

On The Horizon: Revisions To Prop 65 Warning Regulations

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For nearly a year, the Office of Environmental Health Hazard Assessment (OEHHA) has been working on a complete overhaul of the regulations governing the warning requirements under the Safe Drinking Water and Toxic Enforcement Act of 1986, colloquially known as Proposition 65 and codified at California Health & Safety Code Section 25249.5 et seq. Proposition 65 broadly requires that people in the course of doing business provide a warning prior to creating an exposure to any one of more than 900 chemicals that have been determined by the state of California to cause cancer and/or reproductive toxicity. If a person doing business within the meaning of the law creates such an exposure without giving a warning, he or she may be subject to fines, civil penalties and injunctive relief. Cal. Health & Saf. Code § 25249.6.



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OEHHA initially published a proposed regulation that would repeal and replace the current Article 6 of Title 27 of the California Code of Regulations on Nov. 27, 2015. Since then, OEHHA has revised the proposed regulations significantly, and received numerous comments on the revised regulations, the most recent of which were due on June 6, 2016.[1] Though OEHHA could make additional revisions to the regulations, they appear poised for finalization. The new Article 6 effort represents a major change and update from the prior warning scheme under Proposition 65 that would have significant consequences for businesses affected by Proposition 65.

As currently drafted, the proposal provides a two-year grace period between the date of adoption and its effective date, allowing businesses that will be affected time to review the new regulations and make any changes necessary to comply.[2] It further provides that a business may, but need not, comply prior to the effective date, and that any consumer product manufactured prior to the effective date will be deemed to be in compliance with the new Article 6 even after its effective date if the product's warning complies with the current version of the warning regulations as they were adopted in September of 2008.[3]

OEHHA's proposal also leaves some key features unchanged from the current version of Article 6. The regulations continue to provide "safe harbor" warnings for businesses which, if utilized, are deemed to be "clear and reasonable" under the statute.[4] For consumer products, warnings must continue to be "prominently displayed ... with such conspicuousness as compared with other words, statements, designs or devices" that they will be "likely to be read and understood by an ordinary individual under customary conditions of purchase or use." [5]

And under both current regulations and the proposed revisions, businesses may give warnings that

differ from the “safe harbor” warnings described by the regulations, as long as they comply with the statute.[5] The proposal also explicitly preserves existing consent judgments, stating that a person complying with an existing consent judgment’s warning requirements will be deemed to be in compliance with the regulations.[7] Businesses thus will not be faced with the choice of complying with a court order or complying with the new regulations.

But the similarities largely end there, and the updated regulatory scheme will impose significant new requirements on businesses seeking to comply with the statute via the regulatory safe harbor warnings. The most significant of these is the requirement that warnings identify at least one chemical for the endpoint covered by the warning. In other words, a warning regarding a carcinogen must identify at least one chemical listed as a carcinogen that is present in the product, and a warning for reproductive toxicity must identify at least one chemical listed as a reproductive toxicant.[8]

Previously, it was sufficient for a warning to simply state that the product contained “chemical[s] known to the state of California” to cause cancer and/or reproductive toxicity, without naming a particular chemical.[9] Warnings still need not list every chemical in a product in order to protect a business from liability — they may simply state that a product contains “chemicals known to the state of California to cause [cancer and/or reproductive toxicity] including” the name of at least one listed chemical, in which case the business is protected from liability for the presence of other chemicals with the same endpoint. In the alternative, if a business chooses to use an on-product label, a business may direct consumers to the new Proposition 65 warning website administered by OEHHA (found at P65Warnings.ca.gov) and specify whether the warning is for a carcinogen or reproductive toxicant.[10]

The requirement that a warning identify at least one chemical and that the warning is effective only for the particular endpoint for which the chemical is listed will limit the ability of businesses to protect themselves by simply providing a warning, as the warning must identify a particular chemical and whether the product contains carcinogens, reproductive toxicants or both. A company cannot, therefore, protect itself from liability for the presence of an unnamed carcinogen by naming a reproductive toxicant in its labeling and vice versa. Nor can businesses issue blanket warnings without identifying and confirming the presence of at least one listed chemical.

The appearance of a warning that falls within the safe harbor is also described in more detail than in the current version of Article 6. Under the new version, warnings must also now include a black exclamation point in a yellow equilateral triangle with a bold black outline, unless the product label does not use yellow ink, in which case the symbol may be in black and white, and must comply with a variety of specific requirements regarding font size, and bolding.[11]

The proposal makes changes to the language required in specific locations. For example, previously restaurants were protected from potential liability by posting the following warning: “WARNING: Chemicals known to the state of California to cause cancer, or birth defects or other reproductive harm may be present in foods or beverages sold or served here.”[12] The new regulations substitute this language: “**WARNING:** Certain foods and beverages sold or served here can expose you to chemicals including acrylamide in many fried or baked foods, and mercury in fish, which are known to the state of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/restaurant.”[13] Thus, businesses will need to carefully check the new safe harbor language and consider whether they need to update any existing warnings that are not covered by consent judgments if and when the new regulations become final.

