

WARNING: California Adopts New Proposition 65 “How to Warn” Rules

Michèle B. Corash, Robert L. Falk, Peter Hsiao, Michael Jacob Steel, and William F. Tarantino

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[Environmental Litigation](#), [Environmental Permitting + Regulation](#), [Litigation](#), and [Proposition 65 + Chemicals](#)

Client Alert

Last Friday, the [state published](#) the first major changes to the Proposition 65 regulations in more than a decade. The sweeping changes rewrite the “safe harbor” warning regulations and, in doing so, create a new set of challenges for businesses offering products or operating facilities in California.

Thirty years after its adoption, Proposition 65 continues to generate hundreds of “bounty hunter” lawsuits against a host of consumer product manufacturers, retailers, and distributors, as well as restaurants, apartment owners, and other facilities. The new requirements, while undertaken to provide clarity, may have the opposite effect and, as a result, generate yet more such litigation.

Under Proposition 65, businesses with 10 or more employees must give a “clear and reasonable warning” to individuals in the state before knowingly and intentionally exposing those individuals to a chemical listed as known to cause cancer or reproductive toxicity. The new regulations for Clear and Reasonable Warnings repeal and replace Title 27 of the California Code of Regulations, Article 6 (sections 25601 et seq.), except those added via an emergency rulemaking in April 2016 related to warnings for exposures to bisphenol A in canned foods and beverages (sections 25603.3(f) and (g)). In adopting the changes, the state’s Office of Environmental Health Hazard Assessment (OEHHA) determined that its existing regulations were outdated and that the warnings must be rewritten to provide more useful information about potential exposures, as well as to incorporate changes in technology and to communicate more effectively with non-English speakers.

The new regulations become operative on **August 30, 2018**, providing a two-year transition period. Until then, businesses may comply with either the current regulations or the new ones. Products manufactured before the operative date may continue to use the current safe harbor warning language. The new regulations also retain the provision allowing businesses to use either its new safe harbor warning language, which is deemed to be “clear and reasonable,” or other warning language that can be defended as clear and reasonable. Such other warnings may include the current safe harbor language or warnings that have been reviewed and approved by courts. Companies that are parties to a court-ordered settlement or final judgment establishing a warning method or content are deemed to be providing a clear-and-reasonable warning for that exposure, if the warning complies with the order or judgment.

These new rules were closely watched, and the final version is controversial. (See our prior [Client Alert](#).) While the current safe harbor regulations deem a generic warning in English to be clear and reasonable for most exposures, the new safe harbor regulations will require:

- use of a yellow triangle pictogram containing an exclamation point for nonfood products;
- a more unequivocal warning statement indicating that the product “can expose” a user to chemicals known to the state to cause cancer, i.e., “This product can expose you to chemicals, including [name of one or more chemicals], which

- is [are] known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.” The previous regulation merely required the warning to state that a consumer product “contained” a chemical;
- a similar warning statement indicating that the product “can expose” a user to chemicals known to the state to cause birth defects or other reproductive harm, i.e., “This product can expose you to chemicals, including [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov”;
 - identification of one or more chemicals for each end-point (cancer or reproductive toxicity) within the warning, unless the warning appears on the product;
 - addition of a URL to all warnings linking to a public website that the OEHHA will operate to provide information supplementing the warning for those so interested, including potential plaintiff’s lawyers;
 - presentation of the warning in additional languages if the product sign, label or shelf tag otherwise displays them for any other purpose (in French for Canadian products and often in other languages for free trade purposes);
 - for food products, new formatting requirements to enclose the warning in a box and set it apart from other label information; and
 - special rules for Internet and catalog sales.

There are also restrictions on explanatory language given with a warning and requirements necessitating that warnings be given prior to or during sale, rather than prior to use or exposure.

Morrison & Foerster is preparing a detailed analysis of these regulations, and was instrumental in the negotiations and OEHHA rulemaking proceedings to obtain deference to consent judgments and other accommodations for business in the final rule.

For more information, contact:

Michele Corash
(415) 268-7124
mcorash@mofo.com

Robert Falk
(415) 268-6294
rfalk@mofo.com

Peter Hsiao
(213) 892-5731
phsiao@mofo.com

Michael Steel
(415) 268-7350
msteel@mofo.com

William Tarantino
(415) 268-6358
wtarantino@mofo.com