

# California's Proposition 65 & its Impact on Companies

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## Don't Eat These Shoes



<https://californiapolicycenter.org/cpcs-proposition-65-warning-photo-contest/>



# Proposition 65 Photo Contest - WIN \$\$\$\$



The California dip that refreshes- causes cancer and birth defects too?

<https://californiapolicycenter.org/cpcs-proposition-65-warning-photo-contest/>

# Agenda

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- Overview of Proposition 65
- How chemicals become listed
- Determining when a warning is required
- Clear and reasonable warning requirements
  - Consumer product and environmental warnings
  - Occupational warnings and the Hazard Communication Standard
  - Obligations for out-of-state manufacturers
  - Tailored warnings
- Proposition 65 enforcement
- What employers should do

# Proposition 65 Overview

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- Safe Drinking Water and Toxic Enforcement Act of 1986
- Prohibits a person in the course of doing business from:
  - Knowingly discharging or releasing a listed chemical into drinking water sources
  - Knowingly and intentionally exposing any individual to a listed chemical without first giving a “clear and reasonable warning” to such individual
- Focus on **exposure** to chemicals “known to the state” to cause cancer or reproductive toxicity
  - Broad scope
  - Consumer product, environmental, and occupational exposures

# How a Chemical Becomes Listed

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- OEHHA publishes and updates list of chemicals known to the state to cause cancer or reproductive toxicity
  - Publishes and updates list of chemicals known to the state to cause cancer or reproductive toxicity
  - ~ 950 chemicals on its list
  
- Chemicals are added to the list via:
  - Scientific Advisory Board
  - Authoritative Body
  - Federal or State Agency
  - California Labor Code



# Determining if a Warning is Required



- Warning is required unless exposure is below the “no significant risk level” or “maximum allowable dose level”
  - OEHHA established “Safe harbor” levels for 300+ chemicals
  - Regulations describe methods to calculate
    - Cancer NSRL: <1 excess case of cancer in an exposed population of 100,000, lifetime exposure (70 years)
    - Maximum Allowable Dose Level (MADL): Exposure to reproductive toxicant at <1/1000 of NOEL
- Provide “clear and reasonable warning” within 12 months of listing
- Over-warning
- Safe Use Determinations

# Clear and Reasonable Warning Requirement

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- Intent: Assist businesses with compliance and better inform consumers
- Article 6
  - Basic requirements for “clear and reasonable” warning
  - “Safe harbor” warnings for different exposure scenarios
- New Regulations Effective **August 30, 2018**
- New safe harbor language, methods of transmission
  - Consumer, Occupational , Environmental exposures
- “Tailored” warnings for specific products and facilities
- Unlimited sell-through period

# Consumer Product Warnings Safe Harbor

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- Content
  - “**Warning**” in bold type
  - Pictogram
  - Exact language
  - Name of at least one listed chemical per endpoint
  - URL: [www.P65warnings.ca.gov](http://www.P65warnings.ca.gov)
- Internet and catalog warnings
- Foreign language warnings



# Consumer Product Warnings Safe Harbor

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Exposures to listed carcinogens:

Old warning:

WARNING: This product contains a chemical known to the State of California to cause cancer.

New warning:

 **WARNING:** 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. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

# Consumer Product Warnings

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Exposures to listed reproductive toxicants:

## Old warning:

**WARNING:** This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.

## New warning:

 **WARNING:** 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 birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).



# Consumer Product Warnings Safe Harbor



- On-Product warnings

- Cancer

 **WARNING:** Cancer - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

- Reproductive toxicity

 **WARNING:** Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

- Both


 **WARNING:** Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

- On-product warning = affixed to or printed on product label, immediate container or wrapper
- No smaller than largest type size used for other consumer information on the product (but no smaller than 6 point type)

# Environmental Exposure Warnings Safe Harbor



- For exposures to listed carcinogens:

 **WARNING:** Entering this area can expose you to chemicals known to the State of California to cause cancer, including [name of one or more chemicals], from [name of one or more sources of exposure]. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

- Provisions for reproductive toxicants and combinations

- Method of transmitting the warning

- Warning sign posted at all public entrances
  - For indoor environments or outdoor spaces with clearly defined entrances
- Notices mailed or sent electronically to each occupant in affected area
- Published in main or local newspaper with the largest circulation in the area for which the warning is given

