

AMERICAN COPPER POLICY COUNCIL

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WASHINGTON, D.C.

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CALIFORNIA PROPOSITION 65

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Proposition 65: The Basics

- California law passed by voter referendum (“Proposition 65”) in 1986
 - “Safe Drinking Water and Toxic Enforcement Act of 1986”

“If adopted, the law surely would not lead to the banning of ordinary table salt or require warning labels on every apple sold or cup of coffee served in California.”

- Los Angeles Times (1986)

- Proposition 65 does not (explicitly) prohibit, or require reformulation or elimination, of any substance
- Requires businesses who expose individuals in California to substances deemed by the state to cause cancer or reproductive harm to provide a clear and reasonable warning before exposure.
 - Businesses with less than 10 employees are exempt



Proposition 65: The Basics

- No Warning required if exposure poses no significant risk of cancer or reproductive harm
 - Burden rests on business
 - Stringent standards governing how to calculate “safe threshold”
 - Not based on the content/concentration *per se*
 - ◆ Variety of factors: how the product is used; exposure pathway(s); frequency, duration, intensity of exposure; availability/potential for release of the chemical
 - Cost of meeting this burden can be expensive



Proposition 65: The Basics

- Unique enforcement scheme
 - State AG may bring suit to enforce . . . but most cases are brought by private party “bounty hunters”
- Private enforcers: 60-day Notice of Intent to Sue
 - Receive share of penalties, attorney’s fees
 - May bring case even if no harm or have not used or purchased product
- Penalties: up to \$2,500 per day and per exposure
- Rational to settle: provide warning and pay a penalty (~\$10,000-\$200,000+)
 - Litigation uncertainty and cost



Proposition 65: Warning Amendments

- 2016 Amendments entered into full effect August 30th
- Familiar warnings are changing



For exposure to carcinogens:

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.

For exposure to reproductive toxins:

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.

For exposure to both carcinogens and reproductive toxins:

WARNING: This product can expose you to chemicals including [name of one or more listed 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.

Q: What happens to products with old warning?

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Proposition 65: Warning Amendments

- Abbreviated On-Product Warnings

⚠ **WARNING:** Cancer - www.P65Warnings.ca.gov.

⚠ **WARNING:** Reproductive Harm - www.P65Warnings.ca.gov.

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

- Font size no smaller than largest font size used for other consumer information (6 point min)
- Not need to identify specific chemical

- Website: If short form used on product then may use on website.



Proposition 65: Warning Amendments

- Internet Purchases
 - Include either the warning or a clearly marked hyperlink using the word “**WARNING**” on product display page, or by otherwise prominently displaying the warning to the purchaser *prior to completing the purchase*
 - Warning is not “prominently displayed if the purchaser must search for it in the general content of the website”
 - ◆ Issue: hyperlink to a central repository webpage with warnings for a range of products (e.g., Amazon)
- Also must include warning on product



Proposition 65: Warning Amendments

- Clarification of Retailer and Manufacturer Responsibility
 - Statutory mandate to minimize burdens on retailers
 - New provisions governing liability among retailers, manufacturers, supply chain
 - Two basic options for manufacturer:
 - ◆ (1) Affix an appropriate warning to the product; or
 - ◆ (2) Provide written notice to the retailer regarding the required warning for the product.
 - Must obtain confirmation of retailer's receipt of notification electronically or in writing.
 - Retailer liable if fails to post or obscures or alters a warning provided by manufacturer



Proposition 65: Warning Amendments

- Clarification of Retailer and Manufacturer Responsibility (cont.)
 - Allows for individualized agreements regarding Prop 65 liability and responsibility to provide notice ... so long as warning is actually delivered
 - Retailer primary responsibility for products sold under their own brand
 - Retailer also responsible if has *actual knowledge* of consumer product exposure and there is no manufacturer, producer, packager, importer, supplier, or distributor of the product who is subject to Proposition 65 or otherwise has contacts with California.
- Requests for Prop 65 compliance information up and down supply chain:
 - Manufacturers incentivized to notify retailers about Prop 65 compliance options and to instruct distributors to pass on Prop 65 information
 - Retailers not required to request information (in fact, may be incentivized not to request information) but should have process in place to implement notices they receive from suppliers

Proposition 65: Warning Amendments

Summary Thoughts on Amendments

- Amendments succeed, in part:
 - More tailored warnings for specific products and places
 - Technological updates
- **However, by focusing on *HOW* to provide warnings, fail to address the most important question: *WHEN***
 - ***Amendments did NOT alter the analysis re: whether a warning is required***
 - Example: Product contains a listed chemical but company believes, based on due diligence and proper science, that exposure is below a safety threshold
 - ◆ Plaintiffs remain free to challenge such exposure/safety assessments and drag businesses into the expensive and time-consuming Proposition 65 enforcement process; “battle of experts”



Proposition 65: Enforcement Trends

- Dozens of cases filed each month
 - ~88 Sixty-Day Notices
 - ~65 Complaints
 - ~80 Settlements
- Top target chemicals (example products):
 - Lead (lock, brass keys, dietary supplements, seaweed, plumbing fittings)
 - Phthalates (purse, handbags, sandals, vinyl tool grips, imitation leather)
 - Food-related chemicals: lead, cadmium, BPA, acrylamide, etc.
- Increased emphasis on mandatory reformulation as part of settlement
- Increased targeting of website sales (in and out of CA)



Proposition 65: Summary Thoughts

- Amendments raise many questions ... that will be answered in litigation:
 - Do the common warnings currently in place still meet the statutory criteria for an adequate “clear and reasonable” warning?
 - How is a business to choose which chemical to identify if opting to identify only one as the rules allow?
 - When is alternate language required?
 - Liability among retailers, manufacturers, and others
 - Sufficiency of “prophylactic” warnings provided without full assessment of potential exposure
 - Supplemental information to explain or put warning in context? When/how/where? Constitutional to limit?



Proposition 65: Summary Thoughts

- Inventory chemicals in your product
 - Including potential contaminants
- Test products to determine concentration of any listed chemicals
 - Annual testing can provide a defense
- Develop a risk assessment, using conservative exposure assumptions, to determine concentration in specific product that will not lead to exposure above “safe harbor” level
- Develop a warning strategy that is appropriate for your product
- Audit compliance measures (third-party)
- Develop strategy for amending warnings on products, labels, etc.
- Supply chain communication ... consider strategy re: warning responsibility
 - Strategy re: (1) responding to customer requests for information; and (2) requesting information from suppliers



Thank You

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