



Alerts

Four Things Manufacturers, Distributors and Retailers Need to Know About Proposed Revisions to California Proposition 65

January 27, 2015

Hinshaw Alert

Over the last few years, California's Proposition 65, which requires a warning to consumers and members of the public of the potential for exposure to a chemical "known to the People of California to cause cancer or reproductive harm," has been subject to criticism and potential change from various quarters. Business interests have tried to reduce the capacity of private "bounty hunters" to pursue lawsuits as private attorneys general. Environmental groups claim the language used for safe harbors has become meaningless and fails to provide necessary warnings.

The state legislature and Governor Jerry Brown have considered legislative changes to assuage criticisms from both sides of the aisle. California's Office of Environmental Health Hazard Assessment (OEHHA) — the agency responsible for enforcing Proposition 65 — has issued draft guidelines to tackle some of the perceived shortcomings of the regulatory framework. OEHHA recently updated these proposed regulations, which, if adopted, would have a profound effect on, among others, manufacturers, distributors and retailers of products available in California.

OEHHA proposes to repeal the current Article 6 regulations and adopt new regulations in Article 6 in California Code of Regulations Title 27. With this action, OEHHA intends to: (1) clarify the relative responsibilities of manufacturers and others in the chain of distribution for providing "clear and reasonable" warnings for products to be sold at retail; (2) make changes to the current requirements for "safe harbor" warnings; (3) integrate new technology; (4) provide useful information to Californians about their exposure to listed chemicals; and (5) provide compliance assistance for affected businesses.

1. General

The proposed regulations only become relevant after a business determines that the exposure to a listed chemical it knowingly and intentionally causes requires a warning. They allow for a two-year delayed effective date to provide businesses with a transition period to sell products that may use the old warning language and to replace existing signage or implement new technology.

Attorneys

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Service Areas

Complex Tort & General
Casualty

Environmental



2. Responsibility to Provide Product Exposure Warnings

The proposed regulations recognize that the manufacturer, producer, packager, importer or distributor of a product that is known to cause cancer or has reproductive toxicity is primarily responsible for providing warnings. As such, the regulations place retailers in a separate category wherein they are only responsible for providing warnings if certain specified conditions are met.

The manufacturer, producer, packager, importer or distributor of a product may either affix a warning to the product or provide specific notice to the retailer that contains a clear description of the product and either includes, or offers to provide, warning materials. In turn, it is a retailer's responsibility to place and maintain any warning materials it receives from the manufacturer, whether affixed to the product or intended to be a shelf sign or tag.

The retailer is also responsible for providing a warning if it: (1) is selling the product under its own brand name; (2) introduced the listed chemical to the product; or (3) has covered, altered or obscured the warning label that was previously affixed. Furthermore, a retailer is also responsible for providing a warning when it has actual knowledge of the exposure and the manufacturer, packager, importer or distributor cannot readily be compelled to provide it.

3. Safe Harbor Methods and Content

The proposed regulations provide nonmandatory, safe harbor guidance for the methods and content for providing a warning that is deemed to be "clear and reasonable" by OEHHA. For 12 chemicals, as specifically listed in the proposed regulation, the name or names of the chemicals must be listed in the text of the warning. The proposed regulations describe the methods allowed for providing a warning for an exposure to a listed chemical from a product. These methods include product-specific warnings on shelf tags or shelf signs, on-product warnings, warnings provided via the internet during online purchases, or warnings provided via other electronic means. Importantly, however, the person receiving the warning must not be required to seek it out.

The proposed regulations set forth specific content and methods of transmission for: product exposure warnings; environmental exposure warnings; occupational exposure warnings; specific product, chemical and area exposure warnings; food exposure warnings; alcoholic beverage exposure warnings; nonalcoholic beverage and food exposure warnings for restaurants; prescription drug exposure warnings; dental care exposure warnings; raw wood product exposure warnings; furniture product exposure warnings; diesel engine exposure warnings; passenger vehicle exposure warnings; enclosed parking facility exposure warnings; amusement park exposure warnings; petroleum products warnings; service station and vehicle repair facilities warnings; and designated smoking area exposure warnings.

For example, all warnings for exposure to a listed chemical from a product must include: (1) a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline; (2) the signal word "**WARNING**" in bold and capital letters; and (3) a message specific to the type of chemical. All messages must use the phrase "can expose you to" rather than "contains" as OEHHA has determined that this language is more clear and consistent with Proposition 65.

4. Hearing and Comments

A public hearing will be held from 10:00 a.m. to 12:00 p.m. (PT) on March 25, 2015 in the Coastal Hearing Room, California Environmental Protection Agency Building, 1001 I Street, 2nd Floor, Sacramento, California.

Written comments must be received by OEHHA by 5:00 p.m. (PT) on April 8, 2015. Comments can be sent to P65Public.Comments@oehha.ca.gov and should include "Clear and Reasonable Warning Regulations" in the subject line. All comments will be posted on OEHHA's website at the close of the public comment period.

Resources for Additional Information

Notice of the proposed rulemaking and announcement of public hearing

OEHHA initial statement of reasons



Proposed regulatory text

For more information, please contact [Frederick J. Ufkes](#), or your regular [Hinshaw attorney](#).

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