

Environment - USA

California governor signs limited amendment to Proposition 65

Contributed by **Sidley Austin LLP**

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California governor Jerry Brown recently signed an amendment to Proposition 65 allowing certain businesses (restaurant owners, parking garage owners and owners of premises where smoking is permitted) a 14-day cure period to remedy alleged violations without being subject to civil penalties. This is only the second substantive amendment to Proposition 65 since its adoption by voters in 1986. Efforts at broader reforms have failed for the time being.

Proposition 65, also known as the Safe Drinking Water and Toxic Enforcement Act of 1986, requires companies doing business in California to provide a clear and reasonable warning before exposing persons to chemicals known to the state to cause cancer or reproductive harm. A citizen enforcer seeking to enforce the law must provide a public notice 60 days prior to suit and can proceed only if a public prosecutor does not diligently pursue the claim.

Under a new amendment, any person seeking to bring an enforcement action based on three specifically delineated exposure scenarios is prohibited from doing so if the recipient corrects the alleged violation, pays a \$500 civil penalty per facility and notifies the person seeking to bring the action that the violation has been cured, using a proof of compliance form, within 14 days of receipt of the 60-day notice letter.

Assembly member Mark Gotto introduced the amendment in February 2013. The original bill⁽¹⁾ applied this 'cure period' to any exposure but it was later amended and narrowed to cover only the following three specific exposure scenarios:

- exposures to alcoholic beverages that are sold on the entity's premises for immediate consumption (eg, bars and restaurants);
- exposures to tobacco smoke from non-employees on premises owned or operated by the entity where smoking is permitted; and
- exposures to Proposition 65 listed chemicals in engine exhaust inside a parking garage that is primarily intended for parking non-commercial vehicles.

The amendment also imposes additional requirements on citizen enforcers, including provision of a clear and reasonable description of the 14-day cure provisions.

According to Gotto, the amendment should reduce or eliminate 'gotcha', frivolous or opportunistic legal actions under Proposition 65 where plaintiffs seek damages for retail business violations, such as in restaurants, bars and coffee shops, when warnings were not posted due to honest oversight. The amendment does not protect persons who believe that the law does not require a warning in their case and consequently refuse to provide a warning. The Amendment thus may well foster "over warning", further diluting the effect of Proposition 65 warnings on consumers.

Businesses that do not fall within these three narrow categories remain subject to the civil penalties of up to \$2,500 per day for each violation, as well as injunctions ordering violating entities to provide the requisite warnings or to cure the violation.

For further information on this topic please contact [Judith Praitis](#) or [Amy Lally](#) at Sidley Austin LLP by telephone (+1 213 896 6000), fax (+1 213 896 6600) or email (jpraitis@sidley.com or alally@sidley.com). The Sidley website can be accessed at www.sidley.com.

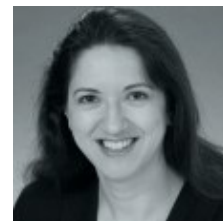
Endnote

(1) AB 227.

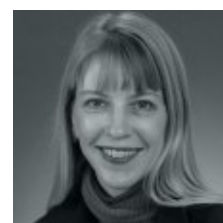
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Authors

Amy P Lally



Judith M Praitis



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