

Client Alert

January 2015

OEHHA Misses the Mark on Prop. 65 Reform

On January 12, 2015, California's Office of Environmental Health Hazard Assessment (OEHHA) released a formal rulemaking draft of its Proposition 65 warning regulations. The draft is dated January 16, 2015. If finalized as released, these new regulations would open broad new avenues for Proposition 65 plaintiffs ("bounty hunters") to pursue litigation and force more settlements on large and small businesses up and down the chain of commerce. The proposed regulations do not implement Governor Brown's intent to end "frivolous 'shake-down' lawsuits" or improve warnings or strengthen the scientific basis for warning levels. In fact, as with the other reforms to Proposition 65, this proposal is likely to make matters worse for businesses and do little if anything to enhance public health.

The proposed regulations keep many of the worrisome requirements from OEHHA's September draft.¹ Several of these requirements may unnecessarily alarm consumers and require businesses to replace existing warnings in order to remain in compliance.

First, significantly, the warning would be required to be provided to consumers prior to purchase, rather than prior to potential exposure, as is currently the case. Second, in order to be considered "clear and reasonable," warnings for products need to use language stating that the product "can expose you to a chemical..." rather than the current "this product contains a chemical...". Third, warnings would be required to include a graphic of a black exclamation point within a yellow triangle. Fourth, unlike the current requirements, warnings would be required in multiple languages if a product label or sign also uses different languages. Fifth, the proposed regulation explicitly allows for any "interested party" to request OEHHA to adopt a warning method or content specific to a product – opening the door for plaintiffs to demand certain warnings on various products. Sixth, OEHHA's proposal would create situations in which businesses with a court-approved settlement would need to utilize warnings that meet the terms of the settlement, but similarly situated businesses warning for the same chemicals would need to use different warnings, further exacerbating consumer confusion.

Further, the draft lists 12 common chemicals (acrylamide, arsenic, benzene, cadmium, carbon monoxide, chlorinated tris, formaldehyde, hexavalent chromium, lead, mercury, methylene chloride, and phthalates) that a warning would be required to identify by name, if exposure to that chemical is reasonably calculated to occur. This requirement could open the door to a new breed of Proposition 65 litigation wherein a business provides an otherwise "clear and reasonable" warning, but fails to specifically identify one of these 12 chemicals. OEHHA also leaves the door open for additions or subtractions from this list, potentially necessitating even further changes to warning labels.

Under the proposed regulations, warnings would also be required to include the URL for a website to be maintained by OEHHA. Upon request, businesses will be required to provide detailed product information to OEHHA for publication upon the website.

OEHHA is accepting comments on these proposed changes until April 8, and will hold a public hearing on March 25, 2015.

¹As discussed in our prior client alert, which is available [here](#).

For more information on these proposed regulations or Proposition 65 in general, please feel free to contact us or visit our [California's Proposition 65 site](#).

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