

# PROPOSITION 65: WHAT BUSINESSES SELLING PRODUCTS IN CALIFORNIA NEED TO KNOW

*Litigation Alert*  
November 9, 2017

When selling products in the United States, it is important to note that some states have stricter regulations than others. California is the quintessential example, where its Proposition 65 requires businesses to provide warning labels on products containing constituents known to cause certain health risks that are ultimately sold to consumers. California has passed amended regulations aimed at reducing frivolous lawsuits, and revising the product warning labels that businesses must comply with by August 30, 2018. This alert provides an overview of Proposition 65, summarizes the new amendments, and recommends a course of action for businesses selling products in California.

## *Proposition 65*

Proposition 65 requires businesses selling products in California to warn consumers about products containing constituents known to cause cancer, birth defects, or other reproductive harm. The State of California's Office of Environmental Health Hazard Assessment ("OEHHA") maintains a list of constituents known to cause these health risks, which is periodically reviewed. Once new constituents are added, businesses have twelve months before they are required to provide a compliant consumer protection notification.

Any business selling products in California must comply with Proposition 65, unless the business has fewer than ten employees, or if federal law "preempts," and already requires a particular warning for a product. Products containing components below a minimum level of exposure, as defined by OEHHA, are not bound by Proposition 65. Businesses that are required to comply with Proposition 65 must place specific warning labels on their products to notify consumers that the product contains a component that could cause cancer, birth defects, or other reproductive harm.

The Attorney General, local government prosecutors, and individuals acting in the public interest, may all enforce compliance with Proposition 65 through civil lawsuits. Before a private party can actually litigate a Proposition 65 case, it must provide the Attorney General and local prosecutors with a 60-day Notice of Violation (including a "Certificate of Merit" justifying their position) to give those parties the opportunity to consider pursuing the case. Practically speaking, State representatives rarely pursue these cases, meaning businesses are more likely to see a lawsuit proceed from a private party, which are enticed by the right to retain 25% of

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the award if they show the business's noncompliance with Proposition 65. This has created a cottage industry, of sorts, whereby Plaintiffs' firms are invested in finding circumstances of non-compliance. The vast majority of these lawsuits end in settlement, and businesses often pay a large fine to address noncompliance. Plaintiffs almost always require the business to pay for their attorney's fees, and sometimes ask a court to order changes to the product at issue, which could include revisions to warning labels, or an order to remove a component from the product completely.

### *Amended Regulations Addressing Frivolous Lawsuits*

Last month, the governor of California signed into law a bill aimed at reducing the number of frivolous Proposition 65 lawsuits that are filed. This bill, which is to go into effect in January 2018, focuses directly on the "Certificate of Merit" documentation that must be provided to the State to justify the lawsuit being brought, and its underlying factual basis. Under prior law, this factual information must be provided to the Attorney General's office for its review, but has not otherwise been discoverable.

These amendments now allow an alleged Proposition 65 violator certain discovery procedures to obtain the underlying factual basis underlying the Certificate of Merit. In addition, if the Attorney General does not believe there is any merit to a potential Proposition 65 action after reviewing the underlying factual information, it is now required to step in to notify the alleging party of this fact. Finally, it requires that certain information be provided on the Governor's Office of Business and Economic Development website to clearly identify information relating to a business's obligation to comply with Proposition 65.

These changes have effectively codified practices already utilized in most Proposition 65 cases.

### *Amended Regulations for Warning Labels*

In 2016, California repealed and revised the clear and reasonable warning requirements for labels required under Proposition 65. These regulations have revised the required content of product warning labels, how the warning labels are presented to the consumer, and the requirements for environmental and occupational exposure warnings. Businesses selling products in California must comply with these amended regulations by August 30, 2018.[1]

There are differing requirements depending on whether the warning is to be placed directly on the product, on the signage or packing accompanying the product, or if the products are sold online or in catalogs. In general, the requirements necessitate use of specific warning symbols that are to be used, specific reference to the individual health risk (*i.e.* cancer, birth defects, or reproductive problems), website links, and font size/disclosure location considerations. In addition, there are new changes to warning requirements that apply to environmental exposure and occupational exposure warnings, and some product-specific warning labels.

Of particular note, the amended regulations shift the burden of compliance for the warning label requirements from retailers to others in the supply chain, such as manufacturers and distributors. However, retailers are not completely insulated from liability due to noncompliance with Proposition 65.

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### *Take-Away for Businesses*

First, businesses with more than ten employees must carefully pay attention to whether they sell any products in California, including online, through catalog shipments, or through a third-party seller or distributor that sells its products. If a business's products are sold in California, the business should determine whether the products being sold contain components on the OEHHA's list, and if so, whether the amount of that component in the product requires a warning label. There are specific ways to assess constituent concentrations in all sorts of products, and guidance can be sought in that regard.

Second, if the business is required to comply with Proposition 65, it should periodically conduct a review of its product's constituents against the list maintained by OEHHA. Once a new component is listed, businesses must comply with the warning requirements for that component within twelve months. For products that businesses know require compliance with Proposition 65, warning labels should be updated to reflect the amendment by August 30, 2018.

Finally, for greater protection, businesses might also consider various contractual mechanisms for protecting themselves, including: indemnification arrangements between parties in the transactional chain; placing a limitation of warranties and remedies within their agreements with third parties; and excluding consequential damages in contracts and sales documents with distributors and other third-parties in the event that a Proposition 65 claim is filed against the business.

### *Conclusion*

Those doing business in California need to be vigilant about ensuring compliance with Proposition 65, as lawsuits for noncompliance can become incredibly costly, and could cause permanent damage to a business, whether financially or to its reputation.

For more information about Proposition 65, and how your business can avoid unnecessary litigation, please contact Hodgson Russ Litigation Practice attorneys Michael Maxwell, Julia Hilliker, Charles Malcomb or Michael Hecker.

[1] These requirements are separate and distinct from another revision that came into effect on October 1, 2017 requiring revised content for Notices of Violations issued pursuant to Proposition 65 for occupational exposure. This revision is not discussed in this alert, but further information can be provided upon request.

*This publication was written with assistance from Hodgson Russ Summer Associate Brianne Szopinski.*