

ALERTS

Toxic Tort Law Alert - OEHHA Adopts Sweeping Amendments To Prop 65 Warning Regulations

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On Sept. 2, the California Office of Environmental Health Hazard Assessment (OEHHA) adopted its final amendments to the Prop 65 warning regulations, which have been a major subject of debate over the last year. Despite being adopted to clarify the consumer product warning label and notice requirements, the new regulations may have just the opposite effect; it is likely the new regulations will result in additional costs for manufacturers, suppliers and retailers and an increase in Prop 65 litigation.

The [new regulations](#) were adopted for primarily two reasons:

1. to clarify the responsibilities of manufacturers and others in the chain of distribution for products eventually sold at retail
2. to change the current requirements for safe harbor warnings by integrating new technology, including the Internet; providing additional information to California residents about possible exposures to listed chemicals; and providing more compliance assistance for affected businesses

The new regulations will go into effect on Aug. 30, 2018. In the interim, businesses may choose to comply with either the current or the new regulations. A side-by-side comparison of the new and current regulations is [available here](#).

The New Regulations Seek to Reduce the Burden on Retailers

The new regulations seek to reduce the burden on retailers to provide Prop 65 warnings about the products they sell. Manufacturers, producers, suppliers, and distributors now will be required to either label the product or to provide a written notice to retailers regarding the warning and providing all warning materials, such as labels, shelf signs, tags, etc. Such notices must be renewed after the first six months and annually thereafter.

Retailers may still be liable for the failure to provide Prop 65 warnings in the following circumstances:

1. where the retailer is selling the product under a brand or trademark that is owned or licensed by the retailer or an affiliated entity;
2. where the retailer has knowingly introduced or caused a listed chemical to be created in a product;
3. where the retailer has covered, obscured, or altered a product's warning label;

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4. where the retailer has received a warning notice and warning materials from the manufacturer or supplier, but sold the product without conspicuously posting or displaying the warning; or
5. where the retailer has actual knowledge of the potential consumer exposure requiring the warning, and there is no manufacturer or supplier who is subject to Prop 65 and has a place of business in California or a designated agent for service of process in California. Actual knowledge will be presumed within five days of receiving the 60-day notice of violation.

New Requirements for Safe Harbor Warnings

While the new regulations retain the “safe harbor” concept, they substantially change the requirements for giving “clear and reasonable warnings.” Under the current regulations, a warning is “clear” if it clearly communicates that the chemical in question is known to the state of California to cause cancer, birth defects or other reproductive harm. It is “reasonable” if the method employed to transmit the message is reasonably calculated to make the warning message available to the individual prior to exposure.

The new regulations require more specificity. First, warnings must list one or more specific chemicals for which the warning is being provided. This has never before been required. The new regulations will also require the use of a symbol (a yellow triangle with a black outline, containing a black exclamation point), which must be no smaller than the word “WARNING.” The word “WARNING” must be written in all capital letters and in bold print. Notably, the regulations also require the addition of a URL to all warnings, linking to the OEHHA lead agency website, which is operated to provide supplemental information about warnings to those who are interested.

Under the new regulations, warnings should state the following:



“On-product” labels may be shorted in the following ways:



The new regulations also provide that if any label, labeling or sign provides consumer information in a language other than English, the Prop 65 warning must also be provided in that language.

New Requirements for Internet Warnings

The current regulations, which were first adopted about 30 years ago, do not specifically address warning requirements for Internet sales. Rather, they only require that a warning be provided prior to exposure. The new regulations now allow for product-specific warnings to be provided via any electronic device or process that automatically provides the warning to the purchaser prior to or during the purchase of the product.

For Internet sales, the new regulations also specifically require that a warning or a clearly marked hyperlink labeled “WARNING” be provided on the product display page itself. Alternatively, the warning may be prominently displayed to the purchaser prior to completing the purchase.

New Menu of Requirements for Food Exposure Warnings

The new regulations also provide new formatting requirements for food and dietary supplement exposure warnings. Specifically, the warning must be enclosed in a box, set apart from other label information, and include the URL linking to the lead agency website. Warnings should read as follows:

In addition to the above, the new regulations also set forth requirements



for warnings regarding alcoholic beverages sold in retail stores, food and alcoholic beverages sold at restaurants, prescription drugs, dental care, raw wood products, furniture products, diesel engines, vehicles, recreational vessels, enclosed parking facilities, amusement parks, petroleum products, service station and vehicle repair facilities, and designated smoking areas.

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