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New Proposition 65 Warning Requirements Take Effect in California

On August 30, 2018, significant updates to California's Proposition 65 regulations went in to effect, potentially impacting all businesses that operate in California including, but not limited to, those that sell products in the state. The new regulations dramatically update the requirements for providing warnings deemed to comply with the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65). The implementation of these new regulations is likely to increase Proposition 65 enforcement actions, where violations can result in statutory penalties as high as \$2,500 per day, per violation. As a result, businesses seeking to issue Proposition 65 warnings guaranteed to comply with the statute, and thus avoid costly enforcement actions, need to update their Proposition 65 warning labels and signs if they have not already done so.

BACKGROUND

California's Proposition 65 requires the Office of Environmental Health Hazard Assessment (OEHHA) to publish a list of chemicals known to the State to cause cancer or developmental or reproductive toxicity. The list is updated annually and has grown to include over 800 chemicals. The law requires businesses offering products or services in California that expose any person to a listed chemical above a threshold level to provide a "clear and reasonable" warning prior to such exposure. Given the breadth of the statute, it impacts any business that manufactures or sells a product that could reach California and any business that owns or operates a facility in California, including businesses in the retail, food, automotive, medical, and energy sectors. OEHHA's regulations provide "safe harbor" warnings that businesses can rely upon to comply with the statute. These regulations used to permit businesses to comply with the statute by using generic warning language, but, in 2016, OEHHA passed significant revisions to these regulations for the first time since the 1980s. These new requirements, which require more specific warnings, went into effect on August 30, 2018 for products manufactured on or after that date.



KEY CHANGES TO THE REGULATIONS:

- **Changes to Safe Harbor Warnings:** In order to satisfy the statute's requirement to be "clear and reasonable," warnings must state that the product "**can expose** you to a chemical ..." known to the State to cause cancer or reproductive toxicity, rather than the prior safe harbor language that the product "**contains** a chemical ..." The new regulation also requires that the warnings include a triangle graphic and a link to the new OEHHA website that hosts detailed information for the public about exposures to listed chemicals.
- **Identification of Chemical Names:** Most warnings for products, services, or locations that would expose a person to one or more Proposition 65 chemicals above a threshold level are required to identify at least one of those chemicals by name, in the warning. The mandate to businesses to identify chemicals by name is a significant departure from the prior regulations and aims to prompt businesses operating in California to evaluate the potential presence of chemicals in their products. It also forces businesses to provide consumers with a more specific product warning rather than the generic warning language many businesses relied upon to comply with the statute. The regulations allow a "short-form" warning that does not require chemical names, but business must still know which endpoint(s) to identify in the warning.
- **Specific Warnings for Certain Products and Exposure Scenarios:** The new regulations include specific safe harbor warning language for certain product and exposure scenarios. Those specific warnings include exposure to food, dental care, raw wood, diesel engines, vehicles, enclosed parking facilities, amusement parks, service stations, repair facilities, and designated smoking areas. Businesses that sell products or operate facilities with these exposure scenarios who want the safe harbor protection need to update their warning labels and facility signage to comply with the new regulations.

NEW PROVISIONS EASILY OVERLOOKED:

- **Internet Warnings:** Businesses selling products over the internet must pay special attention to the new regulations as they require Proposition 65 warnings on websites selling products to consumers in California. The new regulations state that if a product that requires a Proposition 65 warning is sold to California consumers via the internet, the Proposition 65 warning must be displayed online in a location to ensure that California consumers will see it before completing the purchase. This new requirement impacts nearly every business that sells products over the internet.
- **Foreign Language Warnings:** If a product or location contains warnings or signs in a language other than English, businesses should determine if the content of those warnings or signs triggers the new requirement to provide the Proposition 65 warning in that additional language.

These new regulations change the strategies that businesses use to comply with Proposition 65. Under the prior regulations, many businesses found it easier to simply provide a generic Proposition 65 warning rather than determine which Proposition 65 chemicals were present in their products or undertake the costly exposure assessment allowed under the rule to demonstrate that the product does not pose a significant risk. Given the increased regulatory requirements, including the requirement that at least one chemical be identified by name or an endpoint provided on most warnings, businesses may reevaluate this approach.

Now that the new regulations are in effect, businesses should be prepared to see an increase in Proposition 65 enforcement actions. Businesses that do not label their products or facilities with warnings that comply with the new regulations could be the target of these enforcement actions, where statutory penalties for a violation can be as high as \$2,500 per violation per day.

King & Spalding has extensive experience advising clients in every industry in Proposition 65 compliance and representing companies in Proposition 65 enforcement actions.



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