

ARTICLE

OEHHA's Prop 65 Proposal Signals Short Life Span for Short Form Warning

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California's Office of Health Hazard Assessment (OEHHA) issued a notice on Dec. 13th that proposes a surprising number of changes to the simple short form warning approach under Proposition 65. The proposal presents another "safe harbor" but effectively does away with the short form approach - and that was ushered in as part of changes to the warning law in 2016. Public comments will be accepted for only a short time, until January 14, 2022.

Proposition 65, officially known as the Safe Drinking Water and Toxic Enforcement Act of 1986, prohibits any business from "knowingly and intentionally" exposing Californians to a chemical known to the state of California to cause cancer, birth defects, or other reproductive harm without providing a warning.[1] OEHHA publishes and updates a Prop 65 list of well over 900 restricted chemicals.[2] OEHHA's proposal does not change the options for consumer product warnings. Manufacturers may still either:

- Provide a warning on the product, its label ("a display of written, printed or graphic matter upon a product or its immediate container"), or its labeling ("any label or other written, printed or graphic matter affixed to or accompanying a product or its container or wrapper"); or
- Provide a written notice to the "authorized agent" of a retail seller including specific information about the potential exposure to a listed chemical, including all necessary warning materials and including the correct warning language for each product.

Authors

Martha E. Marrapese
Partner
202.719.7156
mmarrapese@wiley.law

Practice Areas

Environment & Product Regulation
Product Safety

The need to use a yellow triangle symbol with the exclamation point will still be required. The specific proposed changes to the short form option are:

- Maximum Label Size: Increased for short form warnings from 5 square inches to 12 square inches for packages with limited available label space for consumer product information that do not easily accommodate the full warning.
- Consistent Usage: Allows use of the new short form warning on websites and in catalogs.
- Removal of the word "Product": The warning instruction text in the regulation will refer simply to the existing term "label" in response to comments that the phrase "product label" was undefined and confusing.
- New Signal Word Options: The additional signal word options "CA WARNING" or "CALIFORNIA WARNING" are proposed to specify that the warning is being given pursuant to California law. Businesses would still have the option to use the signal word "Warning".
- More Safe Harbor Words: OEHHA is doing away with the simple wording approach (e.g., "**WARNING** Cancer - P65Warnings.ca.gov.") and provides two options for each type of required warning. The proposed format is as follows:
 - For exposures to listed carcinogens: The words "Cancer risk from exposure to [name of chemical] - www.P65Warnings.ca.gov.", or "Exposes you to [name of chemical], a carcinogen - www.P65Warnings.ca.gov."
 - For exposures to listed reproductive toxicants: The words "Risk of reproductive harm from exposure to [name of chemical] - www.P65Warnings.ca.gov.", or "Exposes you to [name of chemical], a reproductive toxicant - www.P65Warnings.ca.gov."
 - For exposures to both listed carcinogens and reproductive toxicants: The words "Cancer risk from [name of chemical] and of reproductive harm from exposure to [name of chemical] Exposure - www.P65Warnings.ca.gov.", or "Exposes you to [name of chemical], a carcinogen, and [name of chemical], a reproductive toxicant - P65Warnings.ca.gov."
 - Where a single chemical is listed as both a carcinogen and a reproductive toxicant: The words, "Cancer risk and reproductive harm from [name of chemical] - www.P65Warnings.ca.gov.", or "Exposes you to [name of chemical], a carcinogen and reproductive toxicant - P65Warnings.ca.gov."

Some might see this proposal as a nice holiday package to businesses from the State of California – never before has there been so many "safe harbor" warning options in the twenty-five year life span of Proposition 65! Nevertheless, the proposal raises deeper questions, such as whether the decision to do away with the current format is premature, what the cost to businesses will be to implement the proposed changes, and ultimately, whether the proposed changes defeat the very purpose of having a short form warning option. The short form warning will no longer be small or short – the size of the warning will more than double and the wording will increase to be about a third of the number of words in the long form (i.e., the 32 word "**WARNING**: This product can expose you to chemicals including [name of one or more chemicals], which is

known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov”). The proposed changes will certainly result in varying warning language for the same products which could undermine the integrity of the “clear and reasonable” warning requirement of the law. One aspect which is decidedly short is the comment period, which does not take into account much needed break from the adversity of 2021 to spend time with friends and family. The timing warrants consideration by businesses to ask for an extension of time to comment. As is always the case, the changes will become effective one year after the rule is finalized.

[1] Cal. Health & Saf. Code §§ 25249.5 - 25249.14.

[2] <https://oehha.ca.gov/proposition-65/proposition-65-list>.