

Frequently Asked Questions (FAQ)

What is Proposition 65?

Proposition 65 is a California law officially known as the California Safe Drinking Water and Toxic Enforcement Act of 1986. It requires businesses to provide a "clear and reasonable" warning before exposing persons consumers, employees, and the general public to chemicals that are known to the state of California to cause cancer, birth defects, or other reproductive harm ("Listed Chemicals"). The Proposition 65 warning applies to exposures from consumer products, emissions from facilities, and workplace exposures in the State of California. *Proposition 65 is a "right to know" law as opposed to a safety law, meaning Proposition 65 does not ban the use of any chemicals, but is intended to ensure the public is informed as to its exposure to Listed Chemicals.*

What is/are the chemical(s) involved?

The list of the 800+Prop65 chemicals can be found at:

http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html .

This list is periodically updated.

Are workers/employees/consumers at risk using products with a Prop65 warning?

A Prop 65 warning does not mean that the product is unsafe; however, employees and consumers should be made aware of and heed all product handling and use warnings. A Prop 65 warning does not mean that the product will actually cause cancer or other reproductive harm when used in its intended manner. Prop 65 standards for warnings are often very stringent. For example, for reproductive toxicants, the level for warnings is 1000 times lower than the lowest level at which animal studies reported no reproductive health effect.

How is a supplier selling and distributing a product containing a Prop65 Listed Chemical to provide the required warning?

A business must provide a warning with its product if it is reasonably foreseeable that a person in California will buy or receive the product. The regulations provide that the warning may appear (1) on a product, its packaging, or written materials accompanying the product, (2) at the retail outlet through shelf labeling or signs, or (3) appear through a system of signs, public advertising identifying the system, and toll-free information services provided that the warning is "clear and reasonable". The Attorney General has also advised that the warning must be provided prior to purchase for internet or mail order sales or the supplier must offer free return shipping.

Who is subject to the Proposition 65 Warning Requirement?

Proposition 65 applies to any "person in the course of doing business" with ten or more employees, including companies located outside the State of California. The term "person" is defined broadly to include any individual, trust, firm, joint stock company, corporation, company, partnership, limited liability company, and association. "In the course

of doing business” means any act or omission by an employee that furthers the purpose or operation of the business, whether or not the act or omission is for profit.

Are there exceptions to the Proposition 65 Warning Requirement?

A business is not required to provide a warning if it can prove that the exposure to any Listed Chemical present in the product resulting from its normal, intended use does not pose a "significant risk" to the average user. Unfortunately, while the State of California has identified so-called "safe harbor" exposure levels, there is little regulatory guidance to determine whether or when the use of a product results in exposure below those levels and thus poses no significant risk to the average user. Because Proposition 65 places the burden on the business to prove that intended use of a product poses no significant risk, many businesses choose to provide a warning out of an abundance of caution.

Why are you telling me? I am not even in California nor do I sell anyone in California.

An out-of-state business whose products are sold and distributed within the State (including sales via the internet or by catalogue) may be liable under Proposition 65 for failing to provide adequate warnings on products that contain Listed Chemicals.

Please note that the Proposition 65 warning requirement is widely known in California and to the California legal community. As noted below, the statute includes a private enforcement mechanism that allows private citizens to bring enforcement actions against those businesses they believe have failed to meet the warning requirements. Successful private enforcers, typically law firms, are allowed to recover their attorney's fees and costs of investigation as well 25% of any penalties. In the 25+ years since Proposition 65 was adopted, these private enforcement actions have far exceeded state enforcement initiatives and resulted in thousands of settlements involving millions of dollars paid. Regardless of your location, if you don't have a Prop 65 strategy and your product can end in a sale in California, it is recommended that you may want to consult a Prop 65 knowledgeable lawyer.

Who is warning in California?

There are many commonly used consumer products and items that contain Listed Chemicals and may required warnings under Prop 65. Some of the businesses that have been sued for failure to provide a Proposition 65 notice on a product include grocery stores, drug stores, garages, hardware suppliers, car dealerships, medical facilities, retail stores, amusement parks, and many more.

Some of the product categories sold in the State of California that require California Prop 65 warning include: dog toys, shoes, belts, fabric, imitation leather, foam, medications, synthetic and non-woven material, decorated glassware, decorated ceramics, beauty products, tools, garden equipment, toys and much more.

Why are we notifying customers and warning now?

When a warning is given by a business, it means one of two things:

(1) the business has evaluated the exposure associated with its product and concluded that intended use of the product exceeds the no significant risk level; or

(2) the business has chosen to provide a warning based solely on its knowledge that the product or one of its components contains a Listed Chemical, without attempting to determine whether intended use results in a significant exposure or because there is no clear guidance on how to establish that exposure is insignificant. .

Recent litigation in California has shown it to be very difficult for producers to defend their product, even if the producer believes it has scientifically valid reasons to defend their position. The legal repercussions outweigh the notice implication.

Who enforces Proposition 65?

Proposition 65 gives authority to the State Attorney General and local governments (district attorneys, city attorneys and county counsel) to take enforcement action against businesses that violate the law. The statute provides for a court to impose penalties of up to \$2500 per day against a business for each day of exposure to a product sold or distributed by that business without a required warning. Proposition 65 further authorizes for injunctive relief requiring warnings be provided on future sales and distribution of products containing listed chemicals and directing market withdrawal of products that do have such warnings.

As noted above, Proposition 65 also permits a private citizen to bring the same enforcement actions against businesses to impose penalties, obtain injunctive relief and recover investigative costs and attorney's fees, provided that the private plaintiff satisfies certain procedural requirements. The vast majority of Proposition 65 litigation in California today is brought by private plaintiffs represented by a handful of law firms that specialize in this type of litigation. These private plaintiffs are commonly called "bounty hunters".

How do I protect myself from the bounty hunters?

Consider consulting a California Prop. 65 knowledgeable lawyer.

I'm uncertain of my next steps. What do I do?

Prop. 65 warnings are common throughout California in a wide range of commercial and other settings -- in hospitals, restaurants, bars, hotels, schools, grocery stores, amusement parks and on a wide variety of consumer products. People are used to them in California. If you want more information about your specific product, contact your supplier for more information regarding the chemical composition of products, product components and raw materials supplied to you. Check the Material Safety Data Sheet that accompanies any raw materials used in your own processes. If your product can end up in California, then you need a Proposition 65 strategy.

More information:

Prop 65 Homepage

<http://oehha.ca.gov/prop65/p65faq.html>

Prop 65 in plain language

<http://oehha.ca.gov/prop65/background/p65plain.html>

List of Prop 65 chemicals

http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html