

By Michelle Corrigan Erikson

Do you manufacture, distribute or supply consumer products (or component parts thereof) that are sold in California? If you do, then you likely are familiar with the California Proposition 65 warnings that should accompany your products if they contain any of the chemicals that the California Office of Environmental Health Hazard Assessment (the OEHHA) identifies as causing cancer, birth defects or other reproductive harm. The OEHHA adopted amendments in September 2016 that significantly modify Prop 65's warning requirements and safe harbor provisions. Those amendments are set to go into effect in two short months, on August 30, 2018.

Stinson Leonard Street previously reported on the history of Prop 65 and its recent amendments shortly after they were adopted by the OEHHA.<sup>1</sup> Outlined below is an overview of the new Prop 65 warning parameters as well as some practical tips for getting your products ready for California sales on August 30.


## THE NEW WARNINGS UNDER PROP 65

Prop 65, as amended, requires any consumer product sold in California, with a few notable exceptions discussed later in this alert, to have "clear and reasonable" warnings if they contain any of the more than 900 chemicals the OEHHA has determined to cause cancer, birth defects, or other reproductive harm. The [OEHHA's list](#) is updated constantly with additional chemicals and toxicities to which each chemical may expose users. Essentially, new Prop 65 warnings must:


- » Contain a symbol with a black exclamation point in a yellow equilateral triangle with a black outline (the symbol can be downloaded [here](#))
- » Contain the word "**WARNING**" in all capital letters and bold type
- » State that the product "can expose" a user to one or more of the listed chemicals known to the state of California to cause cancer, birth defects and/or other reproductive harm. At least one of those chemicals must be identified in the warning by name
- » Include a link to the Prop 65 website operated by the OEHHA

The following are some examples of the new Prop 65 warnings:

- » If your product contains one of the listed chemicals determined by the OEHHA to cause cancer, your warning will look like this:

 **WARNING:** This product can expose you to chemicals including [chemical name], which is known to the State of California to cause cancer. For more information, go to <http://www.p65warnings.ca.gov/>.


- » If your product contains one of the listed chemicals determined by the OEHHA to cause birth defects or other reproductive harm, your warning will look like this:

 **WARNING:** This product can expose you to chemicals including [chemical name], which is known to the State of California to cause birth defects or other reproductive harm. For more information, go to <http://www.p65warnings.ca.gov/>.


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<sup>1</sup> See, [California's Proposition 65: History and Proposed Amendments in 2016](#), and [WARNING: Prop 65 "Can Expose" Product Manufacturers to Increased Litigation in California](#).

- » If your product contains one of the chemicals listed as causing cancer, and another chemical listed as causing birth defects or other reproductive harm, then your warning will look like this:


 **WARNING:** This product can expose you to chemicals including [chemical name], which is known to the State of California to cause cancer and [chemical name], which is known to the State of California to cause birth defects or other reproductive harm. For more information, go to <http://www.p65warnings.ca.gov/>.

- » If your product contains one of the listed chemicals determined by the OEHHA to cause both cancer and birth defects or other reproductive harm, your warning will look like this:

 **WARNING:** This product can expose you to chemicals including [chemical name], which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information, go to <http://www.p65warnings.ca.gov/>.

#### Alternative "Short-Form" Warning

The amendments to Prop 65 allow for alternative safe-harbor language to be used in warnings that are placed directly on a product or a product's immediate packaging. For an "on-product" warning, the new regulations shorten the above warnings to:

 **WARNING:** Cancer [and/or] Reproductive Harm - <http://www.p65warnings.ca.gov/>.

An "on product" warning must comply with certain size requirements. It "must be in a type size no smaller than the largest type size used for other consumer information on the product." See, California Health and Safety Code [Section 25602\(a\)\(4\)](#). "Consumer information" on the product includes other warnings, directions for use, or ingredient lists, but does not include the brand name, product name, company name, location of manufacture, or product advertising. See [Section 25600.1\(c\)](#). Importantly, under any scenario, the "short-form" warning must appear in a minimum of 6-point type.

As a practical matter, the short-form warning is likely intended for small products or products that have very minimal packaging. Although the OEHHA has not placed any restriction yet on the size of the product or packaging on which the short-form warning may be used, we anticipate that the OEHHA may eventually further limit the types of products or packaging on which this short-form warning may be placed in lieu of the "long-form" warnings discussed above.

#### EXCEPTIONS TO THE NEW PROP 65 WARNINGS

Under certain circumstances, a company need not provide a Prop 65 warning on its product sold into California, even if it contains one of the 900+ chemicals listed by the OEHHA. There are four major exceptions of which companies should be aware.

