

New California Prop 65 Warning Requirements: What Businesses Should Consider Now

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Long-anticipated changes to California's Proposition 65 warning requirements took effect on August 30, 2018, through amendments and new rules issued by the California Office of Environmental Health Hazard Assessment. Among other changes, the new rules now (1) require businesses to provide California consumers with product warnings at the time of purchase, including at the time of online purchases; and (2) change the text of the warnings that businesses may use to qualify for "safe harbor" protections. The new warning requirements apply only to products manufactured after August 30, 2018.

Background

Prop 65 requires certain companies to provide a "clear and reasonable" warning before selling a consumer product in California that contains a chemical included on the Prop 65 list. The number of listed chemicals is extensive — currently standing at more than 850 — including chemicals ranging from arsenic to wood dust. And while Prop 65 does not spell out every way in which a company can give a "clear and reasonable" warning to consumers, the new rules provide amended and new "safe harbor" warnings — warnings that businesses may rely on to comply with the standard.

Three Ways that Warnings Change

The Prop 65 landscape has changed in three primary ways relating to warnings:

1. When Prop 65 warnings must be provided

The new rules require businesses to provide consumers with warnings at the time of purchase. That means there are now specific warnings that businesses must provide for sales via the internet and hardcopy catalogs. Sellers cannot qualify for the safe harbor by providing an on-product warning for sales transactions that occur via the internet or print catalogs.

2. Who is responsible for Prop 65 warnings

While Prop 65 has always required the California Office of Environmental Health Hazard Assessment (OEHHA) to minimize the burden of the regulations on retail sellers of consumer goods to the extent possible, the rules now specifically identify the relative responsibilities of product manufacturers and suppliers and retail sellers to provide warnings to consumers. The rules require businesses upstream of the retail seller, such as manufacturers and suppliers, to either affix a warning label to products subject to Prop 65 or send written notice to retail sellers that identifies a product as subject to Prop 65 and includes necessary warning materials. The rules generally require retail sellers to maintain warning materials that they receive from upstream businesses. Retailer sellers, however, are responsible for providing Prop 65 warnings to consumers under five scenarios, including, for example, if a retail seller covered or altered a warning label that has been affixed to a product by an upstream business.

3. What Prop 65 warnings must say



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The rules change the warning text that companies must provide to qualify for the safe harbor. Before August 2018, Prop 65 safe harbor warnings needed to warn generally that the product contained a chemical that could cause cancer or reproductive harm. But for products manufactured after August 30, 2018, businesses that want to take advantage of the safe harbor must use one of the following two warnings:

- **WARNING:** This product can expose you to chemicals including [name of listed chemical(s)], which is [are] known to the State of California to cause [cancer and/or birth defects or other reproductive harm]. For more information, go to www.P65Warnings.ca.gov.
- **WARNING:** [Cancer and/or Reproductive Harm] – www.P65Warnings.ca.gov.

These new safe harbor warnings differ from the prior rules as follows:

- Companies were not previously required to identify a listed chemical in the warning. But under the longer version, companies must name the listed chemical in the warning itself.
- The rules add the more truncated warning shown above, aptly named the “short-form warning,” which businesses can print on or affix to a product or its packaging.
- Internet and catalog sellers can use these warnings — including the short-form warning if it is also used as the on-product warning — on their websites or catalogs.

In addition, in some cases, companies are required to include warnings in languages other than English: namely, when the product has other information in a foreign language on its label.

What Businesses Should Be Thinking About

The rules give companies engaged in the sale of consumer products in California a few things to consider.

First, should the “safe harbor” warnings be used? The advantage of using the prescribed language is that the language provides a safe-harbor defense to an enforcement action.

But there is no requirement that companies use the safe harbor warnings, and companies may not always want to implement them. Here is one consideration: The OEHHA has established “no significant risk levels” (NSRLs) for certain chemicals, meaning that if a product has a certain level or less of a particular chemical, no warning is required. However, it is expensive to test the exact number of micrograms of different chemicals present in a product. If a company knows a product contains some amount of a chemical that has a NSRL, the company may want to use a safe harbor warning without going through the expense of testing. On the other hand, if a company finds out that the amount of the chemical was within the NSRL, then the company would never have had to include a Prop 65 warning (at least for that chemical) in the first place.

Second, companies should evaluate other areas where warning labels may be appropriate. The new requirement that internet and catalogue sellers include warnings on their website and in their catalogues indicates that the OEHHA is focused on expanding the reach of product warnings. With that in mind, companies may want to consider placing additional warnings on other materials that consumers commonly receive such as sales invoices and/or receipts.

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