responsibility to the retailer by affixing a warning to the product, retailers who sell over the internet or through a catalogue should review the products they sell to determine if they have Proposition 65 warnings and, for those that do, provide adequate warnings before the purchase is completed (Section 25600.2(b) and (c)).

The regulations provide that retailers and manufacturers may agree to allocate responsibility for providing warnings amongst themselves. In order to avoid disputes and failures to provide warnings that could result in the filing of claims against the retailer and the manufacturer, it may be prudent for manufacturers to inform retailers of products requiring warnings and to consider entering into written agreements to allocate their legal responsibilities (Section 25600.2(i)).

Unless a label is provided on the product or the producer has provided notice to the retailer as described above, a retailer only has responsibility for providing warnings in limited circumstances, such as when it is selling the product under a brand or

trademark that is owned or licensed by the retailer or when it obscures the label provided (Section 25600.2(e)).

A key focus of the new regulations is to provide more specificity regarding what a warning must say, where it must be placed and how conspicuous it must be. Thus, for example, standard warnings must contain a warning symbol, the word "WARNING" and a specific warning message, and must refer the consumer to the OEHHA Proposition 65 warnings website. In addition, unlike the prior requirements, at least one chemical for each form of risk must be identified. For example, a product that contains one or more carcinogens must read:

WARNING: This product can expose you to chemicals, including [name of chemical], which is/are known to the State of California to cause cancer. For more information, go to www.P65Warnings.ca.gov.

A product that contains one or more chemicals that cause reproductive toxicity must state:

WARNING: This product can expose you to chemicals, including [name of chemical], which is/are known to the State of California to cause birth defects or other reproductive harm. For more information, go to www.P65Warnings.ca.gov.

The regulations do not contain specific type size requirements for standard warnings. However, such warnings must be prominently displayed on a label, labeling or sign, and must be displayed with such conspicuousness, as compared with other words, statements, designs or devices on the label, labeling or sign, that the warning is likely to be read and understood by an ordinary customer.

Significantly, however, the regulations provide an option to use short-form warnings, which read, as appropriate:

"Cancer - www.P65Warnings.ca.gov"

"Reproductive Harm - www.P65Warnings.ca.gov"

"Cancer and Reproductive Harm - www.P65Warnings.ca.gov."

OEHHA's original intent was that the short form be used only on small products or where space was limited. However, the regulations do not prohibit use of the short form on larger products as long as the warning is no smaller than the largest type size used for other consumer information on the product label and is not smaller than six-point type. In addition, in all cases, the warning label must be placed in a manner to ensure that customers receive the warning prior to exposure. Therefore, it is not sufficient to merely place a warning directly on the product if the warning will not be visible because of the packaging.

The new regulations also contain express requirements regarding specific situations including environmental exposures, occupational exposures, specific products including food and alcoholic beverages, and exposures associated with dental care, wood and furniture, vehicle and diesel engines, gasoline stations and petroleum products, parking facilities and designated smoking areas.

In conclusion, these new regulations, which take effect on Aug. 30, are detailed and complex. In order to avoid Proposition 65 actions, businesses are advised to carefully review the regulations and to take any necessary steps to come into compliance.

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