Prop 65: Addressing the New Challenges of Complying with the Amended Regulations

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What is Proposition 65

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- In 1986, California voters approved an initiative to address their growing concerns about exposure to toxic chemicals.
- That initiative became the Safe Drinking Water and Toxic Enforcement Act of 1986, better known by its original name of Proposition 65.
- Proposition 65 requires the State to publish a list of chemicals known to cause cancer or birth defects or other reproductive harm.
- This list, which must be updated at least once a year, has grown to include over 800 chemicals since it was first published in 1987.
- Proposition 65 requires businesses to provide Californians with a "clear and reasonable warning" about significant amounts of chemicals in the products they purchase, in their homes or workplaces, or that are released into the environment.

What Types of Chemicals are on the List

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- The list contains a wide range of naturally occurring and synthetic chemicals that are known to cause cancer or birth defects or other reproductive harm.
- These chemicals include additives or ingredients in pesticides, common household products, food, drugs, dyes, or solvents.
- Listed chemicals may also be used in manufacturing and construction, or they may be byproducts of chemical processes, such as motor vehicle exhaust.

What does Prop 65 Require

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- Businesses are required to provide a "clear and reasonable" warning before knowingly and intentionally exposing anyone to a listed chemical.
  - This warning can be given by
    - labeling a consumer product,
    - posting signs at the workplace,
    - distributing notices at a rental housing complex,
    - or publishing notices in a newspaper.
- Proposition 65 also prohibits companies that do business within California from knowingly discharging listed chemicals into sources of drinking water.
- Exemptions
  - Businesses with less than 10 employees and government agencies
  - If the exposures they cause are so low as to create no significant risk of cancer or birth defects or other reproductive harm.

Who Enforces Prop 65

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- The California Attorney General's Office
- Any district attorney or city attorney (for cities whose population exceeds 750,000) may also enforce Proposition 65.
- Any individual acting in the public interest may enforce Proposition 65 by filing a lawsuit against a business alleged to be in violation of this law.

Penalties for Violating Prop 65

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- Injunctive relief
- Penalties of up to $2,500 per day
  - Each sale considered to be a separate violation
  - 25% of penalties paid to citizen suit enforcer
- Attorney's fees and costs

Prop 65 Defenses

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- Less than 10 employees
- Safe Use Determinations
  - Administratively determined
- Safe Harbor Determinations
  - Judicially determined
- Labeling

Amendment Overview – Major Changes

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- Clarifies when a warning must be provided
- Clarifies who must give the warning
- Clarifies the content of a safe harbor warning
- Clarifies how he warning may be transmitted.

When a warning must be given

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- The regulations do not address the question of whether a warning is required
  - The warning regulations do not require a business to perform any testing.
- The regulations provide guidance on how to provide a warning once a business has made a determination that a warning is required.
- OEHHA has developed over 300 regulatory safe harbor levels for Proposition 65 chemicals.
  - A safe harbor level identifies a level of exposure to a listed chemical that does not require a Proposition 65 warning.
  - A business is not required to provide a warning if exposure to a chemical occurs at or below these levels.
- How does a business know if it falls within the safe harbor without testing?

Transferring the responsibility

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- Provided that the consumer receives a warning that meets the requirements of the Act prior to exposure, the manufacturer, producer, packager, importer, supplier, or distributor of a product that may cause a consumer product exposure may enter into a written agreement with the retail seller of the product to allocate legal responsibility among themselves for providing a warning for the product, which shall bind the parties to that agreement and which shall supersede the requirements of the regulations.

Consumer Warnings

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- Consumer product exposure warnings must be prominently displayed on a label, labeling, or sign, and must be displayed with such conspicuousness as compared with other words, statements, designs or devices on the label, labeling, or sign, as to render the warning likely to be read and understood by an ordinary individual under customary conditions of purchase or use.
  - Warnings in manuals alone no longer considered adequate

Consumer Warning – Four Methods of Transmission

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- A product-specific warning provided on a posted sign, shelf tag, or shelf sign, at each point of display of the consumer product.
- A product-specific warning provided via any electronic device that automatically provides the warning to the purchaser before purchase without requiring the purchaser to seek out the warning. (Internet Warnings)
- A warning on the label that complies with the content requirements in Section 25603(a)
  - The warning symbol, the signal word, “WARNING:”, and the applicable warning message.
- An on-product “short-form” warning on the label that complies with the content requirements in Section 25603(b)
  - The warning symbol, the signal word, “WARNING:”, and the applicable truncated warning message.
  - The warning must be in a type size no smaller than the largest type size used for other consumer information on the product and in no case in a type size smaller than 6-point type.

Internet Warnings

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- Warnings are required for purchases made over the internet
- Warnings must be provided to the consumer prior to completing the purchase
- For a website warning, if a label is used for a product warning, a business may opt to provide a hyperlink to the warning or a picture of the warning label used on the product.
- If an on-product (short-form) warning is provided on the product label, the website warning may use the same content.
- Ship-to Popups

Catalog Warnings

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- Warnings are required to be provided for purchases made through catalogs prior to completing the purchase.
- A warning must be provided via any one of the four methods.
- If an on-product (short-form) warning is provided on the product label, the catalog warning may use the same content.