# Occupational Exposures Safe Harbor

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- (a) A warning to an exposed employee about a listed chemical meets the requirements of this subarticle if it fully complies with all warning information, training, and labeling requirements of the federal Hazard Communication Standard (HCS). . .the California HCS . . . , or, for pesticides, the California Pesticides and Worker Safety requirements . . . .
- (b) For occupational exposures to chemicals not covered by subsection (a), warnings may be provided consistent with sections 25601, 25602, 25603, 25604, 25605 and 25607 et seq. of this subarticle

# California Employers

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- OSHA approved incorporation of Prop 65 occupational requirements into the CA state OSH plan
  - CA hazard communication standard (HCS) includes Prop 65 requirements
  - Exposures to substances within the scope of the CA HCS and that require a Prop 65 warning:
    - Comply with CA HCS requirements
  - Exposures to substances not within scope of CA HCS but require a Prop 65 warning:
    - Comply by either complying with Prop 65 requirements for environmental exposures or consumer product exposures, or
    - Comply with CA HCS requirements as if they were covered by the HCS

# CA Employers Warnings for Non-Employees

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- Visitors to facility require warnings visible to them
  - Can provide “environmental exposures” warnings (posting signs)
- Communities outside fence line may require separate warnings (e.g., newspaper advertisements, signage at perimeter)



# Out-of-State Manufacturers

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- OSHA: The State standard, including Proposition 65 in its occupational aspects, may not be enforced against out-of-state manufacturers because a State plan may not regulate conduct occurring outside the State.”
- No obligation to provide Prop 65 warnings
- *But*, voluntary, contractual product stewardship obligations may require more.

# Obligations for Out-of-State Manufacturers

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- Contractual or product stewardship
- Provide notification to downstream customers
  - Safety data sheet (SDS)
  - Customer letters
- Failure to convey information to customers:
  - Contractual and indemnification obligations to customers
  - Potential legal claims from customer that is the target of a bounty hunter suit for a Prop. 65 violation
    - Breach of implied warranties of merchantability and fitness for a particular purpose
    - Uniform commercial code theories of liability

# Tailored Warnings

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- Food exposure
- Alcoholic beverage exposure
- Food and beverage exposure for restaurants
- Prescription drug exposure and emergency medical or dental care exposure
- Dental care exposure
- Raw wood product exposure
- Furniture product exposure
- Diesel engine exposure (except passenger vehicle engines)
- Vehicle exposure
- Recreational vessel exposure
- Enclosed parking facility exposure
- Amusement park exposure
- Petroleum products
- Hotel exposure
- BPA from canned and bottled foods and beverages
- Designated smoking area
- Service station and vehicle repair facilities

# Proposition 65 – Enforcement

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- Penalties up to \$2,500 per violation per day
- CA Attorney General or private citizen
  - Bounty hunter can bring suit “in the public interest”
  - In 2017, 688 private Prop. 65 settlements generated \$25.7 million.
    - 76% went to bounty hunters
- Low\_burden for bounty hunter
  - Plaintiff is not required to show physical harm
  - No exposure to an actual person must be proven
- High burden for defendant
  - Show the exposure is below safe harbor level

## Prop 65 Enforcement (cont.)



- Since 1986, vast majority: Consumer product exposure
- Occupational exposure claims
  - Very few
  - Mostly relate to tobacco smoke in the workplace, *not products*
  - One case where workers exposed to lead while remodeling
- Environmental exposure claims
  - Relatively few
    - Fireplace smoke in hotels
    - CWA or CAA violations
  - New systematic claims
    - Neighborhoods adjacent to styrene facilities (TRI data “hit list”)



# What Employers Should Do

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- If located in California
  - Review chemicals used in the workplace
  - Assess need to warn employees, visitors, customers, and the community
  
- Distributing in California, or distributors send products to California
  - Assess potential exposures to customers
  - May need to notify customers about potential exposures on labels or SDS

# QUESTIONS?

[https://www.khlaw.com/Proposition\\_65](https://www.khlaw.com/Proposition_65)



# THANK YOU

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