



ICT Environmental, Sustainability and Supply Chain Counsel Roundtable

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Garden Court Hotel | Palo Alto, CA





California Proposition 65 Update

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Agenda

- **Prop 65 Refresher** – what it is, how it is enforced
- **Revised Clear and Reasonable Warning Approaches** – what has changed
- **Supply Chain Challenges** – new provisions on allocation of responsibility for Prop 65 warnings
- **Private Enforcement** – early impressions following warning revisions and other trends
- **Other Developments to Watch**

What is Prop 65?

- The warning requirement:
 - “No person in the course of doing business shall knowingly and intentionally **expose any individual** to a **chemical** known to the state to cause cancer or reproductive toxicity **without first giving clear and reasonable warning** to such individual...”
- Applies to approximately 900 [listed chemicals](#)
- Covers consumer product exposures, occupational exposures, and environmental exposures
- Exemption if exposure is within acceptable risk level

How is Prop 65 Enforced?

- Can be enforced by California AG, district or city attorneys, and any individual acting in the public interest (i.e., “bounty hunters”)
- Plaintiffs have sufficient basis for claim if they can show any level of exposure (mere detection of a listed chemical is usually enough)
- Burden then shifts to defendant to show that any exposure would be within acceptable risk levels
- Civil penalties of up to \$2,500 per violation per day, plus plaintiffs’ attorney’s fees

Why is Prop 65 a “hot topic” now?

- Prop 65 enacted in 1986; warning regulations in 1988
- In 2016, warning regulations significantly revised for the first time
- After a 2 year transition period, revised regulations became effective August 30, 2018
- Changes impact *how* warnings should be provided, not *whether* warnings are required
- Yet prompted a wave of activity across industry sectors and supply chains that has led to more warnings

Consumer Product Exposures

Revised “safe harbor” warning *content*

Short form variations (can use if affixed to product/package)

-  **WARNING:** Cancer - www.P65Warnings.ca.gov.
-  **WARNING:** Reproductive Harm - www.P65Warnings.ca.gov.
-  **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

Long form (example for carcinogen and reproductive toxicant)

-  **WARNING:** This product can expose you to chemicals including lead, 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.

Consumer Product Exposures

Revised “safe harbor” warning *methods*

- Four primary options
 - Point of display warnings (shelf signs, tags in stores)
 - Via any electronic device or process that provides warnings prior to purchase (QR codes, electronic displays)
 - Label using long form warning content
 - Label using short form warning content (if affixed to product or package)
- Additional warnings prior to sale for internet or catalog purchases
- Specific provisions on font size, languages other than English, and limitations on providing other consumer information

Consumer Product Exposures

- Warning translations
 - Required when sign, label or shelf tag used to provide warning includes **consumer information** in another language
- Supplemental information
 - Only allowed to extent it identifies source of exposure or provides information on how to avoid or reduce exposure

Considerations for California Facilities

- Occupational exposures
- Environmental exposures
- Specific product, chemical and area exposure warnings



Alcoholic Beverages



Passenger and Off-Highway Vehicles



Amusement Parks



Hotels



Diesel Engine Exhaust



Petroleum Products



Dental Offices



Restaurants



Food



Recreational Vessel



Designated Smoking Areas



Service Stations



Furniture Products



Wood Dust



Enclosed Parking Facilities



Vehicle Repair Facilities

Supply Chain Challenges

- New provisions on allocation of responsibility
 - Statute directs OEHHA to minimize burden on retail sellers to extent practicable
 - Primary responsibility for providing warnings is with manufacturer, producer, packager, importer, distributor
 - Retailer responsibility only in five specified scenarios
 - Manufacturer can transfer responsibility to retailer through new notice provision in 25600.2(b)
 - Or entities can contractually agree to other arrangement

Supply Chain Challenges

- New provisions on allocation of responsibility (continued)
 - Retailers have 5 day opportunity to cure
 - Retailers “shall promptly provide” contact information for manufacturer, producer, packager, importer, distributor to enforcers

Supply Chain Challenges

Key Questions	Context
Could your company be a “retail seller”?	Broadly defined, can include manufacturers who sell third party products
Are other entities seeking to transfer warning responsibility to your company?	Notice letter mechanism an appealing option for suppliers who may not want to label
What do your contractual provisions with suppliers or customers say?	Existing provisions could be viewed as an alternate arrangement
What to do if you are targeted with a 60-day notice due to another entity’s failure?	Unclear how to defend in this scenario

Remaining Ambiguities and Open Questions

- Can retailers refuse to post signs and force manufacturers to provide product labels?
- What warning materials does a manufacturer need to send with a notice letter to retailers?
- Do standard “compliance with laws” provisions count as an alternative arrangement?
- What happens to the warning responsibility if an entity in the distribution is not subject to Prop 65 and does not pass the warning along?
- Can other entities in the supply chain use the notice letter approach to shift liability?
- Can companies provide contextual information about Prop 65 on their websites and still fall within the safe harbor?
- Do warning translations need to be provided for internet purchases?

Private Enforcement

- Too soon to say whether enforcement will target adequacy of warnings (vs. failure to warn)
- Lead and phthalates continue to be most targeted chemicals
- Notices continue to target DEHP and DINP in USB cables, headphones and ear cushions, and other cables and cords, accessory cases
- Several recent notices and one settlement involving BPA in cell phone cases, gaming cases – emerging reformulation standard?
- PFOS and PFOA listings effective Nov. 10

Other Developments to Watch

- From OEHHA

- Requests for information from entities on why warnings provided
- Emergence of additional industry-specific approaches through tailored warnings rulemaking by OEHHA
- More guidance from OEHHA on obligations of different entities within supply chain
- More Safe Use Determinations



Questions?

Thank you!

Next Meeting

Data Centers
April or May 2019
Austin, TX





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