

## New Prop. 65 Regulations: *What do they mean for your small business?*



AUGUST 2018, new regulations regarding Prop. 65 went into affect. California voters enacted the Safe Drinking Water and Toxic Enforcement Act (“Proposition 65”) In 1986. The law requires warnings for potentially dangerous chemicals that may cause cancer, birth defects, or other reproductive harms. Thirty-two years later, Californians are now well accustomed to seeing these warnings on consumer products, and virtually everywhere they go.

A typical warning currently reads: “This product/area contains chemicals known to the State of California to cause cancer and birth defects, or other reproductive harm.”

Manufacturers nationwide, and California businesses, should take note of new regulations recently promulgated by the California Office of Environmental Health Assessment (OEHHA). Beginning in August of 2018, Proposition 65 warning requirements will become more strict and specific. Rather than just the generic warning that a harmful chemical may be present, the new regulations require that warning labels must specifically identify one of the listed chemicals prompting the warning. Additionally, the warning must identify potential harms with specific language, as emphasized in this example: “WARNING: This product can expose you to chemicals, including Acetamide, which is known to the State of California to cause cancer.”

If your product or workplace currently displays Proposition 65 warnings, you must update those warnings by identifying at least one specific chemical prompting the warning. In some cases, it may be

relatively easy to identify a chemical prompting the warning. For example, you might identify a listed chemical on the packaging of cleaning agents, or you might learn through a Google search that a product contains chemicals known to the State of California to present cancer or birth defect risks. But in other cases a business might not be able to identify what chemical is prompting its warning. In the past, many small businesses posted generic Proposition 65 warnings to avoid the threat of trolling lawyers, without really giving thought to what chemicals they are actually using. These businesses, in particular, might struggle with the new requirements and or might ultimately decide that they are not using any product that should trigger a Proposition 65 warning; however, they can expect greater clarity as manufacturers begin updating their product labels to comply with the new requirements.

### *What Does this Mean for Small Business?*

The new regulations clarify that the primary burden of Proposition 65 compliance is on manufacturers and those companies packaging products sold in California. This means that liability for retailers should be limited. Specifically, to qualify for safe harbor, retailers are required to acknowledge receipt of any labeling materials from the manufacturer or distributor and to post Proposition 65 warnings where provided.

Meanwhile, manufacturers may need to work with a chemist to identify specific chemicals within their products to create Proposition 65 compliant labels. Likewise, companies packaging and distributing products for use and consumption in California should proactively work with manufacturers to identify chemicals that may prompt a Proposition 65 warning, and to update existing product labels.

All other businesses must continue to provide Proposition 65 warnings for “environmental exposure” when they are using products containing listed chemicals, or otherwise discharging such chemicals. OEHHA provides guidance if you are unsure as to whether you should be posting a warning. NOTE: There is an exception for businesses with 9 or fewer employees.