

LEGAL ALERT

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California's Proposition 65: Proposed Amendment Would Restrict Use Of Short-Form Warning

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California's Office of Environmental Health Hazard Assessment (OEHHA) proposed an amendment to the content and conditions of use of Proposition 65 ("Prop 65") short-form warnings. The proposal, which has not yet been adopted, would provide businesses one year (from its date of adoption) to comply with the amendments. So while businesses do not need to take immediate action, businesses that use Prop 65 short-form warnings may need to reexamine their short-form warnings in the likely event the amendment is adopted.

BACKGROUND ON PROP 65

Prop 65 requires that warnings be provided before persons are exposed to chemicals known to cause cancer or reproductive toxicity. The Code requires the State to publish a list of chemicals known to cause cancer, birth defects or other reproductive harm. The list is updated periodically, and currently includes about 900 chemicals along with a "safe harbor level" for chemicals.

Exposure may occur in a wide variety of contexts, including product sales, food and beverage consumption, environmental exposure, and occupational exposure. This means that virtually every company that manufactures, distributes, or sells goods, food or beverages that reach California consumers, along with every company that employs or hosts individuals in its California place of business, must be cognizant of Proposition 65 and how it relates to their business.

If exposure to a listed chemical above the safe harbor level arises, businesses with 10 or more employees must either reformulate to eliminate the offending chemical or, more commonly, provide a "clear and reasonable" warning before exposing anyone to the listed chemical.

Penalties for violations can be up to \$2,500 per day, per violation.

PROPOSED AMENDMENT TO THE CONTENT AND CONDITIONS OF USE FOR SHORT FORM WARNINGS

OEHHA amended Prop 65 warning requirements in 2016. Those amendments gave businesses the option of a short-form warning. Many businesses chose this option because, in addition to its brevity, the short-form warning did not require the identification of at least one of the over 900 chemicals listed under Prop 65. In some circumstances, the short-form warning provided security against litigation given the expense of testing and the overzealous prosecution by private enforcers of Prop 65.

Now, OEHHA seeks the amendment due to its concern of overuse of the short-form warning by businesses without knowledge that the product contains a chemical that would trigger a Prop 65 exposure. The significant changes include:

- Limiting the short-form warning to products that have a surface area of the product label available for consumer information of five square inches or less;
- Disallowing the short-form warning for internet and website sales (even when the short-form warning may be used on the product); and
- Requiring the short-form warning to include a chemical name, e.g. “Risk of Cancer From [Name of one or more chemicals known to cause cancer] And Reproductive Harm From [Name of one or more chemicals known to cause reproductive toxicity] Exposure - www.P65Warnings.ca.gov.”

CONCLUSION

Businesses using the short-form warning should seek advice from qualified legal counsel experienced in Prop 65 compliance. Hahn Loeser will continue to monitor developments with the proposed amendment and assist its clients in the likely event the amendment is adopted. If you are concerned that your business is or will become subject to Prop 65, want to ensure that your existing procedures remain compliant, or if you receive a 60-Day Notice, we encourage you to contact us.

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