

New Proposition 65 Clear and Reasonable Warning Regulations Are Effective in 2018

November 6, 2017

In less than a year, on August 30, 2018, the new Proposition 65 warning regulations will go into effect. [Proposition 65 \(Safe Drinking Water and Toxic Enforcement Act\)](#) requires businesses to provide Californians with a clear and reasonable warning about exposures to Proposition 65-listed chemicals in the products they purchase, in their homes or workplaces, or that are released into the environment.

Amendments to the regulations significantly change what constitutes a “clear and reasonable warning” under Proposition 65, and may open the door for more rampant lawsuit abuse by citizen groups looking to enforce Proposition 65’s revised terms. Businesses that do not comply with the new regulations by August 30, 2018 are at risk for third-party citizen lawsuits for failure to provide a clear and reasonable warning and/or failure to adequately provide a clear and reasonable warning, also known as “bad warning” lawsuits.

The new warning regulations change the warning language for many different types of products and exposures. Proposition 65 warnings under these new regulations must contain a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline, the word warning in bold and caps, and must identify at least one chemical for which the warning is being provided for each endpoint (cancer or reproductive toxicity). Other changes in the new regulations include:

- **Manufacturers:** The new regulations require specific warnings based upon the type of product and type of exposure. In the consumer product context, primary responsibility for providing a Proposition 65 warning still rests with the manufacturer or a distributor of a foreign made product. However, the new regulations are more complicated because the clear and reasonable warning is different for different types of products. For example, food products now have their own clear and reasonable warning language, as do furniture products, among others.
- **Retailers:** The new regulations also have implications for retailers, who under the old regulations received some protection from Proposition 65 liability because that liability

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generally rested with the manufacturer. The new regulations create a greater risk of exposure for retailers by allowing manufacturers to shift responsibility for a warning to the retailer. In addition, the new regulations include a list of the circumstances under which a retailer will have responsibility for providing a Proposition 65 warning.

- **Internet Sales:** Previously, the clear and reasonable warning regulations did not directly address sales on the internet. The new regulations, on the other hand, include provisions that directly address such sales, and make clear that on-product warnings are no longer sufficient when selling a product on the internet. Instead, the regulations provide the content and methods permissible for internet warnings.
- **Environmental/Facility Exposures:** The new regulation includes provisions that specify the warning content and method for parking facilities, amusement parks, service stations/vehicle repair, and designated smoking areas, among other changes. [California Office of Environmental Health Hazard Assessment \(OEHHA\)](#) is also in the process of adopting a regulation providing the warning content and method for hotels.

For assistance in understanding how to achieve compliance with the new warning regulations, please contact us.