



## KNOW THE LAW

# PROP. 65 FOOD NOTICES ABUNDANT DURING COVID-19

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## THE COVID-19 PANDEMIC, SHELTER-IN-PLACE ORDERS AND ASSOCIATED CALIFORNIA COURT CLOSURES ARE ALL UNPRECEDENTED EVENTS IN THE LIVES OF CALIFORNIANS.

None of these events, however, slowed Proposition 65 plaintiff groups, who sent a record number of Prop. 65 Notices of Violation (“Notices”) during the first months of the COVID-19 pandemic.

These Notices allege that the food products contain chemicals on the Prop. 65 list, and therefore, also allege that the products must contain the all too familiar “Prop. 65 warning” on their label or packaging. Grocers, national food brands, and private label suppliers have received Notices in the last three months.

Prop. 65, also known as the Safe Drinking Water and Toxic Enforcement Act of 1986, requires “clear and reasonable warnings” on consumer products (including foods) sold in California if use of the products causes an exposure to chemicals on the Prop. 65 List at a harmful level. The regulation authorizes monetary penalties for violations, and alleged violators also pay attorney’s fees of the plaintiff enforcers that send the Notices.

Typically, Prop. 65 food Notices allege that lead, mercury, acrylamide, arsenic, and cadmium content in food products requires a warning. Prop. 65 plaintiffs have sent the numerous Notices during the COVID-19

period alleging that a variety of food products contain these chemicals. Types of food products noticed include: Seaweed & seafood products (lead, arsenic & cadmium), canned goods, including fruits & vegetables (mercury, lead & acrylamide), vinegars (lead & carbaryl), baby food fruit & vegetable pouches (acrylamide & lead), almond products, including butters (acrylamide), Crackers, cookies & chips (acrylamide), waffles (acrylamide), and baby teething wafers & baby cookies (acrylamide).

These Notices are significant in their volume and their variety. Some of these Notices have updated prior Notices with supplier/manufacturer information, and other Notices are completely new. Certain products, including vinegars, baby foods, and canned seafood have been the subject of Prop. 65 Notices in the past. The variety of products identified in acrylamide Notices, in particular, are growing increasingly creative.

In addition to these Notices for “typical food chemicals,” Notices in the COVID-19 period also alleged that food products contained chemicals triggering a Prop. 65 warning that typically are not mentioned in Prop. 65 food claims – carbaryl and furan. Several Notices during the COVID-19 period alleged that

vinegar products contained carbaryl, an insecticide. As of the date of this article, a number of these had been withdrawn.

Regarding furan, two Notices were sent in May, alleging that furan content in canned goods required a warning. These two Notices are the first time that plaintiff groups have alleged that furan content in foods requires a Prop. 65 warning.

It is important for grocers to be aware of and monitor these trends. The confluence of circumstances related to the COVID-19 pandemic has created a shifting risk analysis for businesses subject to the regulation. On the one hand, grocers have been open during the SIP months as “essential” businesses and may see an uptick in Notices for food products as a result.

On the other hand, California courts have been closed for much of SIP, and Plaintiffs are correspondingly hamstrung to file lawsuits and prosecute their cases during this downtime.

In the midst of other crucial decision-making in the COVID-19 period, those receiving Notices during this time of “suspended animation” in the Courts would be well served, to the best of their abilities, to shore up their Prop. 65 procedures and risk analyses, evaluate the possible settlement of the Notices they receive, and ready themselves to defend these claims as the Courts re-open. ■