

New Legislation Lessens Impact of Proposition 65 on California Restaurants, Parking Garages, Grocery Stores, Hotels, and Other Businesses

California's Safe Drinking Water and Toxic Enforcement Act of 1986 [Cal. Health & Safety Code §25249.5 *et seq.*] ("Proposition 65") has, since its inception, exposed businesses selling products or operating premises in California to strict warning requirements. New legislation passed on October 5, 2013, amended Proposition 65 [§25249.7] to permit California businesses either involved in the sale of food or alcohol, or owning premises on which there is tobacco smoke or engine exhaust, to remedy any alleged violation of Proposition 65 without exposure to costly litigation brought by attorneys representing citizen groups.

Proposition 65 Overview

Proposition 65 requires businesses to warn the public when they sell a product, or maintain a premises, in California which contains chemicals known to cause cancer or birth defects or other reproductive harm. The State of California maintains a list of these chemicals, which has grown to include approximately 800 chemicals since it was first published in 1987. For example, if a product sold in California contains a listed chemical, and a warning is not posted on or near the product at its point of sale, Proposition 65 expressly provides that businesses selling the product are subject to citizen lawsuits enforcing the warning requirement, which commonly seek statutory penalties paid to the State and attorneys' fees. Concerned citizen groups must first send a notice of violation to the offending business 60 days prior to filing their case, in order to give the California Attorney General's office time to bring its own enforcement action. Penalties for violating Proposition 65 by failing to provide notices can be as high as \$2,500 per violation per day, in addition to attorneys' fees and costs.

New Legislation Amending Proposition 65

Under the new law, concerned citizens who have given notice to businesses (which employ 10 or more people) of alleged Proposition 65 violations may not commence litigation if: (1) the notice was served after the above effective date; (2) the alleged violation only concerns: (a) alcoholic beverages consumed on premises; (b) food or beverages prepared and sold for immediate consumption on or off the premises if the chemical was not

intentionally added, and the chemical was formed by cooking or preparing food or beverages to render them palatable or to avoid contamination; (c) non-employee tobacco smoke on premises where smoking is permitted; or (d) engine exhaust at a facility primarily intended for parking noncommercial vehicles; (3) the alleged violator has not been served with a notice of violation arising from the same exposure in the same facility; and (4) if within 14 days of serving the notice, the alleged violator has:

- Corrected the problem by posting a warning or eliminating the alleged exposure,
- Agreed to pay a civil penalty of \$500 (to be adjusted every five years for inflation, starting April 1, 2019) per facility where the alleged violation occurred, and
- Sent to the noticing attorney a completed compliance form under penalty of perjury that describes the corrective action taken and attaches a copy of the new warning and a photograph showing its placement on the premises.

Within 30 days of service of the notice, the alleged violator must pay the civil penalty to the noticing party's attorney, who then pays the State of California 75% of that amount (within 30 days of receiving funds from the alleged violator) and retains 25%. Importantly, nothing shall prevent the Attorney General, District Attorney, or city attorney from bringing an action against the alleged violator. Nothing in this law should affect any pending Proposition 65 litigation.

Hanson Bridgett LLP Experience

Hanson Bridgett's lawyers are experienced in counseling clients on Proposition 65 compliance, as well as handling Proposition 65 litigation when it arises. We have tried to verdict some of the first Proposition 65 cases brought in California, and have worked with countless businesses to resolve these citizen lawsuits and to develop warnings to limit exposure to such suits in the future.

For more information, please contact:

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