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July 27, 2020

An Introduction to California's Proposition 65: What is Proposition 65?

Welcome to the first in a multipart series of posts regarding California's Proposition 65 (Prop. 65). This piece introduces readers to the law and its requirements. Future posts will dive deeper into analysis and trends regarding Prop. 65 litigation. ***What Is Prop. 65?*** California's Safe Drinking Water and Toxic Enforcement Act of 1986, better known as "Proposition 65," requires businesses that sell consumer products—including food—to notify Californians about certain chemicals that are in those products. Prop. 65 affects all consumer products sold or distributed in California. The state's Office of Environmental Health Hazard Assessment (OEHHA) administers the law. Pursuant to Prop. 65, California's state government publishes a list of substances known to the state to cause cancer or reproductive toxicity. This "Prop. 65 List" of chemicals is available via the [OEHHA website](#). Listing and delisting chemicals [involves](#) a public notice and comment process. There are currently over 900 substances on the Prop. 65 list. Prop. 65 prohibits "knowingly and intentionally" causing exposure to one of the substances on the list without first providing a "clear and reasonable" warning. To comply with this law, businesses must provide consumers with a Prop. 65-compliant warning unless they can ensure that any listed substances do not cause exposures above either the No Significant Risk Level (NSRL) for cancer-causing substances or the Maximum Allowable Dose Level (MADL) for substances causing birth defects or other reproductive harm. Effective in August 2018, warnings for Prop. 65 changed to require, among other things, the specific identification of at least one listed chemical. According to the new regulations, primary responsibility for providing warnings falls on product manufacturers. Previously, an effective Prop. 65 warning [might read](#), "WARNING: This product contains a chemical known to the State of California to cause cancer." Now, an effective warning might state, "? WARNING: This product can expose you to chemicals including [individual listed chemical], which is known to the State of California to cause cancer. For more information, go to [www.P65Warnings.ca.gov](#)." There are several other methods for businesses to comply with the updated warning requirements, and warnings must also accompany online sales. ***What are the Potential Penalties Regarding Proposition 65?*** The enforcement of Prop. 65 can include penalties of \$2,500 per day for each violation. Given that this penalty is per violation, the potential exposure for noncompliant businesses can be exorbitant. Prop. 65 has led to considerable litigation that has steadily increased over time. The law provides private parties with the to file actions to enforce Prop. 65, provided that private enforcers first issue pre-suit notices at least 60 days in advance of filing suit. In 2019, there were over 530 pre-suit notices filed for food and beverage products alone. As of July 2020, private enforcers have already filed over 470 pre-suit notices for food and beverage products and are on pace to file more food and beverage notices this year than in any year prior. Future posts will dive deeper into current trends in Prop. 65 litigation, particularly as it affects the food and beverage industry.

Authors

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