

California Adopts Long-Pending Modifications to Proposition 65 "Clear and Reasonable" Warning Regulations

On August 30, 2016, the Office of Health Hazard Assessment ("OEHHA") adopted amendments to Article 6, Clear and Reasonable Warnings, of the California Code of Regulations for the Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"). The newly adopted amendments are the result of years of proposed rulemaking, hearings, and feedback regarding regulatory updates and protocols for the methods of transmission and content of warnings deemed "clear and reasonable" under Proposition 65.

The most obvious effect on consumers of the amended regulations is a change in the content of a Proposition 65 warning. Beginning August 30, 2018, the generalized Proposition 65 "safe harbor" warning for consumer products must identify at least one Proposition 65-listed chemical by name that is contained in the product and must include a pictogram, as follows:

[! pictogram] **WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer, and [name of one or more chemicals], 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.

In addition, the amendments address various other types of location-specific or product-specific exposures, such as environmental exposure, alcoholic beverages, dental care, and recreational vehicles. The amendments also include the extension of the emergency regulation issued on April 18, 2016, for bisphenol A ("BPA") point of sale warnings, which would otherwise have expired on October 15, 2016. However, the new BPA provision will sunset one year from adoption – on August 30, 2017 – unless acted on by the agency.

The amendments are intended to provide the public with more informative warnings, while giving businesses greater guidance



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and flexibility on the content and delivery of such warnings. The amended regulations require the warnings to be more visible, more specific as to the chemical exposure(s) at issue, and more accessible to non-English speakers. Also, for on-product warnings, businesses may use the pictogram symbol and one of the following references to the OEHHA-created website: 1) "Cancer – www.P65Warnings.ca.gov"; 2) "Reproductive Harm - www.P65Warnings.ca.gov"; or 3) "Cancer and Reproductive Harm - www.P65Warnings.ca.gov," in lieu of the full warning text provided above. Other requirements for placement of warnings remain substantially the same as in the prior version of the regulation.

In addition to the various modifications to the look and content for warnings specific to each type of exposure, the amendments address a few issues which are more globally impactful to all parties involved in Proposition 65 compliance and litigation. Specifically, the new regulations are intended to provide clarity on the relative responsibilities for providing Proposition 65 warnings within a product's chain of commerce. The regulations make explicit that the goal of Proposition 65 is not to penalize retailers, but to reach product manufacturers, distributors, and premises owners. As such, manufacturers, producers, importers, and distributors are required under the amended regulations to either provide a warning themselves or provide written notice to retailers. The notice must indicate that a warning is required, the exact name or description of the product, all necessary warning materials, and a receipt and acknowledgement from the retailer at time of initial distribution and *every 180 days thereafter* during which the item is offered for sale. Furthermore, the amendments make a retailer responsible for providing the warning only when one of the following occurs: 1) it sells the product under its own brand or trademark; 2) it has knowingly and intentionally introduced a listed chemical; 3) it has covered, obscured or altered a warning; 4) it has received warning information and sold the product without posting; or 5) it has actual knowledge of the exposure and there is no upstream entity that the courts or a citizen suit can reach.

Moreover, the amendments establish that a warning provided pursuant to, and in compliance with, a court-ordered settlement or judgment is per se "clear and reasonable" for purposes of Proposition 65, and will remain compliant even after the new regulations take effect. Thus, for companies that have resolved Proposition 65 lawsuits through court-approved settlements, this proposed regulation should provide comfort that they can continue to rely on their existing warning program to the extent a court has reviewed and approved it, unless the regulation is further amended to remove that protection at some point in the future.

The new regulations will become operative on August 30, 2018. In the interim, to allow affected business to transition to the new warning requirements, businesses may comply with the regulations that were in effect on August 30, 2016, or the newly-amended regulations. More information regarding the new regulations is available on OEHHA's website, at <http://oehha.ca.gov/proposition-65/crnr/notice-adoption-article-6-clear-and-reasonable-warnings>

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