

Client Alert

Product Liability and Environmental Practice Groups

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New Requirements for Proposition 65 Warnings Proposed

On January 12, 2015, California's Office of Environmental Health Hazard Assessment (OEHHA) proposed the first significant revisions to Proposition 65's warning requirements since the 1980s. The updated regulations seek to change the requirements for warnings provided for exposures to chemicals identified by the State to cause cancer or reproductive toxicity. Notably, the proposal would require warnings to specify certain listed chemicals by name, and it creates an informational OEHHA website to host detailed information for the public about exposures to listed chemicals.

California's Proposition 65 requires OEHHA to publish a list of chemicals known to the State to cause cancer or developmental or reproductive toxicity. The law requires businesses offering products or services in California that expose any person to a listed chemical above a threshold level to provide a "clear and reasonable" warning prior to such exposure. OEHHA's current regulations provide "safe harbor" warnings that businesses can rely upon to comply with the statute.

For more information, contact:

Cynthia A.M. Stroman

+1 202 626 2381

+1 713 276 6374

cstroman@kslaw.com

Amber Trincado

+1 415 318 1268

+1 415 318 1300

atrincado@kslaw.com

King & Spalding

Houston

1100 Louisiana Street

Suite 4000

Houston, Texas 77002-5213

Tel: +1 713 751 3200

Fax: +1 713 751 3290

Washington, D.C.

1700 Pennsylvania Avenue, NW

Washington, D.C. 20006-4707

Tel: +1 202 737 0500

Fax: +1 202 626 3737

www.kslaw.com

Key Changes in the Proposal:

- **Changes to the Safe Harbor Provisions:** In order to satisfy the statute's requirement to be "clear and reasonable," warnings must state that the product "**can expose** you to a chemical ..." known to the State to cause cancer or reproductive toxicity, rather than the current safe harbor language that simply states that the product "**contains** a chemical..." The proposal will also require a graphic and a link to a website to be maintained by OEHHA. Warnings must be provided in multiple languages for product labels or signs that use different languages.

- **Warnings Must Identify Certain Listed Chemicals:** Warnings for products and services that would expose a person to one or more identified chemicals above a threshold level would be required to identify those chemicals, by name, in the warning. These chemicals are:

- Acrylamide
- Arsenic
- Benzene
- Cadmium
- Carbon Monoxide
- Chlorinated Tris
- Formaldehyde
- Hexavalent Chromium
- Lead
- Mercury
- Methylene Chloride
- Phthalates

The mandate to businesses to identify chemicals by name will be a significant departure from the current regulations and aims to prompt businesses operating in California to evaluate the potential presence of these chemicals in their products. Furthermore, the regulations permit OEHHA to revise this list on an ongoing basis; while such revisions will include notice and opportunity to comment, businesses can expect to provide repeated updates to their warning labels.

- **More Detailed Requirements for Certain Warnings:** The proposed regulations contain additional requirements for warnings regarding exposure to chemicals in certain identified products and exposure scenarios: food exposure, alcoholic beverages, prescription drugs, dental care, raw wood products, furniture products, diesel engines, passenger vehicles, enclosed parking facilities, amusement parks, petroleum products, service stations, and designated smoking areas.
- **OEHHA Website:** The proposed regulations would require that all warnings include the address of a new OEHHA website. The website will include information related to the chemicals at issue, including common routes or pathways of exposure, relevant toxic effects, and strategies for avoiding or reducing exposures. OEHHA describes the focus of the website to be collection of and increased accessibility to existing, publicly available information, but the regulations also authorize the agency to request that businesses provide detailed product information related to specific product exposures for publication upon the website.

Although the proposal is clear that the regulations creating and implementing the website are not enforceable by private plaintiffs, the website's content would provide a consolidated source of information that interested parties may seek to use in product liability suits against businesses operating in California.

- **Directs Responsibilities to Product Manufacturers:** The proposed regulations attempt to address relative responsibilities for providing warnings to manufacturers, distributors, producers, and packagers versus retail sellers. The proposal places responsibility for providing the warnings squarely on manufacturers, distributors and producers. In most cases, retailers would only need to provide the name and contact information for such entities if requested, and would only be required to create warnings under limited circumstances.

If adopted, these new regulations are expected to change the strategies that businesses use to comply with Proposition 65. Under the existing regulations, many businesses have found it easier simply to provide a Proposition 65 compliant warning rather than undertake the costly exposure assessment allowed under the rule to demonstrate that the product does not pose a significant risk. Businesses may reevaluate this approach in light of the increased requirements and litigation potential expanded under the new regulations.

OEHHA is accepting written comments on these proposed changes until April 8, 2015 and will hold a public hearing in Sacramento on March 25, 2015.



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