The new proposed regulations also add product-specific safe harbor warnings for a wide variety of

products. These include specific guidance for not just alcoholic beverages, prescription drugs and emergency medical or dental care (which all have specific safe harbor warnings under existing Section 25603.3), but also for raw wood products, furniture, dental care that is not an emergency, diesel engines, vehicles, enclosed parking facilities, amusement parks, petroleum products, service stations, and designated smoking areas.[14] Companies creating exposures of these types will also have to be alert to the new regulations and ensure that any warnings they provide comply not just with the general safe harbor warnings contained in proposed Sections 25602 through 25605, but also any applicable more specific ones.

OEHHA's proposed new Article 6 also contains specific provisions for warnings not given in English. If finalized, the new regulations would require that "[w]here a consumer product sign, label or shelf tag used to provide a warning includes consumer information in a language other than English, the warning must also be provided in that language in addition to English." Likewise, environmental exposure warnings conveyed via mail must be made "in English and in any other language ordinarily used by the person to communicate with the public," and warnings provided via newspaper must be given in another language "if a newspaper published in a language other than English is circulated in the affected area." [15] This represents the first time that OEHHA has required warnings in a language other than English.

Bringing warnings into the 21st century, the new regulations also finally explicitly address the question of internet sales. They require that a warning must be provided either on the product display page, or in a clearly marked hyperlink using the word "WARNING," "or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase." [26] Under the new regulations, on-product warnings or warnings that the customer "must search for ... in the general content of the website" are not "clear and reasonable," meaning that consumers purchasing products outside of California will also be likely to be faced with an increasing number of Proposition 65 warnings, as they are likely to buy from the same websites selling potentially violative products to Californians.[17]

The new regulations similarly make specific provision for products sold via catalog, requiring warnings to be "provided in the catalog in a manner that clearly associates [them] with the item being purchased." [18] These changes provide guidance in areas that have been fraught with uncertainty for many years, but will likely also make internet retailers who previously had thought themselves beyond the reach of Proposition 65 to re-evaluate their websites and catalogs, and may force costly redesigns of those websites.

The warning requirements placed on websites also to some degree undermine OEHHA's purported attempt to implement Section 25249.11 of Proposition 65, which requires it to "minimize the burden on retail sellers of consumer products" by "plac[ing] the obligation to provide any warning materials ... on the producer or packager rather than on the retail seller" to the extent practical. (See Cal. Health & Saf. Code section 25249.11(f); Proposed Section 25600.2(a).) Internet and catalog warnings obviously must be provided by the retailer, even if the manufacturer has already put warnings on the product's label. Thus, though retailers running brick and mortar stores may find their burden reduced slightly, the same cannot be said for e-tailers.

Overall, the proposed regulations represent an almost complete overhaul of the regulations implementing the warning requirements of Proposition 65. They cover areas where OEHHA had previously been silent, such as internet sales and also provide significant revisions to the previous safe harbor warnings. Businesses affected by Proposition 65 will have a two-year grace period to review the new regulations and determine what steps, if any, they need to take to comply, but they should

nevertheless be vigilant and proactive about doing so as soon as the new Article 6 is adopted because compliance could be costly and time-consuming.

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[1] The current regulations are cited as “Cal. Code Regs. Tit. 27, § [x].” The revised regulations will be cited as “Proposed § [X].”

[2] Proposed § 25600 (b).

[3] Ibid.

[4] Compare Cal. Code Regs. Tit. 27, § 25601 with Proposed § 25601

[5] Compare Cal. Code Regs. Tit. 27, § 25603.1(c) with Proposed § 25601(c).

[6] Compare Cal. Code Regs. Tit. 27, § 25601 (“Nothing in this section shall be construed to preclude a person from providing warnings other than those specified in this article that satisfy the requirements of this article, or to require that warnings be provided separately to each exposed individual”) with Proposed § 25600(f) (“Nothing in Subarticle 2 shall be construed to preclude a person from providing a warning using content or methods other than those specified in Subarticle 2 that nevertheless complies with Section 25249.6 of the Act.”).

[7] Proposed §25600(e).

[8] See Proposed §25601(b).

[9] Cal. Code Regs. Tit. 27, §25603.2.

[10] Proposed §25603(b)

[11] See, e.g., Proposed §25603(a); Proposed § 25604 (environmental warnings must be in at least 72 point size type.)

[12] Cal. Code. Regs Tit. 27, §25603.3(a).

[13] Proposed § 25607.6. Note that the change from simply all capital letters to bolded and all capital letters is also reflected in the new regulations.

[14] See proposed sections 25607.1 through 25607.28.

[15] Proposed §25602(d); see also Proposed §25607.1(d) (creating an identical requirement for food product signs); proposed §25604(a)(2)(D) & (3)(E).

[16] Proposed § 25602(b).

[17] Ibid.

[18] Id. at (c)