

FDRA Alert - Key Changes for California's Proposition 65 Effective August 30, 2018

LEGAL ALERT

June 6, 2018

FDRA Members:

As a reminder, the new “Safe Harbor” warning regulations for Proposition 65 (“Prop 65”) go into effect on August 30, 2018. As of that date, the 2008 warning regulations will no longer be available as a safe harbor compliance option. This alert provides you with a reference guide for consumer product warnings to ensure you are aware of the key changes.

Who Must Comply With The New Regulations?


The new regulations apply to any company seeking to provide a Prop 65 compliant warning on its products sold in California. The new warning language is required for products that are manufactured on or after August 30, 2018.

However, if a company has already agreed to different warning language for its products through a court-approved settlement (known as a consent judgment), it can continue to use the warning language provided for in that consent judgment. The consent judgment's terms only apply to the specific products that are covered by the consent judgment and only companies that are parties to the consent judgment (signatories to it) can rely on it.


The new regulations place primary responsibility for providing the warnings on manufacturers, producers, packagers, importers, suppliers and distributors. These companies must either provide the warning on the product, or follow a specific process for providing the warning and materials to the “authorized agent” for the retailer and receive an acknowledgement of receipt. The process for providing notification to the retailer is not detailed in this summary.

What Is Required?

Language For Signs, Labels, And Internet Warnings:

 **WARNING:** This product can expose you to chemicals including [name 1 or more] which [is/are] known to the State of California to cause cancer and [name 1 or more] which [is/are] known to the State of California to cause birth defects or other reproductive harm. For more information go to: www.P65Warnings.ca.gov.


For this type of warning, the company must include the full name of one or more chemical for which it is providing a warning. If the chemical is only listed for cancer, the warning should not include the language regarding birth defects or other reproductive harm. For instance, the safe harbor warning language for formaldehyde (which is only listed as a carcinogen) would be:

 **WARNING:** This product can expose you to chemicals including formaldehyde which is known to the State of California to cause cancer. For more information go to: www.P65Warnings.ca.gov.


Language For Short-Form Warnings:

The new regulations do not require identification of a specific chemical where the “short-form” on product warnings is used. The short-form warning can be affixed to or printed on a product *or its immediate container or wrapper*.

Three versions of the abbreviated warnings are allowed for short-form warnings depending on the type of exposure:

 **WARNING:** Cancer – www.P65Warnings.ca.gov

 **WARNING:** Reproductive Harm – www.P65Warnings.ca.gov

 **WARNING:** Cancer and Reproductive Harm – www.P65Warnings.ca.gov

Where Should The Warnings Be Placed?

For short-form warnings, the warning must be placed on the product or its immediate container or wrapper.

For posted or shelf signs or shelf tags, the warning must be at each point of display of the product. Note that the abbreviated warning language is not allowed for these warning methods.

For internet purchases, in addition to providing a warning on the product or label or tag, a warning must be communicated to the consumer before the purchase is completed. The warning should be on the page where the product is displayed or through a hyper-link on the product display page, or any other page that prominently displays the warning to the consumer prior to purchase.

For catalog purchases, in addition to providing a warning on the product or label or tag, a warning must be communicated to the consumer before the purchase is completed. A warning symbol provided near a product in the catalog or on a separate webpage does not meet the requirement that the warning be “clearly associated” with the item being purchased and would not satisfy the safe harbor requirements.

What Other Changes Do Companies Need To Know About?

- The warning must be in a type size no smaller than the largest type size used for other consumer information on the product. In no case shall a warning appear in a type size smaller than **6 point** font.
- The warning must have the word **WARNING** in all caps and bold font.
- It must include a yellow triangle symbol in a size no smaller than the height of the word “**WARNING**” (unless the packaging does not use the color yellow, in which case it can be in black and white).
- It must have the correct warning language and refer to the OEHHA Prop 65 warning website.
- If a consumer product sign, label, or shelf tag used to provide a warning includes consumer information in a language other than English, the Prop 65 warning must also be provided in that language in addition to English.
- For warnings that include the chemical name, the full chemical name must appear at the first mention of the chemical.
- There are additional requirements for occupational exposure warnings that companies with employees in California must adhere to as well, which are not discussed in this summary.

This reference guide is intended to help you identify changes that you may need to make to adhere to the Prop 65 warning requirements. Depending on your products and approach for Prop 65 compliance, you may need to further research and assess the requirements of the regulations. If you need additional information, please contact FDRA’s Prop 65 counsel: **Melissa Jones, Stoel Rives LLP, at (916) 319-4649 or melissa.jones@stoel.com**.