

NEW PROPOSITION 65 WARNING REGULATIONS FOR BUSINESSES EFFECTIVE AUGUST 30, 2018

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California's Office of Environmental Health Hazard Assessment ("OEHHA") has made significant changes to the regulations for Proposition 65 warnings required for certain consumer products and locations (e.g., enclosed parking facilities and hotels). These changes became effective **August 30, 2018**. If your business has not yet reviewed the new Prop. 65 regulations, or has never conducted a Prop. 65 audit, now is the time to do so.

Background on Prop. 65

In 1986, California enacted Prop. 65 (officially known as the Safe Drinking Water and Toxic Enforcement Act) by ballot referendum. Among other things, Prop. 65 requires businesses with 10 or more employees to provide warnings when they knowingly and intentionally cause significant exposures to one or more of almost 1,000 chemicals that are considered to cause cancer and/or reproductive toxicity. The full list of Prop. 65 chemicals of concern can be found [here](#).

A business can avoid Prop. 65 liability by making a "clear and reasonable" warning that complies with the applicable provisions of the California Code of Regulations. (27 CCR § 25601 et seq; Article 6 Clear and Reasonable Warnings.) While a business is free to craft its own warning language, it can open itself to litigation as to whether the crafted warning is sufficient. Accordingly, the statutory "safe harbor" language for warnings can be a surer option.

Prop. 65 provides for public and private enforcement of claimed violations. Certain private law firms specialize in such litigation, incentivized by the Prop. 65 regime's provision for reimbursement of attorney fees and costs. Indeed, attorney fees compose the bulk of funds paid by defendants in Prop. 65 settlements!

Prop. 65 litigation can be exceptionally burdensome for the target defendant. Once a plaintiff establishes that a listed chemical of concern is present, even at a low concentration, the burden of proof shifts to the defendant to demonstrate that an actionable exposure has **not** occurred. Meeting this burden can be very difficult. The target defendant may not be able to avoid the specter, cost, and risk of trial, absent a negotiated settlement.

Accordingly, any business engaged in commerce in California would be well advised to assess whether their products, workplaces, or properties may cause an exposure to a Prop. 65 chemical of concern.

This is not limited to those businesses with a physical presence in California.

Any business selling products into California or manufacturing or distributing component parts that will end up in a product sold by another business in California may also be exposed to Prop. 65 claims.

Summary of the New Regulations Regarding Warnings

Until the advent of the new Prop. 65 warning regulations, the statutory Prop. 65 safe harbor warning language for most consumer products was relatively simple. For example, "This product may contain a chemical known to the State of California to cause cancer, or birth defects or other reproductive harm." However, effective August 30, 2018, the safe harbor warning language (27 CCR § 25603) now includes the following:

- 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.
- A triangular yellow warning symbol  on most warnings.

Product labels may contain a short-form warning, provided they include certain key elements:  the triangular yellow warning symbol, the word "WARNING" in capital letters, in bold print, a reference to the type or harm posed (cancer or reproductive harm), and a reference to www.P65Warnings.ca.gov. (27 CCR § 25603, subd. (b).)

OEHHA also provides a series of new requirements for warnings for specified businesses, and they provide for special warnings for specific places and types of products. Internet retailers must ensure that each product page includes a Prop. 65 warning or a clearly marked hyperlink using the word "WARNING" on the product display page. The new regulations state, "a warning is not prominently displayed if the purchaser must search for it in the general content of the website." (27 CCR § 25602, subd. (b).) Where a business primarily interacts with customers in a language other than English or provides warnings on product labels in a language other than English, the Prop. 65 warning must also be provided in that other language. (See 27 CCR § 25602, subd. (d) & 27 CCR § 25604, subd. (a).)

Where to Obtain New Compliant Warning Placards or Labels

Compliant warnings need to be permanent (or at least semi-permanent), so it is important to invest in durable and unobtrusive warnings that comply with the relevant regulations. Here is a sampling of outlets that provide an assortment of the required signage:

www.compliancesigns.com www.prop65ca.com

However, these outlets will not be able to give you legal or technical advice as to whether a particular warning is sufficient, or whether your business requires a Prop. 65 warning on a particular product or in a particular location.

Newmeyer & Dillion LLP counsels businesses regarding Prop. 65 compliance, and has relationships with industry



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professionals if a more detailed exposure analysis is required. For more information regarding the new Prop. 65 regulations, please contact attorney Jason Moberly Caruso.

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