

NEW PROPOSITION 65 WARNING REQUIREMENTS GO INTO EFFECT

In 1986, California voters approved Proposition 65, an initiative to address their growing concerns about exposure to toxic chemicals. That initiative is officially known as the Safe Drinking Water and Toxic Enforcement Act of 1986. The law requires California to publish a list of chemicals known to cause cancer or reproductive toxicity, and for *businesses* with 10 or more employees to provide warnings when they knowingly and intentionally cause significant exposures to listed chemicals.

New product warning requirements became effective August 30, 2018 for products produced after that date.

The list of chemicals currently includes more than 850 chemicals. Proposition 65 does not ban or restrict the sale of listed chemicals, or products containing those chemicals. The warnings are intended to help Californians make informed decisions about their exposures to these chemicals from the products they use and the places they go.

“Businesses” affected by Proposition 65 include wholesalers, distributors, dealers and retailers, as well the manufacturer, producer, packager, importer and supplier of a *consumer product* sold in or into California. More limited obligations are imposed on a retail seller who sells products directly to California consumers, including via the internet.

A “consumer product” is any article, or component part thereof, including food, which is produced, distributed, or sold for the personal use, consumption or enjoyment of a consumer. (27 CA ADC 25600.1(d)).

California’s Office of Environmental Health Hazard Assessment (OEHHA) administers the Proposition 65 program. For general information on Proposition 65 go to:

<https://oehha.ca.gov/proposition-65>

The California Attorney General maintains a useful website where a business can search if its products have been involved in any enforcement actions:

<https://oag.ca.gov/prop65/60-day-notice-search>

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What Are the Most Significant Changes to the Proposition 65 Warnings For Consumer Products?

Since the original warning requirements took effect in 1988, most Proposition 65 warnings simply state that a chemical is present that causes cancer or reproductive harm, but they do not identify the chemical or provide specific information about how a person may be exposed or ways to reduce or eliminate exposure to it.

New OEHHA regulations were adopted in August 2016 and took full effect on August 30, 2018 for products produced on or after that date. The regulations changed the safe harbor warnings which are deemed to comply with the law in several important ways. The amended requirements are not retroactive, so businesses need not update on-package warnings for items manufactured before August 30, 2018.

For example, the long-version of the new warnings for consumer products will say the product “can expose you to” a Proposition 65 chemical rather than saying the product “contains” the chemical. They will also include:

- The name of at least one listed chemical that prompted the warning,
- The Internet address for OEHHA’s new Proposition 65 warnings website, www.P65Warnings.ca.gov, which includes additional information on the health effects of listed chemicals and ways to reduce or eliminate exposure to them, and
- A triangular yellow warning symbol on most warnings.

There is also a short-form warning that may be provided. For more information refer to the California Code of Regulations, 27 CA ADC 25601-25607.33.

What Are Other Highlights of the New Warnings System?

The new warning regulation also:

- Adds new “tailored” warnings that provide more specific information for certain kinds of exposures, products, and places,
- Provides for website warnings for products purchased over the Internet,
- Provides for warnings in languages other than English in some cases, and
- Clarifies the roles and responsibilities of manufacturers, those in the supply chain, and the ultimate retail seller in providing warnings.

Noncompliance Can Be Costly

Failure to provide the product warnings can result in substantial fines and other expenses. Enforcement is vested in the State and private attorneys' lawsuits for recovery of fines and attorney fees. So-called "Bounty Hunter" lawsuits have become big business for California attorneys, as the table below illustrates.

	<u>Prop 65 Settlements</u>	<u>Total Payments (Million)</u>	<u>Attorneys Fees (Million)</u>
2017	688	\$25.76	\$19.48
2016	760	30.15	21.56
2015	582	26.23	17.83
2014	663	29.48	21.85
2013	352	\$17.41	\$12.73
Total	3,045	\$129.03	\$93.45

Conclusion

The Proposition 65 warning requirements for consumer products sold in or into California do apply to wholesalers, distributors, dealers and other non-manufacturer sellers as well as to the manufacturer. However, it is the manufacturer that has the knowledge of the chemical content of its products and thus has the ability to determine if a warning is required, and to apply that warning to the product before it enters the supply chain.

To help assure compliance, a company should consult with your management and quality assurance personnel and professional advisors. Possible responses to consider include: have your upstream suppliers confirm that their products meet the new California warning requirements; check existing contracts with suppliers for adequate assurances that require the supplier to place legally-mandated warnings on its products; and assure your website properly displays the required warnings for products you sell to California consumers over the Internet.