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 **California Proposition 65**  
**New Safe Harbor Warning Regulations &**  
**the Hotel and Lodging Industry**

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[www.HuntonAKProp65.com](http://www.HuntonAKProp65.com)

**Malcolm Weiss**

Hunton Andrews Kurth LLP

**Shannon Oldenburg**

Hunton Andrews Kurth LLP



## Malcolm Weiss

Hunton Andrews Kurth LLP

[mweiss@HuntonAK.com](mailto:mweiss@HuntonAK.com)



## Shannon Oldenburg

Hunton Andrews Kurth LLP

[soldenburg@HuntonAK.com](mailto:soldenburg@HuntonAK.com)

- *Advising clients on Prop 65 matters for over 30 years*
- *Worked with CH&LA on global settlement and compliance strategies*
- *Worked with CH&LA in drafting hotel Prop 65 warning provisions adopted by OEHHA*
- *Matters include compliance counseling and enforcement defense*

# Today's Agenda

- **Proposition 65 overview**
- **New voluntary “safe harbor” warnings**
- **Specific types of warnings applicable to hotels**
- **Risk management/claim avoidance**

- Voter initiative (1986)
- > **900 chemicals** listed by Governor and Office of Environmental Health Hazard Assessment (OEHHA)
- **Discharge**
  - Businesses may not discharge or release a listed chemical that will contaminate any water supply.
- **Exposure**
  - Businesses may not **“knowingly and intentionally”** expose persons in California to chemicals known to the state to cause ***cancer or reproductive harm*** without first giving a **“clear and reasonable”** warning.

- Attorney General, District Attorneys or private parties (“**bounty hunters**”) enforce Prop 65
- Private parties issue **60-day notices of violation** and can initiate **lawsuits**
- Hotels were heavily targeted about 13 years ago
- Private parties bring actions to:
  - Recover attorney's fees
  - Impose penalties
  - Force compliance via reformulation and/or warnings
  - Recover attorney's fees

- **August 2016** – OEHHA amended Prop 65 warning regulations
- **August 30, 2018** – New regulations become operative
  - **Subarticle 1:** Definitions and allocation of responsibility between retailers and others
  - **Subarticle 2:** Voluntary “Safe Harbor” methods and content
- **“Safe Harbor”** warnings are deemed “clear and reasonable” under the statute and provide a “safe harbor” against enforcement actions

- Safe harbor provisions address content and methods of delivery for:
  - ✓ Consumer product exposures
  - ✓ Environmental exposures
  - ✓ Occupational exposures
  - ✓ Specific product, chemical, and area exposures
    - **Includes HOTELS** (27 CCR §§ 25607.32–25607.33)
- Be aware of other potential exposures that may trigger a Prop 65 warning requirement

## 27 CCR §§ 25607.32-25607.33

“**Hotel**” defined broadly, includes any type of transient lodging establishment, including:

Hotels – motels – bed and breakfast inns – resorts – spas – ski resorts – guest ranches – agricultural homestays – tourist homes – condos – timeshares – vacation home rentals – extended stay establishments



## 27 CCR §§ 25607.32–25607.33


### 1. Sign at Registration Desk

- No smaller than 22-point type
- In a location likely to be seen, read, and understood
- Prior to completion of registration or check-in process


### 2. Electronic or Hard Copy Warning

- Electronic – directly or via a hyperlink
- Same size type as other consumer information
- Prior to or during registration or check-in process

## 27 CCR §§ 25607.32–25607.33

- Warning symbol  (to the left of “**WARNING:**”)
- The word “**WARNING:**” (in **bold** and all CAPS)
- Specific warning language:
  - ✓ Identifies exposure *source* and listed *chemical*
  - ✓ Identifies *toxicological endpoint* (cancer and/or reproductive harm)
- **Foreign languages:** If “consumer information” is given to guests during registration or check-in in a language other than English, then the warning must also be given in English and the other language(s)

## Sample hotel specific warning:


 **WARNING:** Plastic and vinyl items in this establishment can expose you to di(2-ethylhexyl)phthalate which is known to the State of California to cause cancer and birth defects or other reproductive harm. For additional information go to [www.P65Warnings.ca.gov/hotels](http://www.P65Warnings.ca.gov/hotels).

SOURCE

CHEMICAL

TYPES OF HARM

PROP 65 WEBSITE

 **WARNING:** Plastic and vinyl items in this establishment can expose you to di(2-ethylhexyl)phthalate which is known to the State of California to cause cancer and birth defects or other reproductive harm. For additional information go to [www.P65Warnings.ca.gov/hotels](http://www.P65Warnings.ca.gov/hotels).

- Providing a hotel-specific warning is just one aspect of “safe harbor” compliance
- **Other exposures may occur on the premises** triggering warning requirements, including:
  - Restaurants and Other Food Facilities (27 CCR §§ 25607.5-.6)
  - Alcoholic Beverages (27 CCR §§ 25607.3-.4)
  - Designated Smoking Areas (27 CCR §§ 25607.28-.29)
  - Enclosed Parking Facilities (27 CCR §§ 25607.20-.21)
  - Occupational Exposures (27 CCR § 25606)
  - Consumer Products (27 CCR §§ 25602-25603)

## 27 CCR §§ 25607.5-25607.6

**“Food Facility”** is broadly defined -- An operation that stores, prepares, packages, serves, vends, or otherwise provides food, including:

- Where food is consumed on or off premises
- Places used in conjunction with the operations (storage for utensils, equipment, materials)

## 27 CCR §§ 25607.5-25607.6

Warning **placement** for exposures to chemicals in **food or non-alcoholic beverages served or sold in restaurants** or other food facilities may use **one or more** of the following methods:

- 1. Signs at each public entrance:** 8.5 x 11 inches with minimum 28-point type; readable and conspicuously placed;
- 2. Signs at each point of sale:** 5 x 5 inches with minimum 20-point type; readable and conspicuously placed;

AND/OR

- 3. Warnings on menus or lists:** type size no smaller than type used for general menu items.

