



WASHINGTON WATCH

Proposition 65 Warning Regulations Must Change -- And Soon!

By Lynn L. Bergeson

Proposition 65 (Prop 65) is very much a part of the “right-to-know” landscape in California and, as we all know, Prop 65 warnings are especially visible in that state. This much is clear. What may be less clear are the sweeping changes in the “clear and reasonable warning” requirements now scheduled to take effect August 30, 2018. This date may seem like a long way off, but it is right around the corner in terms of coming into compliance with these dramatic changes. This *Washington Watch* column summarizes the new warning requirements and the reasons why companies need to focus now on these changes.

Background

The basics of Prop 65 are well known. Decades ago, the State of California determined that its citizens had a right to know if products they purchase and use or are exposed to in the workplace could cause them to come into contact with chemicals believed to be carcinogens or reproductive toxicants. To ensure people were advised of these chemical exposures, Prop 65 was ushered into effect in 1986. Under Prop 65, businesses in California with ten or more employees must provide “clear and reasonable warning” before knowingly exposing individuals to a chemical listed by the State as known to cause cancer or reproductive toxicity. The regulations provide a safe harbor for warning language and certain means for providing the warning that are presumed to be “clear and reasonable.” The new regulations fundamentally redefine the terms and conditions of the safe harbor warnings. Failure to conform timely, existing safe harbor warnings could result in substantial penalties under Prop 65’s bounty hunter enforcement provisions.

The dramatic new requirements are the result of provisions adopted by the California Office of Environmental Health Hazard Assessment (OEHHA) on August 28, 2016, in its Prop 65 Article 6 regulations covering “clear and reasonable warnings” requirements. The final regulations are effective on August 30, 2018. In the interim, businesses may comply with the regulation that came into effect on August 30, 2016, or the provisions of the revised regulation. Until August 30, 2018, companies have the choice of whether to comply with the clear and reasonable warning requirements that will be operative until August 30, 2018, or the clear and reasonable warning requirements that must be operative by August 30, 2018.

Considering the substantive and controversial revisions in the final regulations applicable to Prop 65 warning requirements, and also considering production and distribution chain challenges and logistics, companies should not delay reviewing current warning practices and determining when and how these changes are to be implemented.

Key Changes

Prop 65 regulations currently provide several methods of transmission for warning messages, including signs, notices, stickers, or labels. The new regulations expand the list of acceptable methods for providing a warning for an exposure to a listed chemical from a product to incorporate warnings via electronic means. To comply with the new requirements, companies must include the safe harbor language on the product display page of the web listing. Warnings provided with Internet purchases also must be provided to the purchaser prior to completing the purchase (*e.g.*, clearly marked hyperlink using the word “WARNING”). Companies considering this new method of transmission must be careful to ensure that requirements related to the timing of the warning are satisfied. Even warnings that are not relayed via electronic means or Internet sales should be reviewed as to when that warning is still compliant, as the revised regulations no longer contain any language that would permit a warning that would be read and understood under customary conditions of use.

The regulations require the inclusion of a warning symbol. It consists of a black exclamation point in a yellow equilateral triangle with a bold black outline.



Also, now required is the signal word “WARNING,” which must appear in all capital letters and bold print. The actual language must now also conform to a more explicit warning: “This product *can expose you to* [name of one or more chemicals], which is (are) known to the State of California to cause [cancer or birth defects or other reproductive harm]. For more information go to www.P65Warnings.ca.gov.” (California Environmental Protection Agency Office of Environmental Health Hazard Assessment (OEHHA), 2016, p. 7). Some stakeholders objected to the use of the word “expose” in product warnings because they are concerned that it will cause unnecessary alarm and because, it was claimed, an exposure may not actually occur. OEHHA concluded that these concerns are contrary to the purpose of the statute, which is to provide people with notice concerning their *exposures* to listed chemicals.

