

ARTICLES

Key Developments in California's Proposition 65 Right to Know Law

By Amy P. Lally – February 28, 2019

California's consumer warning law known as Proposition 65 took center stage in 2018. Three decades after the law was passed, the state of California rewrote the regulations implementing the clear and reasonable warning requirement and promulgated a new safe harbor warning regime for food, including dietary supplements. The new regulations took effect on August 30, 2018 and are codified in the California Code of Regulations at Title 27, Section 25600 *et seq.* This article examines some of the ambiguities that have arisen as food manufacturers and retailers implement the new safe harbor warning regime and highlights a pending new regulation that will make its mark in 2019.

Proposition 65

Proposition 65 is officially named the Safe Drinking Water and Toxic Enforcement Act of 1986. The law is codified in California's Health & Safety Code at Section 25249.5 *et seq.* California's Office of Environmental Health Hazard Assessments (OEHHA) is the lead agency charged with implementing Proposition 65 and maintains a list of chemicals known to the state of California to cause cancer or reproductive harm. Currently, there are more than 900 chemicals on that list. In relevant part, Proposition 65 prohibits persons doing business in California from knowingly and intentionally causing an exposure to a chemical on its list without first providing a clear and reasonable warning. Ingestion is a route of exposure under the proposition.

A Proposition 65 violation may be enforced by public prosecutors or any private person who gives 60 days' notice to the Attorney General's office and other public prosecutors. Civil penalties up to \$2,500 per day per violation may be assessed; injunctive relief may be ordered; and a private enforcer may seek to recover his attorneys' fees. The threat of a steep penalty and potential enforcer's attorneys' fee recovery has created a cottage industry of Proposition 65 litigation. Nearly 2,400 notices of intent to sue were sent to the Attorney General's office by private enforcers last year. Hundreds of those notices related to food and dietary supplements.

The new warning regulations set forth a safe harbor regime for consumer products generally (in Sections 25602 and 25603) and for several sub-categories of consumer products specifically, including food (Section 25607.1 and 25607.2) and alcoholic beverages (Section 25607.3 and 25607.4). Inconsistencies between the safe harbor warning regime for consumer products generally, on the one hand, and for specific consumer products like food, on the other hand, create ambiguities and cause confusion.

Short-Form Warnings

Section 25607.2 of the new safe harbor warning regulations provides four different warning phrases for food depending on whether the chemical is a carcinogen, reproductive toxicant, or both. The four safe harbor warnings are lengthy and require the company to identify a specific chemical for which the warning is being provided. The warning options for food are:

- WARNING: Consuming 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/food.
- WARNING: Consuming 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/food.
- WARNING: Consuming 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 and [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/food.
- WARNING: Consuming 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 and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/food.

These four food warnings are similar to the four safe harbor warnings for consumer products generally, set forth in Section 25603 of the regulations. Section 25603 also provides three short form safe harbor warnings for consumer products generally. These warnings do not require a specific chemical to be identified. The short form warning options are:

- WARNING: Cancer - www.P65Warnings.ca.gov.
- WARNING: Reproductive Harm - www.P65Warnings.ca.gov.
- WARNING: Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

The short form warning options are not referenced in Section 25607.2 of the regulation addressing food, creating confusion as to whether using one provides a safe harbor. Section 25607 provides that “where warning methods or content are included in Section 25607.1 *et seq.* [including for food], a person must use the specified warnings in order to satisfy the requirements of this subarticle.” The most prudent practice to ensure safe harbor status is to use one of the long form food warnings instead of a short form one.

Catalog Warnings

Section 25602 sets forth several methods for transmitting safe harbor warnings for consumer products generally. It also provides that if consumer products are purchased through a catalog, the safe harbor warning must be provided in the catalog in a manner that clearly associates it

with the item being purchased. In contrast, Section 25607.1 governs the methods for transmitting safe harbor warnings for food and does not contain a catalog warning requirement. Guidance documents from OEHHA regarding catalog warnings have not clearly limited the catalog warning to non-food consumer products, creating confusion in the marketplace.

Section 25607.1 requires safe harbor food warnings to be “provided using *one or more* of the methods required in Section 25602” (emphasis added). This cross-reference to Section 25602 cannot reasonably be read to require catalog warnings for food since warning providers are given the flexibility to choose any “one or more” warning method. However, in the absence of further clarification, the most cautious approach would be to include catalog warnings for food where appropriate.

New Coffee Regulation

A new food regulation from OEHHA is on the horizon for 2019. Unlike some regulations, the proposed new Section 25704 would be a welcomed addition to the law. If adopted, Section 25704 would provide that “[e]xposures to listed chemicals in coffee created by and inherent in the processes of roasting coffee beans or brewing coffee do not pose a significant risk of cancer.” In other words, no Proposition 65 warning would be required for chemicals inherent in coffee.

OEHHA’s proposal follows a court ruling to the contrary in *Council for Education and Research on Toxics v. Starbucks Corp. et al.*, No. BC435759 (Cal. Super. Ct. L.A. County March 28, 2018). The court decision in *Starbucks*, which would have required Proposition 65 warnings on coffee, received national attention in light of extensive scientific evidence that drinking coffee has not been shown to increase the risk of cancer, and may reduce the risk of some types of cancer. The new coffee regulation has been presented to the Office of Administrative Law and is expected to become final in February 2019.

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