1. If a company can show that the levels of any listed chemical in the product are low enough to be covered by the "[safe harbor](#)" provisions<sup>2</sup> established by the OEHHA, then no warning need be given. The "safe harbor" levels are generally so low that the OEHHA has found that they pose no significant risk to consumers.
2. Certain companies are exempt from Prop 65, subject to certain caveats. If a company employs fewer than 10 people, it is not required to put a Prop 65 warning on any of its products. Similarly, if a company of any size sells no products into California, it need not comply with Prop 65. However, there is a very important limitation to these exceptions. If any exempt company (those with fewer than 10 people or those who sell only outside of California) sells its products to a retailer who subsequently sells in California, and that retailer is not exempt under Prop 65, then a Prop 65 warning should be provided. Under the Prop 65 amendments, a retailer may defer to its suppliers and manufacturers for all warning information about a product. Therefore, even if a manufacturer or supplier is exempt from Prop 65, its non-exempt retailers would likely require and expect the manufacturer or supplier to provide all information necessary to comply with Prop 65.
3. Products manufactured prior to August 30, 2018 are exempt from the new Prop 65 regulations, as long as they are properly labeled in accordance with the old Prop 65 (pre-amendment) regulations. Practical tip: if a manufacturer has a large amount of existing inventory to which the old Prop 65 warning standards (which do not require identification

<sup>2</sup> The OEHHA has established No Significant Risk Levels (NSRLs) and/or Maximum Allowable Dose Levels (MADLs) for 300 chemicals on the Prop 65 list.

of specific chemicals) would apply, then exhausting this existing inventory first will allow more time to prepare for compliance with the new warning standards (which do require identification of at least one such chemical).

4. Products covered by a court-approved settlement can continue to use the warning method and content approved in the settlement, even after the Prop 65 amendments go into effect and even if the warning method subject to a court-approved settlement is different from the amended Prop 65 warning parameters.

#### EFFECTS ON THE SUPPLY CHAIN OF CONSUMER PRODUCTS SOLD IN CALIFORNIA

A big question with most companies subject to Prop 65 is who has the burden of providing the warning information for a product? The answer, quite simply, is everyone in the supply chain other than the retail seller. The new regulations place primary responsibility for providing these warnings onto product manufacturers, producers, packagers, importers, suppliers or distributors of a product. Any of these entities must either provide a warning on the product, or provide notice and warning materials to "the authorized agent" of a retail seller, and receive an acknowledgment that the notice and materials were received. The retail seller is only then responsible for placement and maintenance of the warning materials it received from the product manufacturer, producer, packager, importer, supplier or distributor.

A manufacturer that does not sell directly to retailers has two options for compliance with Prop 65 as amended:

1. Label the product with the required warning; or
2. Provide a warning notice and the warning materials to the downstream packager, importer, supplier, or distributor via their authorized agent, who is then responsible to warn the retailer or the consumer

#### Effect on Bulk Product Sales

A company that manufactures component parts that are sold in bulk to other manufacturers can and should provide Prop 65 warning information related to those component parts to its customers (product manufacturers). This ensures that the component part manufacturer complies with the Prop 65 obligation to warn persons who can be occupationally exposed to the bulk product. The product manufacturer is then responsible for determining whether the product they are manufacturing with the component part causes an exposure to the listed chemical at a level that requires a warning. If so, the product manufacturer is responsible for passing the information along to its customers or the product retailer.

#### Effect on Internet and Catalog Sales

Prop 65 warnings should be provided by a company if it sells a product through the internet or a catalog that may reach consumers in California. The internet or catalog warnings must be "clearly associated" with the particular product in question. For example, if the company sells the product through a website, the amended Prop 65 regulations require the warnings to be included on the product display page, in a prominent hyperlink using the word "WARNING" on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase.

#### TAKEAWAYS

Depending on your business and your product, you should consider all practical and legal aspects of updating your Prop 65 warning plan as soon as possible. Products manufactured after August 30, 2018 will need to comply with the new Prop 65 regulations discussed above before any of those products are sold into California. Failure to comply may expose companies in the supply chain (other than a retail seller who has not received proper warning information from its suppliers) to fines of up to \$2,500 per violation per day.

For more information about the amendments to California's Prop 65, and how those regulations may affect your company or your products, please contact Michelle Corrigan Erikson or the Stinson Leonard Street attorney with whom you regularly work.

#### CONTACT US

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