One of the more consequential changes relates to the warning language, including but not limited to adding a new pictogram and referencing OEHHA’s new website, www.P65Warnings.ca.gov/product. Significantly, companies must identify the name of one or more of the listed chemicals for which the warning is being provided. When the warning is being provided for more than one endpoint (i.e., cancer and reproductive toxicity), the warning must include the name of one or more chemicals for each endpoint, unless the named chemical is listed as known to cause both cancer and reproductive toxicity and has been so identified in the warning. Companies must review all the products for which they provide warnings and determine how they will meet this new regulatory requirement on a product-by-product basis depending on whether there is one or more chemicals for which warning is required and the bases for each such warning.

The new regulations provide tailored methods for transmission of warnings and warning language for several products, chemicals, and area exposures, as follows:

- Food (including dietary supplements);
- Alcoholic beverages;
- Food and non-alcoholic beverages in restaurants;
- Prescription drugs;
- Dental care and emergency medical care;
- Raw wood;
- Furniture;
- Diesel engines;
- Passenger vehicles or off-road vehicles;
- Recreational vessels;
- Parking garages;
- Amusement parks;
- Petroleum products;
- Service stations and vehicle-repair facilities; and
- Designated smoking areas.

Any company that has warning obligations related to any of these scenarios must review and ensure compliance with the specific warning requirements. The warning requirements are quite specific. Care will need to be taken to ensure both the content and location of all such Prop 65 warnings are correct.

If a consumer product's sign, label, or shelf tag notes a language other than English, that product's Prop 65 warning must also be made in any other languages. Warnings for environmental and occupational exposure similarly must be provided in any language in which other signs at a facility appear.

The revised regulations limit the circumstances of when the retail seller is responsible for providing the warning requirement. Any company with an arrangement to have a retail seller or other entity provide a Prop 65 warning for its product(s) must review that arrangement and determine if current procedures comply with the revised regulations.

More Recent Guidance

Most recently, OEHHA released a *Questions and Answers for Businesses (Q&A)* document related to its August 28, 2016, (California Environmental Protection Agency OEHHA, 2017) adopted revisions to the Prop 65

regulations covering clear and reasonable warnings requirements. The Q&A document provides important guidance on issues related to those responsible for providing warnings, the methods for providing warnings via the Internet or catalogs, short-form (previously on-product) warnings, and issues related to occupational and environmental exposure warnings. OEHHA also clarifies that the date the product is available for purchase does not determine whether the product should have a new warning. Instead, a consumer product that is manufactured prior to August 30, 2018, and labeled with a warning that is compliant with the September 2008 version of the regulations is deemed to be compliant with the new regulations.

Steps to Take Now

The summary above should alert readers to the level of effort that is required to conform business operations with the new requirements. Depending upon a company's commercial operations in California, the burden will be significant or more measured. If you have not already done so, companies should begin now to assess the scope of work needed and develop a plan to implement the changes timely.

The enforcement of Prop 65 has been the subject of considerable consternation for decades. Under the law, "any person" may file a law suit alleging noncompliance if, after issuing a 60-day notice letter, the California Attorney General or County District Attorneys decline to take action. Civil penalties are steep and calculated on a per chemical, per day basis. The law is believed to incentivize citizen lawsuits in that citizens are awarded one-fourth of the civil penalty -- hence the "bounty" hunter characterization of Prop 65. The standard of proof is also very lax as there is no requirement to prove injury and plaintiffs' attorney fees are routinely awarded. Often, rather than engage in protracted litigation, companies settle claims to avoid the cost of litigation.

In light of the significant changes in the law and the need for new and different warnings under Prop 65, there is every reason to believe citizen and state enforcers alike will be on the enforcement prowl come August and thereafter. These are not trivial changes and care will need to be taken to understand the rule and come into compliance with it to avoid the damaging consequences of allegations of non-compliance. In addition to the obvious

financial burden of paying a penalty, reputational damage, and loss of consumer and employee confidence also need to be considered. Understanding the new requirements and developing a plan to satisfy them provides the surest way to avoid these unplanned costs and obtain the peace of mind planning and regulatory compliance provide.

References

California Environmental Protection Agency Office of Environmental Health Hazard Assessment (OEHHA). (2016). Title 27 California Code of Regulations. Article 6 Clear and Reasonable Warnings. Subsection 25603(a) (1) (2) (D). Consumer Product Exposure Warnings—Content. Page 7. Available at:

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