

LEGAL ALERTS | SEP 09, 2016

# California Agency Announces Changes to Proposition 65

“Clear and Reasonable” Warning Requirement Clarified



In a move that could have significant implications for businesses throughout the State of California (as well as businesses whose goods are sold in California), the Office of Environmental Health Hazard Assessment recently **announced** that it has adopted new regulations that seek to clarify the methods for complying with

Proposition 65’s “clear and reasonable” warning requirement.

In 1986, California voters approved Proposition 65, an initiative measure that sought to address concerns relating to exposure to toxic chemicals. Officially known as the Safe Drinking Water and Toxic Enforcement Act of 1986, Proposition 65 requires the State to publish a list of chemicals known to cause cancer or reproductive toxicity — a list that has grown to include more than 800 chemicals. In addition to this listing requirement, Proposition 65 requires any business (including manufacturers, producers, packagers, suppliers and distributors) that has 10 or more employees to provide a “clear and reasonable” warning before knowingly and intentionally exposing any Californian to a listed chemical.

Historically, businesses were provided relatively broad authority to determine the proper method for conveying this warning. Generally speaking, a warning would satisfy Proposition 65’s requirements so long as “the method employed . . . [is] reasonably calculated” to “clearly” communicate that the individual will be exposed to a listed chemical. In an effort to clarify Proposition 65’s warning requirements, OEHHA recently adopted new regulations strengthening this regulatory standard. Among the newly adopted regulations, there are several key provisions that could impact businesses selling, manufacturing or distributing products within the State.

## **Burden to Warn on Manufacturers**

First, the regulations place the responsibility to warn on manufacturers, distributors and producers of consumer products. The regulations also clarify the circumstances in which a retailer may be responsible for creating warnings, such as where the retailer knowingly introduces a listed chemical into a product.

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## Key Changes to Warning Content

There are also several key changes to product warning requirements:

- Consumer product warnings will need to state that the product “can expose” the individual to a listed chemical, and then identify each specific listed chemical for which the warning is being provided. For example, for exposures to listed carcinogens, the warning must state: “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.”
- Consumer product warning labels will need to contain the signal word “WARNING,” as well as display a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline.
- Almost all warnings must include a hyperlink to an OEHHA-operated Proposition 65 website. Many of the required hyperlinks are product-specific, ranging from alcohol, furniture and diesel engines, to parking structures and amusement parks.
- There are exceptions to some of the above requirements for on-product warnings. For example, as opposed to listing the chemical for which the warning is being provided, on-product labels need only include the words “cancer” and/or “reproductive harm.”

While the regulations do not become operative until Aug. 30, 2018, businesses should continue to work with legal counsel to ensure that any warnings fully comply with the new regulations and satisfy Proposition 65’s “clear and reasonable” warning requirement.

If you have any questions about these regulations or how they may impact your business, please contact the attorney authors of this Legal Alert listed to the right in the firm’s [Environmental Law & Natural Resources](#) practice group, or your [BB&K attorney](#).

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