## 27 CCR §§ 25607.5-25607.6

### Warning language is specified in the regulations:

**WARNING:** Certain foods and beverages sold or served here can expose you to chemicals including acrylamide in many fried or baked foods, and mercury in fish, which are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov/restaurant](http://www.P65Warnings.ca.gov/restaurant).

- If other languages on signs or menus, then warnings must be in English and those other languages



## 27 CCR §§ 25607.3-25607.4

### Warnings placement, size and location varies:

- **Vicinity where alcohol is served:** 8.5 x 11-inch sign, minimum 22-point type, placed at eye level, placed in manner to be readable and conspicuous
- **At retail point of sale:** minimum 5 x 5-inch sign, minimum 20-point type, border around text, each retail point of sale
- **Over-the-counter:** sign on menu or list identifying alcoholic beverages on premises (or menu/list identifying food and other beverages if no alcohol on the list)
- **Sold/distributed through package delivery service:** signage must be incorporated or placed on shipping container/delivery package in type size no smaller than largest type used for other consumer information (min. 8-point)

## 27 CCR §§ 25607.3-25607.4


### Specific language required for safe harbor warning for alcoholic beverages:

**WARNING:** Drinking distilled spirits, beer, coolers, wine and other alcoholic beverages may increase cancer risk, and, during pregnancy, can cause birth defects. For more information go to [www.P65Warnings.ca.gov/alcohol](http://www.P65Warnings.ca.gov/alcohol).

- Note: no warning triangle
- Warning to be in English and *any other language* used for labeling or advertising the product


## 27 CCR §§ 25607.28-25607.29

### Designated smoking areas “safe harbor” warning requirements:

- ✓ Signs to be 8.5 x 11 inches
- ✓ Posted at entrances *and* within exposure areas
- ✓ Minimum 22-point type size
- ✓ Warning enclosed in a box (border)
- ✓ Warning symbol  to the left of the word **“WARNING:”**
- ✓ **“WARNING:”** (in **bold** and all CAPS)


27 CCR §§ 25607.28-25607.29

**Sample smoking area  
sign:**

 **WARNING:** Breathing the air in this smoking area can expose you to chemicals including tobacco smoke and nicotine, which are known to the State of California to cause cancer and birth defects or other reproductive harm. Do not stay in this area longer than necessary. For more information go to [www.P65Warnings.ca.gov/smoking-areas](http://www.P65Warnings.ca.gov/smoking-areas).

## 27 CCR §§ 25607.20-25607.21

- **20 x 20-inch** signs
- **Posted at all public entrances** to meet safe harbor warning provisions
- Min. **72-point** type
- Placed in **readable and conspicuous** manner

 **WARNING:** Breathing the air in this parking garage can expose you to chemicals including carbon monoxide and gasoline or diesel engine exhaust, which are known to the State of California to cause cancer and birth defects or other reproductive harm. Do not stay in this area longer than necessary. For more information go to [www.P65Warnings.ca.gov/parking](http://www.P65Warnings.ca.gov/parking).


## 27 CCR § 25606

- Occupational warnings are within “safe harbor” if fully compliant with all warning, information, training, and labeling requirements of the federal **Hazard Communication Standard (HCS)** (29 CFR § 1910.1200), the **California HCS** (8 CCR § 5194), or the **Pesticides and Worker Safety requirements** (3 CCR § 6700 *et seq.*)
- An additional Prop 65 occupational warning may be required
- Occupational exposures to chemicals not covered by HCS **may be provided consistent with** Sections 25601, 25602, 25603, 25604, 25605 and **25607 et seq. (i.e., hotel-specific warnings)**

## 27 CCR §§ 25602-25603

- Gift shops
- Internet sales
- In-room items for sale (*e.g.*, mini bar items, bottled water, toiletries, robes....)

### Example Long-form Warning:

 **WARNING:** This product can expose you to chemicals including [*name of one or more chemicals*], which is [*are*] known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

### Example Short-form Warning:

 **WARNING:** Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

## Ways to minimize RISK:

- Through safe harbor compliance or other warning systems
- Utilizing more than one method of delivery
- Contract with vendors to reduce, eliminate, or share liability



# Final Thoughts

- ❖ Future enforcement issues
- ❖ Possible future regulations

**QUESTIONS?**

## Transactional

- We guide developers, owners, operators and investors of upscale lodging establishments, major investment banks and real estate investment trusts (REITs) as they approach and conduct transactions throughout the United States, the Caribbean, Europe and the Middle East.

## Litigation

- We represent companies in alleged security breach class action and privacy law suits. Hotels are vulnerable to data breaches of customers' private identifiable information, especially when guests book hotel reservations online.



## Contact Information

### **Malcolm Weiss**

Partner, Hunton Andrews Kurth LLP

+1 213 532 2130

[mweiss@Huntonak.com](mailto:mweiss@Huntonak.com)

### **Shannon Oldenburg**

Senior Attorney, Hunton Andrews Kurth LLP

+1 213 532 2115

[soldenburg@Huntonak.com](mailto:soldenburg@Huntonak.com)

- For more information please go to:

[www.HuntonAKProp65.com](http://www.HuntonAKProp65.com)