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**CALIFORNIA'S NEW "CLEAR AND REASONABLE"  
PROPOSITION 65 WARNING REGULATIONS  
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On August 30, 2016, the Office of Environmental Health Hazard Assessment ("OEHHA") adopted a comprehensive overhaul of the "clear and reasonable" warning regulations for Proposition 65. The new regulations go into effect on August 30, 2018 for all products manufactured by or after that date. Companies may choose to comply with the new regulations or the old ones in the interim. To comply with the new requirements, businesses must re-word all warnings and include chemical names and the URL to the state's new Proposition 65 website.

**I. CONSUMER PRODUCT WARNINGS**

**A. General Content of Warning**

The warning language changes depend on whether the chemical is listed for cancer or for reproductive toxicity, or both. The triangular symbol below can appear in black and white if the sign, label, or shelf tag for the product is not printed using the color yellow.

**1. For chemicals listed only for cancer:**

 **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).

**2. For chemicals listed only for reproductive toxicity:**

 **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).

**3. For products that contain multiple chemicals listed for only one or the other:**

 **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, 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](http://www.P65Warnings.ca.gov).

**4. For chemicals listed for both (like the chemical lead):**

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

**B. Alternative Warning Option Allowed for On-Product Warning**

Companies may provide on-product warnings using the appropriate longer version of the warning language above or through the following shorter alternative warnings.

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

**C. Methods of Transmitting the Warning**

As defined in the statute, 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.” The content of the warning may only contain supplemental information if the information identifies the source of the exposure or provides information on how to avoid or reduce exposure from the identified chemical.

For on-product warnings, the entire warning must be in a type size no smaller than the largest type size used for other consumer information on the product. The warning cannot under any circumstances appear in a type size smaller than 6-point type.

For internet purchases, the warning language or a clearly marked hyperlink using the word “**WARNING**” must be provided on the product display page, or the website must prominently display the warning in some other way to the purchaser prior to completing the purchase. The longer version of the warning language needs to be used for internet purchases unless the product will also be shipped with the shorter on-product warning. In that situation, the shorter on-product warning may be used online as well.

If an on-product label or shelf sign uses a language other than English to provide consumer information, then the warning must also be provided in that language as well as in English.

**D. Retailers Have Some Limited Ability to Avoid Litigation**

Manufacturers, distributors, or other non-retailers may comply with the new regulations by either putting labels on products directly or by providing written notice to the “authorized agent” of retailers. The notice must state what products are at issue and which chemicals are in the products. Further, the notice must include all necessary warning materials, such as labels or shelf

signs, and information about online sales. The company giving notice must also confirm in writing or electronically that the retailer received the notice. Finally, the notice must be renewed within the first six months during the first year after the effective date, and then annually thereafter.

Retailers may be primarily responsible for providing the warning in the following five circumstances: (1) The retailer sells the product under a brand or trademark that it owns or licenses; (2) The retailer knowingly introduced a listed chemical into the product; (3) The retailer covered, obscured, or altered a warning sent via the notice provisions described above; (4) The retailer ignored the notice and warning materials sent to it; or (5) The retailer has actual knowledge of the potential exposure, and there is no other upstream company that either can be served in California or has 10 or more employees pursuant to statute.

## **II. ENVIRONMENTAL EXPOSURE WARNINGS**

An “environmental exposure” is defined as “an exposure that occurs as the result of contact with an environmental source, such as ambient air, indoor air, drinking water, standing water, running water, soil, vegetation, or manmade or natural substances or objects, through inhalation, ingestion, or skin or other contact with the body. All exposures that are not consumer product exposures or occupational exposures are environmental exposures.”

There are several different approved methods for transmitting warnings for environmental exposures. First, for indoor environments or outdoors spaces with clearly defined entrances, a warning sign can be posted at all public entrances to the affected area in no smaller than 72-point type. The warning sign must identify one or more sources of exposure, be provided in a conspicuous manner in a way likely to be seen, read, and understood, and be provided in English and in any other language used on other signage in the affected area.

A second way to provide the warning is in a notice mailed, sent electronically, or otherwise delivered to each occupant in the affected area. This type of warning must include a map that clearly identifies the affected area, be provided at least every three months, and be provided in English and any other language ordinarily used by the person to communicate with the public.

Finally, a third way is by publishing the warning in the main or local news section of a newspaper with the largest circulation in the area for which the warning is given, at least once every three months. This warning must be at least a quarter-page size in the print version and be published in the electronic version of the publication as well (if any).

The content of the new environmental exposure warning must include the name of a chemical at issue using the following templates:

### **1. For exposures to 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).

The warning can be slightly shortened for an exposure to a single listed carcinogen.

**2. For exposures to listed reproductive toxins:**

 **WARNING:** Entering this area can expose you to chemicals known to the State of California to cause birth defects or other reproductive harm, 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).

Again, the warning can be slightly shortened for an exposure to a single listed reproductive toxin.

**3. For exposures to both listed carcinogens and reproductive toxins:**

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

Note: the warning may be shortened for an exposure to a single chemical listed for both cancer and reproductive toxicity.

**III. OCCUPATIONAL EXPOSURE WARNINGS**

A warning to an exposed employee about a listed chemical meets the requirements of the new regulations if the warning complies with all warning information, training, and labeling requirements of the federal Hazard Communication Standard, the California Hazard Communication Standard, or, for pesticides, the Pesticides and Worker Safety requirements.

Any occupational exposures not covered by those statutes may be provided consistent with the other appropriate exposure warnings sections of the new regulations.

