HUNTON

**WARNING:** We Can Assist Your Compliance with California's Proposition 65

# California's Proposition 65

## The Safe Drinking Water and Toxic Enforcement Act of 1986

### Overview

California's Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop 65) is one of the most onerous chemical control statutes in the nation. It prohibits businesses with 10 or more employees, including those that merely ship products into California, from:

- Exposing people in California to listed chemicals without a "clear and reasonable" warning; and
- Discharging or releasing listed chemicals to "sources of drinking water" in the state.

Though Prop 65 does not apply to businesses with less than 10 employees, exempt businesses should consider providing compliant warnings or notifying their customers to avoid indemnity demands from retailers for products in their stores or sold online.

Over 900 chemicals are identified as carcinogens, reproductive toxins, or both, on the Prop 65 list that includes solvents, plasticizers, metals, additives, PFAS, and/or ingredients in common household, commercial, and office products. Even naturally occurring chemicals, such as lead, sometimes found in food products, are listed.

If a chemical is listed, Prop 65 consumer product warning requirements apply unless the exposure to: a) a carcinogen will not pose a "significant risk of cancer", or b) a reproductive toxin will have "no observable effect" on people. These standards are exceptionally difficult to meet and, in litigation, are the *defendant's* burden to prove.

Compliant Prop 65 warning regulations, when used, can help insulate businesses from claims. However, recent changes made to the Prop 65 "short form" warning requirements provide additional new grounds for lawsuits brought by private parties, and resolving claims is likely to become more complex.

### Enforcement and Penalties

Prop 65 allows for public and/or private enforcement. Plaintiffs need only to allege a violation has occurred and do not need to allege or show harm, injury, or damage to people, property, or the environment. Failure to comply with Prop 65 is enforceable by penalties of up to $2,500 per day, per violation. In addition, plaintiffs seek, and courts routinely grant, attorney fees and costs, and injunctive relief, including product reformulation to remove offending chemicals to ensure the alleged objectionable conduct is cured.

Bringing a Prop 65 action is relatively easy and lucrative for private plaintiffs and their counsel. Given the relative ease and potential payoff of bringing suit, businesses often face aggressive litigation tactics from plaintiffs' counsel.

Notably, defendants' costs to resolve claims has been on the rise: 2015 payments totaled $26,226,761; 2016 payments were $30,150,111; 2017 payments were $25,767,500; 2018 payments were $35,169,924; 2019 payments were more than $37,000,000. By 2023 payments exceeded $50,000,000. In 2024 payments exceeded **$100,000,000**. These figures exclude defense counsel fees and the costs to businesses to resolve claims and implement compliance programs.

### Responding to a Prop 65 Lawsuit

Once a plaintiff establishes that a listed chemical is present, even at a very low level, the burden of proof to demonstrate that an actionable exposure has not occurred shifts to the defendant business. Because this is a difficult burden to meet, most Prop 65 cases are resolved through negotiated settlements. On occasion, however, there are viable and important reasons to litigate.

Any settlement in a private Prop 65 enforcement action (other than voluntary dismissal) must be reported to the California Attorney General. Judicially-approved settlements with a private plaintiff can preclude other private parties from bringing the same claim.

**Learn more about the new warning regulations on OEHHA's website.**
oehha.ca.gov/proposition-65

Scan QR code to visit site

**For more information on Prop65 visit our website.**
HuntonProp65.com

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## Compliance

Effective compliance strategies exist. Among other things, a covered business (effectively, every business in the chain of commerce) should assess whether it is exposing individuals to any Prop 65-listed chemical through products or environmental or occupational exposures.

Compliance with Prop 65's warning requirements insulates a business from exposure liability, regardless of exposure levels. It is, therefore, critically important that your business fully understands the warning requirements and implements a compliant warning program. In most cases, "safe harbor" warnings must be specific as to the chemical(s) involved. A number of other requirements apply to a warning's content and how the warning is communicated. In addition to warnings, businesses may take other actions to protect against Prop 65 liability, including implementing legal protections such as contractual indemnities, certificate programs, and testing protocols.

Compliance can also be achieved by demonstrating that an exposure will produce no significant risk of cancer or no observable effect on reproduction, even at minute exposure levels. However, because actionable exposures can occur even at trace concentrations, this can be difficult and expensive to prove.

## Our Firm

For more than 120 years, Hunton has served clients across the globe with a collaborative and purposeful approach. The firm is known for its strength in the energy, financial services, real estate, and retail and consumer products industries, as well as its considerable depth across numerous practice areas. Our California lawyers are on the front lines of emerging environmental issues, routinely counseling clients in litigation, regulatory matters (including Prop 65, air and water quality, contaminated properties, hazardous chemicals, land use, and climate change issues), and transactional matters (including due diligence, agreement drafting and negotiation, procurement of environmental insurance, and permit transfers). We have extensive experience working with regulatory agencies on behalf of clients, including the US EPA, Cal/EPA, California Department of Toxic Substances Control, State Water Resources Control Board and Regional Boards, California Office of Environmental Health Hazard Assessment, California Air Resources Board, and South Coast and Bay Area Air Quality Management Districts (and other air quality districts).

## Proposition 65 Notice Tracker

Along with our Prop 65 website, we have developed a publicly-accessible, interactive tracker dedicated to monitoring and identifying trends regarding Notices of Violation filed under Propositions 65. The tracker incorporates a chart which offers a visualization of the volume of Notice of Violation filings and identifies the filer, the type of products affected, and the chemicals indicated in each notice. Tracker data can be sorted by date range, filing party, product category and chemical type to derive a variety of interesting trends and is updated regularly with data from the Office of the Attorney General for California.

**Explore Our Proposition 65 Violation Tracker.**
**https://www.hunton.com/proposition-65-notice-tracker**

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