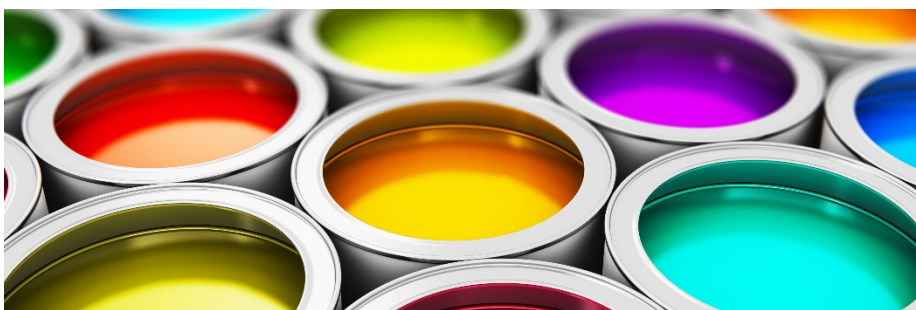


New California Proposition 65 Warning Regulations Take Effect August 30th



In less than two months the safe harbor warning regulations for California's Proposition 65 will be amended and operative, ending a two-year phase-in period. As we have covered previously, the California Office of Environmental Health Hazard Assessment's (OEHHA's) final amendments to the Proposition 65 regulations revise the clear and reasonable safe harbor warnings and it is important for businesses to be prepared.

Below we summarize and link to several alerts we have published since the amendments were first adopted that explain what is needed before the new warning regulations take effect August 30.

Background

The California Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) was enacted to protect drinking water sources from chemical contamination and requires businesses to inform, or warn, individuals about possible exposure to certain chemicals. More specifically, Proposition 65 requires businesses to provide "clear and reasonable" warnings before exposing an individual to a known carcinogen or reproductive toxin by a consumer product, occupational, or environmental exposure. OEHHA is the lead agency for implementing Proposition 65 through regulations. Article 6 of the Proposition 65 regulations provides "safe harbor" warnings to satisfy the clear and reasonable requirements that a business can use to comply with the statute. Article 6 also recognizes that businesses may use other warning language or methods in lieu of the safe harbor warnings to satisfy clear and reasonable requirements of Proposition 65.

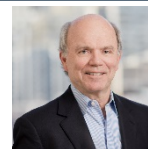
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For several years now, OEHHA has been proposing repeal, replacement, or modifications of the safe harbor warnings, thereby modifying what may satisfy the “clear and reasonable” warning requirements.

Since adopting the proposed amendments in August 2016, the regulated community has been urging OEHHA to clarify the modifications—businesses want to be sure about their warning requirements. OEHHA responded by issuing guidance on the amendments, offering some clarification of the new safe harbor warnings.

The state then approved the new regulation amendments in December 2017. The final, approved amendments include several minor modifications in an effort to incorporate OEHHA’s clarifications.

Implications for “Clear and Reasonable” Warnings

For the past two years, businesses have been allowed to continue using their existing safe harbor warning methods and content or to adopt the new, amended warning methods and content to satisfy the Proposition 65 clear and reasonable warning requirement. After August 30, 2018, all businesses that opt to use safe harbor warnings will need to use the methods and content provided for in the new amendments, or else their warnings will no longer be deemed clear and reasonable under the regulations. As before, businesses may instead use their own warning in lieu of the safe harbor warnings provided for in the regulations, but risk legal challenge on whether a different warning method and content is clear and reasonable.

Amendments include changes to the method and content requirements for most general safe harbor warnings. The amended general safe harbor warnings generally will require businesses to identify at least one specific chemical for which the warning is being given, and whether it is a carcinogen and/or reproductive toxin. The amendments, however, also allow on-product short form safe harbor warnings that do not name a listed chemical. The amendments contain new tailored safe harbor warnings as well for certain environmental exposures—including parking facilities and restaurants—and certain consumer product exposures—including food, wood dust, and dental care. OEHHA is also considering a tailored safe harbor warning for apartments. The tailored safe harbor warnings should be used instead of a general safe harbor warnings for these specific exposures after August 30, unless a business opts to use its own clear and reasonable warning.

There are less than two months left during the interim and businesses should continue to use this time to review their warnings and make certain they conform to the new safe harbor requirements.

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