Through the new regulations for occupational exposure warnings, OEHHA sought to clarify the relationship between state and federal law, stating:

Given that warnings for occupational exposures are also regulated by federal and state entities, including the federal Occupational Safety and Health Administration, several stakeholders expressed concern over the possibility of federal preemption of Proposition 65 warnings for occupational exposures. To address these concerns, the proposed regulation incorporates by reference existing federal and state law and regulatory requirements related to warnings for occupational exposures. The requirements of the proposed regulation thus harmonize with existing federal and state laws and regulations in this area and pose no preemption concern.

(OEHHA, Initial Statement of Reasons (Nov. 27, 2015), at p. 33.)

In its response to several comments from industry stakeholders throughout the administrative process, OEHHA further evaluated the effect of the occupational exposure regulations on other

state and federal laws. OEHHA explained, “The intent of the provisions of subsection 25606(a) is to carry over the existing regulations that allow an employer to provide a clear and reasonable warning by complying with the federal and state Hazard Communication Standards [29 Code of Federal Regulations, section 1910.1200 and Title 8, California Code of Regulations, section 5194, respectively].” (OEHHA, Final Statement of Reasons (Sept. 2, 2016), at p. 225.) Concerning federal preemption, OEHHA again revealed that it did not intend “to contravene existing law on federal preemption of occupational warning aspects of Proposition 65.” (OEHHA, Final Statement of Reasons (Sept. 2, 2016), at p. 263.)

Finally, several commenters to the proposed regulations expressed concerns over Safety Data Sheets. OEHHA clarified that it could not allow warnings to be provided on Safety Data Sheets because it is “outside the scope of this rulemaking as OEHHA cannot prescribe the content of forms under the authority of a federal or other state agency.” (OEHHA, Final Statement of Reasons (Sept. 2, 2016), at p. 264.)

In sum, the Proposition 65 Occupational Warning requirements for out-of-state manufacturers will not change. OEHHA recognizes and reaffirms that for occupational warnings; Proposition 65 cannot be applied to or enforced against out-of-state companies that manufacture industrial use only products. Caution: where out-of-state manufacturers direct the same products both to consumers and industrial uses, those products sold into the consumer market must comply with the new consumer product warning requirements. (See Consumer Product warnings - Article 1)

For operators of California workplaces that use the California Hazard Communication Standard as the basis for compliance, there will be a change to incorporate the name of listed chemicals in area warning signs (See Environmental Warnings above) and also to identify the listed chemicals during employee safety meetings and in other facility-specific hazard communication documentation, if that is not already being done.

#### **IV. FOOD EXPOSURE WARNINGS**

##### **A. General Requirements**

For food exposure warnings, including dietary supplements, the *warning must be set off from other surrounding information and enclosed in a box where the warning is provided on the food product label*. The warning must be provided in a language other than English if other consumer information is provided in a non-English language.

*Importantly, the yellow triangle symbol with an exclamation point is NOT required for food exposure warnings as well as for other types of exposure warnings described below. The warning content also includes a unique website link.*

**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](http://www.P65Warnings.ca.gov/food).

**1. For exposures to a listed carcinogen:**

For exposures to a listed reproductive toxin:

**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](http://www.P65Warnings.ca.gov/food).

**2. For exposures to both listed carcinogens and reproductive toxins:**

**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](http://www.P65Warnings.ca.gov/food).

**3. For exposures to a chemical listed as both a carcinogen and a reproductive toxin:**

**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](http://www.P65Warnings.ca.gov/food).

**B. ALCOHOLIC BEVERAGE EXPOSURE WARNINGS**

There are three main methods of transmission for alcoholic beverage exposure warnings: (1) an 8.5 by 11 inch sign in no smaller than 22-point type, placed at eye level so that customers can read it as they enter an area where alcoholic beverages are served; (2) a notice or sign no smaller than 5 by 5 inches placed at each retail point of sale or display where the warning message must be no smaller than 20- point type and be enclosed in a box; or (3) for alcoholic beverages provided for consumption on the premises, a warning provided on a menu or list. In particular, for alcoholic beverages sold or distributed to purchasers in California through package delivery services, a warning must be provided on or in the shipping container or delivery package in a type size no smaller than the largest type size used for other consumer information on the product. In no case can the warning be smaller than 8-point type.

For any method of transmission, the warning must be provided in English and in any other language used for labeling or advertising the product on the premises. The warning content must be as follows:

**WARNING:** Drinking distilled spirits, beer, coolers, wine and other alcoholic beverages may increase cancer risk, and, during pregnancy, can cause birth defects. For more information go to [www.P65Warnings.ca.gov/alcohol](http://www.P65Warnings.ca.gov/alcohol).

**C. FOOD AND NON-ALCOHOLIC BEVERAGE EXPOSURE WARNINGS FOR RESTAURANTS**

Restaurants have three options for transmitting exposure warnings: (1) an 8.5 by 11 inch sign printed in no smaller than 28-point type placed at each public entrance; (2) a notice or sign no smaller than 5 by 5 inches printed in no smaller than 20-point type placed at each point of sale; or (3) a warning on a menu or list in a type size no smaller than the largest type size used for the names of general menu items.

Further, the warning must be provided in English and in any other language used on other signage or menus provided on the premises.

The warning content must be as follows:

**WARNING:** Certain foods and beverages sold or served here can expose you to chemicals including acrylamide in many fried or baked foods, and mercury in fish, which 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/restaurant](http://www.P65Warnings.ca.gov/restaurant).

While the new regulations are not effective until August 30, 2018, it is important for companies to begin the initial steps toward compliance. Steptoe will be sure to keep you posted on any subsequent developments. For more information, please visit OEHHA's website here: <http://oehha.ca.gov/proposition-65/crn/notice-adoption-article-6-clear-and-reasonable-warnings>.

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