

WARNING: FAILURE TO POST PROPER SMOKE EXPOSURE SIGNS COULD BE HAZARDOUS TO YOUR FISCAL HEALTH

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As many of you are aware, the California Attorney General (“AG”) is in the midst of settling a number of Proposition 65 claims originally brought against California skilled nursing facilities (“SNFs”) by a group called California Advocacy Group or “CAG.” Starting in December 2009, 60-day notices of intent to sue were filed against 114 California SNFs alleging that they failed to give adequate warning to residents and staff of the risks of secondhand exposure to smoke from residents smoking in designated, supervised areas. CAG threatened the SNFs with penalties of as much as \$2500 per day and \$70,000 per facility.

The California Association of Health Facilities (“CAHF”) has worked closely with the AG’s office to preempt these claims. Under Prop. 65, the AG can file actions against and enter into settlement agreements (called “consent judgments”) with violators to preclude private enforcers, such as CAG, from recovering from the same facilities for the same violations. The price tag is also much more attractive: the claims by the AG (not to be confused with CAG) will settle for \$1000 per SNF originally named in CAG’s notices.

The AG filed its complaint against the named SNFs on March 26, and the proposed settlement terms will be considered (and hopefully approved) at a hearing in Alameda County Superior Court on June 7. By the time this article is published, the consent judgment will have been shared with these SNFs and they will have had an opportunity to review and sign it. The consent judgment addresses not only penalties, but also proper signage and precautions to reduce exposure to secondhand smoke.

During the next phase, California SNFs that were not named in the CAG notices will be allowed to opt into the settlement at a lower price: \$750 per SNF. Like the first group, they will enjoy protection against a private lawsuit for the same violations addressed by the consent judgment. The AG expects to begin the opt-in process after the June hearing approving the initial settlement terms.

So, you might ask: How does all this SNF activity affect RCFEs? Since CAHF first published an alert on this topic on February 18, the senior care sector has been abuzz with this and similar questions. In this article, I will answer many of the questions I have been asked since this saga first unfolded over three months ago.

Q1: Does the proposed AG settlement protect RCFEs?

A1: No. It is strictly limited to SNFs.

Q2: Then why should I care about the AG’s suit?

A2: You should care because CAG and its competitors have gone after other sectors (such as hotels and apartment buildings) in the past and could easily go after RCFEs or other senior care providers in the future. Mercifully, the statute of limitations on Prop. 65 claims is one year. If RCFEs adopt the terms of the AG’s settlement with SNFs, they may be able to eliminate (or certainly mitigate) any exposure to liability in connection with secondhand smoke. Perhaps the easiest component of the settlement to adopt is the AG-approved signage. (Information about these requirements is posted on CALA’s website. Two different signs are required: one in the lobby or entrance and a different one in designated smoking areas.)

Q3: When are we going to see the AG’s settlement terms?

A3: By the time this is published, the final terms should be available.

Q4: How critical is it that we use the exact font, color, verbiage and materials approved by the AG? We would like to create something classier.

A4: You have flexibility regarding the signs because RCFEs are not included in the AG’s settlement. Prop. 65 states that you shall not “knowingly and intentionally” expose an individual to a chemical known to the State to cause cancer or reproductive toxicity without first giving him or her “clear and reasonable warning.” I recommend that the content of the notice mimic the AG’s language to assure proper warning; however, you have some discretion as to color, font and material, as long as the warning gives the public fair notice. For example, a deviation in color (from bright red) would likely be acceptable as long as the color selected did not blend completely into the décor.

Q5: We only allow smoking outdoors. Are we subject to Prop. 65?

A5: Yes. Both indoor and outdoor areas are affected by this law.

Q6: We only allow smoking in employee lounges. Our residents are not exposed to smoke. Do we need to comply?

A6: Again, yes. Prop. 65 was designed to protect members of the public, be they residents, staff, volunteers, or visitors.

Q7: If we only allow smoking outdoors, where should we post the signs?

A7: You should post a sign by the door or other egress nearest the smoking area.

Q8: What if our smoking apartments are interspersed with non-smoking apartments? Must we post a Prop. 65 notice on or near the door to each unit? Can we instead post a sign by the elevator or stairwell indicating that some units on the floor allow smoking?

A8: Again, your objective is to give an individual entering an area where smoking is allowed “clear and reasonable warning.” You should place your notices so that you are satisfied that they give such warning.

Q9: Our campus is very spread out. Must we post a Prop. 65 notice by or on the door to each home?

A9: See Q8 above.

Q10: We operate a multi-level facility that includes an SNF. If we sign the settlement agreement under our corporate name, can we protect the entire campus?

A10: No. The settlement affects only SNFs.

Q11: If there were one step we could take now to reduce our liability exposure, what would it be?

A11: I would recommend immediately posting secondhand smoke risk signs that materially comply with the signs approved by the AG for SNFs. (This information is posted on CALA's website.)

In many ways, RCFEs and other senior care housing providers have dodged a bullet and caught an opportunity with respect to the Prop. 65 SNF litigation. RCFEs were not named in CAG's notices, yet they can benefit from the experience of their SNF neighbors by adopting as best practices the carefully crafted settlement terms agreed to by the AG. Next time, the roles may well be reversed.

Stay tuned for updates.