



Employee Safety

What California's Update to Prop 65 Means for Manufacturers

Gillian Scott | Jul 26, 2018

What You Need to Know

Proposition 65 is a right-to-know law requiring manufacturers and other businesses to inform consumers about potential exposure to chemicals known to cause cancer, birth defects or other reproductive harm.

The law presents some management challenges, in part because it includes an ever-growing list of chemicals.

Companies must provide "clear and reasonable" warnings when a product contains one of the chemicals listed by Proposition 65, unless the expected level of exposure poses no significant risk.

The new warnings provide more information about the risks posed by certain chemicals and products.

Recent changes to one of California's consumer protection laws mean manufacturers will need to update their consumer warnings.

Passed in 1986, California's *Safe Drinking Water and Toxic Enforcement Act*, commonly known as Proposition 65, prohibits businesses from knowingly discharging certain chemicals into sources of drinking water and requires them to inform consumers about potential exposure to the chemicals. It now lists more than 800 substances known to cause cancer, birth defects or other reproductive harm, ranging from dyes and lead found in consumer products to alcoholic beverages.

According to California's Office of Environmental Health Hazard Assessment (OEHHA), which administers the law, Proposition 65 has not only increased public awareness about toxins in products, allowing people to reduce their exposure, but it has also encouraged companies to remove toxins from some products.

The Business Impact

Other reviews have been less positive.

In a **recent article**, K&L Gates attorneys Edward P. Sangster, Daniel W. Fox and Caitlin C. Blanche call Proposition 65 an “undiminished irritant” to businesses. The attorneys say the law is a challenge for several reasons, including:

- The list of chemicals continues to grow and change.
- New chemical listings may require warnings for products that did not need them in the past.
- Companies may not know their products contain chemicals subject to the proposition’s requirements.

What Goes into a ‘Safe Use Determination’ by OEHHA?

If a business or trade group has a question about whether a product needs a Proposition 65 warning label, it can request a safe use determination (SUD) from the Office of Environmental Health Hazard Assessment.

With an OEHHA determination request, a business is asking the state to review whether the exposure or discharge is at or below the “safe harbor” level for that chemical for the specific business action or product.

“Businesses that request a SUD are usually fairly certain that their product or activities do not require a warning or do not violate the discharge prohibition, and would like a best judgment made by OEHHA to reinforce their claim,” OEHHA says in a **fact sheet**.

“Based upon the specific set of facts presented in your request, OEHHA can issue a decision representing our best judgment on whether the discharge or exposure in question complies with the law and regulations, or whether the exposure in question requires a warning.”

Here’s the OEHHA determination process:

1. The business contacts the agency before filing a safe use determination request; OEHHA can provide confidential guidance on what to include.
2. The business prepares and submits the request (which must identify the scope—a single product, a class of products, a specific use or a class of users).
3. The business responds to any information requests from OEHHA.
4. OEHHA accepts or rejects the request. If accepted, the agency provides a cost estimate to the requestor.
5. If necessary, the agency holds a public comment period.
6. OEHHA reviews the request and any comments, and it conducts an exposure assessment.
7. The agency either issues a safe use determination, declines to issue a determination, issues an informational letter or issues an interpretive guideline.

In addition, not all substances on the list are universally recognized as dangerous.

“Scientists classify all of these cancer-related substances at least as probable carcinogens, meaning that they might cause cancer in some people. But not all of them are known carcinogens (known to cause

cancer) by groups and experts outside the state of California,” notes the *American Cancer Society*. “This means that not every compound labeled as a possible cancer-causing substance has been proven to the worldwide scientific community to actually cause cancer.”

Giving a Clear Warning

A manufacturer must provide “clear and reasonable” warnings when a product contains one of the chemicals listed by Proposition 65, unless the expected level of exposure poses no significant risk. These warnings include labels placed on a product, signs posted at a workplace or business, and notices published in a newspaper. If a chemical is added to the Proposition 65 list, businesses have a year to comply with the warning requirements.

On Aug. 30, changes to what those warnings must look like will take effect. While previous warnings needed only to state that a product contained a chemical that could cause cancer, birth defects or reproductive harm, the new warnings require more details:

- The word “warning” in all capital letters and in bold
- A graphic of a yellow triangle with a black outline and a black exclamation point inside
- The name of the chemical
- A link to the state’s *Proposition 65 site*, where consumers can find more information about routes of exposure for specific chemicals and learn ways to reduce or eliminate exposure
- A description that identifies whether the product contains only carcinogens, only reproductive toxins, both carcinogens and reproductive toxins, or a substance that is both a carcinogen and a reproductive toxin

Warnings must also now be included with items sold in catalogs or online. You can read more about warning requirements in *an OEHHA document* that provides a side-by-side comparison of the old regulations and the 2018 update.

Updates Will Provide Clarity

The new guidelines will help consumers and businesses make informed choices about the products they buy and use, says Damon Cassell, QSSP, a safety specialist with MSC.

“It’s so broad now that it’s refreshing to know that it’s going to be more specific so the consumer can make a better decision,” Cassell says, likening current warnings to “white noise.”

“In California, it seems like you see that label on everything,” he says. “I might as well just put it on the front door of my house.”

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The details required for the new warnings could also help businesses better evaluate potential risks to their employees because the warnings will identify specific chemicals and information about possible exposure mechanisms.

For manufacturing and metalworking shops, the use of protective equipment—such as respirators, gloves and full-body suits—can help reduce exposure risk, even before a chemical is added to the list.

For manufacturers that need to issue Proposition 65 warnings for their products, Cassell recommends preparing to implement the new rules by making sure all chemical use information is up to date.

“Now’s the time to get compliant on your safety data sheets because you have to put it on your label anyway,” he says.

Have you begun updating your Proposition 65 warnings? Can you share any handy tips?

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