

CALIFORNIA AMENDS PROPOSITION 65 NOTIFICATION REQUIREMENTS

Hodgson Russ Litigation Alert
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On April 1, 2020, California implemented changes to its Safe Drinking Water and Toxic Enforcement Act of 1986, commonly referred to as Proposition 65. Those changes clarify the responsibility of manufacturers, distributors, packagers, and importers (non-retail suppliers) to provide warnings for consumer products that may be sold in California, either at a retail outlet or online. Proposition 65 requires businesses with 10 or more employees to provide warning labels when selling consumer products which contain any of over 900 chemicals listed by California as carcinogens and reproductive toxins.

I. Amendments to the Notification Requirements

Prior to the amendments, non-retail suppliers subject to Proposition 65 had to apply a warning label to the product or provide written notice of the warning requirement to the authorized agent of the retail seller of the products. Now, if businesses choose to send a written notice rather than apply a label, they can provide that notice to either the authorized agent for the business to whom they are selling the product or the authorized agent for the retail seller. Per the Office of Environmental Health Hazard Assessment's (OEHHA) Final Statement of Reasons, this change reflects the practical fact that "the original manufacturer, distributor, importer, or others in the chain of commerce may not know where or by whom the product will ultimately be sold to a consumer." Note that regardless of the recipient, the notice must be resent every year during the period a retail seller in California is selling the product.

The notice requirements have also been updated to allow the authorized agent who receives such notification to confirm receipt electronically or in writing. Further, if a business does not have a designated authorized agent, the notice may be served on the legal agent for service of process for the business.

II. Implications for Businesses

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Non-retail sellers are no longer required to identify what may be an unknowable endpoint retail seller for the notification requirements, and can instead comply by providing a written notice to the next business in the chain of commerce that takes legal possession of the products. But failure to comply with the rather stringent requirements of Proposition 65 continues to potentially result in expensive and time-consuming private claims against businesses in the chain of commerce, whether they are aware of those requirements or not. To that end, it is important for businesses that do business in California, whether directly or indirectly, to be vigilant regarding these obligations to appropriately manage the risk.

If you wish to discuss these amendments or the requirements of Proposition 65 more generally, please contact Michael E. Maxwell at 716.848.1495.

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