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Proposition 65 updated: new warning regulations are here

By Lauren Michals

After almost two years, the new regulations under California's Safe Drinking Water and Toxic Enforcement Act of 1986, commonly referred to as "Proposition 65," are finally becoming fully effective on August 30, 2018. For those who have not yet encountered Proposition 65, it requires that any company selling a product that could expose a consumer in California to one of over 900 chemicals known by the State of California to cause cancer or reproductive harm provide a "clear and reasonable" warning putting a consumer on notice of a potential exposure, before that exposure occurs. In other words, almost any company selling or distributing a product into California needs to understand and comply with the statute and its regulations.

While clear and reasonable Proposition 65 warnings can be given in a variety of ways, accompanying regulations set out "safe harbor" wording and methods that are deemed to be clear and reasonable. The new Proposition 65 regulations change the default "safe harbor" warning language used on many products and in many locations, such as stores, restaurants and buildings, as well as impact warnings that were developed and agreed to outside of a court-approved consent judgment, and provide additional guidelines on how "clear and reasonable" warnings should be provided, including for some specific products and specific exposures.

The primary impacts of the amended regulation are: (1) the default "safe harbor" warning language was modified and the new "safe harbor" language should be used for any product manufactured after August 30, 2018, and at any locations where such warnings are posted; (2) the new "safe harbor" warning language generally requires the use of a warning signal, and the identification by name of at least one chemical in the warning (as a result, a company must have a better understanding of potential Proposition 65 chemicals in its products and can no longer rely simply on a good faith belief that some listed chemical may be present); (3) there are new guidelines for how warnings should be provided, including required warnings for internet and catalog sales; and (4) retailers may have a short window to cure alleged violations of Proposition 65.

The new safe harbor warning language and guidelines do not impact compliant warnings that are on products that are already manufactured, distributed, on store shelves and/or in distribution centers prior to August 30, 2018. For products manufactured before August 30, a company may use the old or new warnings, so long as the warning is not contrary to any settlement it has entered

into with an enforcer. Warnings prescribed under a court-entered consent judgment (but not an out-of-court settlement) remain unchanged for parties to that judgment.

Additional guidance on Proposition 65 and the warning regulations is available from the California Office of Environmental Health Hazard Assessment (OEHHA), the agency that oversees the application of Proposition 65, at <https://oehha.ca.gov/proposition-65>.

Because the regulations are, in part, product and exposure specific and there are additional details that should be evaluated, we strongly recommend reviewing the regulations and, if necessary, consulting with a professional.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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