

Client Alert

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New Prop 65 Warning Requirements on the Horizon?

By Michael Steel and Dan Gershwin

Proposition 65 warnings could soon become a much bigger burden for businesses.

On Friday, March 7, the California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA) released a pre-regulatory draft of proposed changes to its regulations governing Proposition 65 warnings. As drafted, the proposed regulations would place major new burdens on California businesses and create still more litigation regarding the law's requirements.

The proposed regulations would require businesses, for every warning given, to prepare and submit a very detailed report to be posted on the OEHHA website for public viewing, would modify the language that must be used to meet the "clear and reasonable" warning requirement, and would require all warnings to explicitly inform consumers of the presence of any one of 12 specially designated chemicals, including acrylamide and lead.



PROPOSED REGULATORY PROVISIONS

Major Change #1: Detailed Reports to OEHHA

Within 30 days of first providing a warning to the public, a business must provide a detailed report to OEHHA, which will be posted on OEHHA's Proposition 65 warning website. Every business posting a warning will be required to identify, among other things:

- The specific products covered, including barcodes;
- The type of occupational exposure, if any;
- The type of environmental exposure, if any, and the affected area;
- The name of the chemical or chemicals at issue;
- Anticipated routes of exposure;
- Reasonably available information concerning anticipated levels of human exposure; and
- Information concerning actions a person can take to minimize or eliminate exposure, if any.

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This report would need to be updated by a business within 30 days of becoming aware that exposure to an additional chemical requires a warning, or when any other information needs to be updated. This will be a significant new burden for businesses; moreover, factual disputes over what constitutes compliance (e.g., the boundaries of the “affected area” and the “anticipated levels of human exposure”) will likely give rise to more lawsuits.

Major Change #2: Warning Contents

Under the current regulations, businesses typically use the familiar “safe harbor” language in their warnings, which states that chemicals known to cause cancer, birth defects, or reproductive harm are present in a product or in an area of exposure. The current “safe harbor” language would be eliminated and replaced with new mandatory warning language. OEHHA’s proposed regulations differ from the “safe harbor” in that:

- The warnings are no longer optional;
- They require use of the phrase “will expose” or “will be exposed” to describe the exposure, rather than the current language, which focuses on the chemical’s presence in a product or area;
- Warnings for nonmedical consumer products, as well as occupational and environmental exposures, must include the international health hazard symbol for toxicity;
- As discussed in more detail below, the presence of any of 12 specially designated listed chemicals must be explicitly named in the warning’s text; and
- They require businesses to provide a link to the OEHHA website, where consumers can access more information related to warnings, including information from the newly required detailed reports discussed above.

Below are the changes to the warning language for the general warning categories:

- Nonfood and nonmedical consumer product warnings:

“**WARNING.** This product will expose you to a chemical [or chemicals] known to the State of California to cause [cancer/birth defects or other reproductive harm]. For more information go to www.P65Warnings.ca.gov.”
- Food warnings, other than those on a label:

“**WARNING.** Consuming this product will expose you to a chemical [or chemicals] known to the State of California to cause [cancer/birth defects or other reproductive harm]. For more information go to www.P65Warnings.ca.gov.”

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This warning is intended to be provided at the point of display; the alternative food label warning is discussed below.

- Occupational exposures:

- Warning signs:

- “**WARNING.** Entering this area will expose you to a chemical [or chemicals] known to the State of California to cause [cancer/birth defects or other reproductive harm]. For more information, ask your employer or go to www.P65Warnings.ca.gov.”

- Product labels:

- “**WARNING.** Using this product will expose you to a chemical [or chemicals] known to the State of California to cause [cancer/birth defects or other reproductive harm]. For more information, ask your employer or go to www.P65Warnings.ca.gov.”

- General environmental-exposure warning signs:

- “**WARNING.** Persons in [location] will be exposed to a chemical [or chemicals] known to the State of California to cause [cancer/birth defects or other reproductive harm]. For more information go to www.P65Warnings.ca.gov.”

Separately, the proposal includes specific unique requirements for:

- Alcoholic beverage warnings;
- Restaurant warnings;
- Prescription drug and medical device warnings;
- New dental care warnings; and
- Warnings for the following specific environmental exposures: parking facilities, apartments/hotels/lodging facilities, and amusement parks.

Major Change #3: Explicit Naming of 12 Specially Designated Chemicals

If one of the following is a chemical for which warning is being provided, businesses would be required to explicitly name it in the text of the warning: acrylamide; arsenic; benzene; cadmium; chlorinated tris; 1, 4-Dioxane; formaldehyde; lead; mercury; phthalates; tobacco smoke; and toluene.

Selected Additional Provisions

For foods and nonmedical consumer products, OEHHA is proposing to allow slightly simplified versions of on-product label warnings in recognition that long warning messages may not fit on certain packaging. These simplified warnings could be used instead of the new mandatory language set forth above:

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“WARNING: Cancer Hazard”

or

“WARNING: Reproductive Hazard”

If one of the 12 specially designated chemicals is present, the label would additionally need to state, “Will expose you to [chemical].” Businesses providing simplified warnings for nonmedical consumer products would still be required to use the international health hazard symbol, and all simplified warnings would be required to provide a link to OEHHA’s Proposition 65 warning webpage.

OEHHA’s proposed regulations would not apply to parties to court-approved settlements prescribing warning content and methods, if those settlements were entered into prior to January 1, 2015. While this exception appropriately recognizes that court-approved warnings should not be overturned by the agency, limiting the exception to parties to the settlements, rather than to products that are the subject of settlements, may result in very different warnings on identical products, creating confusion and potentially misleading consumers. Consumers may conclude, for example, that a product whose label bears the international health hazard symbol for toxicity is more dangerous than an identical product made by a different manufacturer.

The proposed regulations contain provisions intended to clarify that the primary responsibility for providing clear and reasonable warnings for consumer products and foods falls on the product manufacturer, producer, distributor, or packager rather than the retail seller. At the same time, the proposed regulations require retail sellers to cooperate in warning efforts, and state that retail sellers would bear “primary responsibility” for placement and maintenance of warnings other than those on product labels. This provision, however, does not appear to actually change retailer liability under the Act.

Finally, under the proposed regulations, small retail sellers with fewer than 25 employees will have a limited opportunity to cure minor violations of warning requirements.

Overall, the proposed regulatory changes are likely to impose significant compliance costs, create new reporting obligations that will prove burdensome for all regulated entities, and increase litigation. Hopefully, the public input invited by OEHHA will produce a document that achieves its stated purpose without these presumably unintended consequences.

OEHHA is holding a public workshop where it will discuss the proposed regulatory changes on April 14, 2014, in Sacramento, and will also be accepting written comments until May 14, 2014. At this time, OEHHA is targeting summer 2014 for the formal proposal of the new regulations, and hopes to adopt the final regulations by summer 2015.

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