



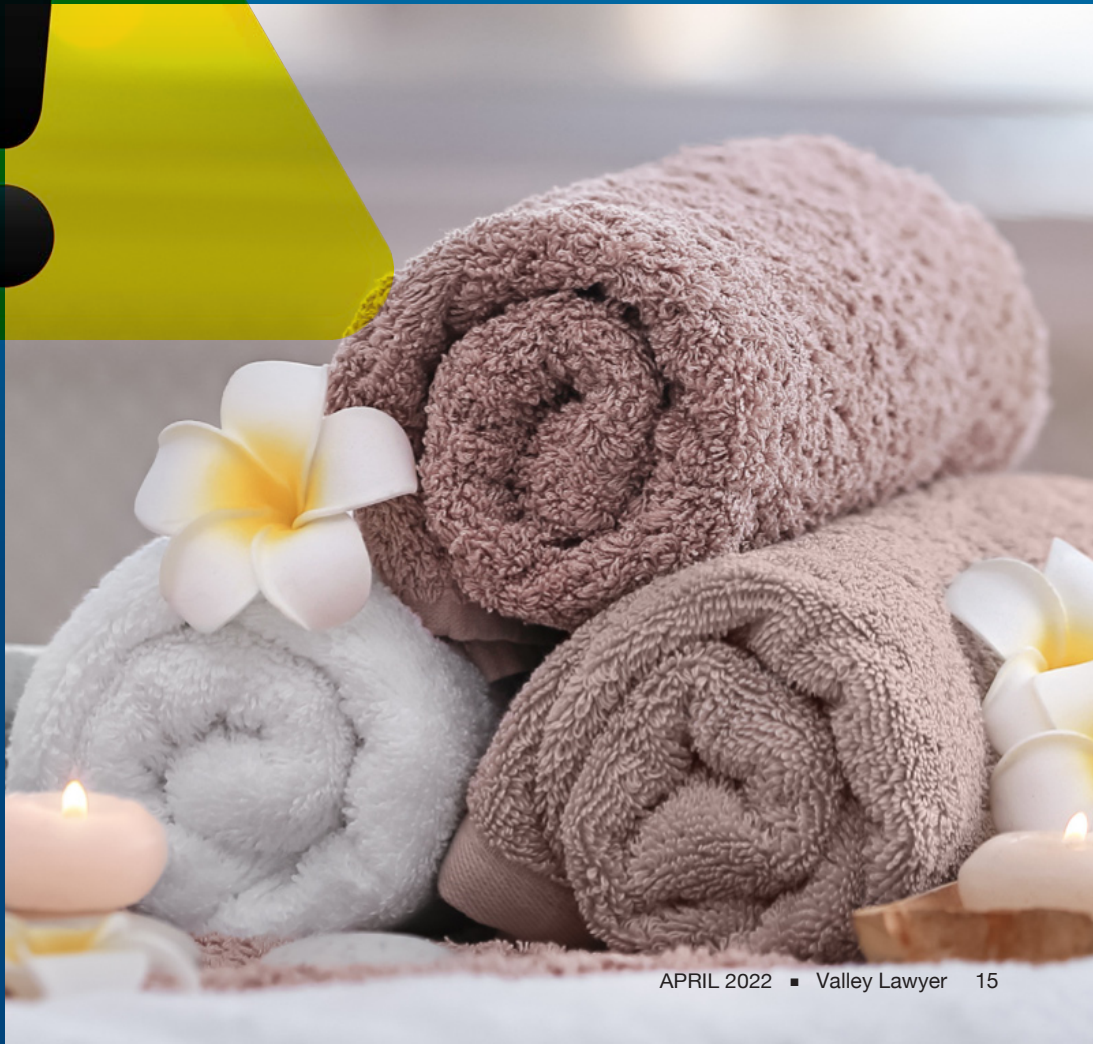
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By Stephen T. Holzer and Steven L. Feldman

Proposition 65: A Primer and An Alert

Enacted in 1986, Proposition 65 was enacted to warn consumers, workers, and others that they were unknowingly being exposed to harmful, cancer-causing chemicals and reproductive toxicants, and that a mechanism was needed to warn them of potential exposure.





IN 1986, CALIFORNIANS VOTED 63 PERCENT to 37 percent to add several sections—namely, 25249.5 through 25249.13—to the California Health & Safety Code, also known as the Safe Drinking Water and Toxics Exposure Act of 1986.

These statutes, commonly known as Proposition 65, were enacted because of a belief on the part of the public that consumers, workers, and others were unknowingly being exposed to cancer-causing chemicals and reproductive toxicants, and that a mechanism needed introduction to warn them of potentially harmful exposure.¹

Proposition 65 requires California businesses employing ten or more persons to warn people if the business' product or business' working environment exposes an individual to carcinogens or reproductive toxicants.²

Specifically, the Health & Safety Code states:

*"No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual..."*³

The precise methods of providing "clear and reasonable" warnings are set forth in regulations promulgated by the state Office of Environmental Health Hazard Assessment, colloquially known as OEHHA.⁴

These regulations specify the text of the warnings to be given about carcinogens and reproductive toxicants and how the warnings are to be given, whether to:

- Exposed consumers;⁵
- Exposed persons in indoor environments and in outdoor environments with clearly defined entrances;⁶
- Exposed employees;⁷ and,
- Persons exposed in a wide variety of other contexts such as alcoholic beverages; food; prescription drugs; dental care; wood dust; furniture products; diesel engines; vehicles; recreational vessels; parking facilities; amusement parks; petroleum products; service stations

and other vehicle repair facilities; smoking areas; canned and bottled foods; hotels; residential rental property; and rental vehicles.⁸

For a business to have a warning obligation, of course, first requires a determination as to whether or not a specific chemical associated with the business is a carcinogen or a reproductive toxicant.

H & S Section 25608 specifies the method for making this determination:

*"A chemical is known to the state to cause cancer or reproductive toxicity within the meaning of this chapter if in the opinion of the state's qualified experts it has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive toxicity, or if a body considered to be authoritative by such experts has formally identified it as causing cancer or reproductive toxicity, or if an agency of the state or federal government has formally required it to be labeled or identified as causing cancer or reproductive toxicity."*⁹

The Governor is tasked with determining, in a publication popularly known as the "Governor's List", which chemicals are "known to the state to cause cancer or reproductive toxicity."¹⁰

As a practical matter, the Governor delegates this task to the Carcinogen Identification Committee

(CIC) and Developmental Reproductive Toxicant Identification Committee (DARTIC), and the Governor just accepts these Committees' recommendations.

The list of chemicals identified as carcinogens or reproductive toxicants is by statute required to be published at least once a year and is published as often as every six months.^{11 12}

There are exceptions to listing of a chemical if the regulated business can show that the exposure at issue to the chemical "poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer, and that the exposure will have no observable effect assuming exposure at one thousand (1000) times the level in question for substances known to the state to cause reproductive toxicity..."¹³



Keeping abreast of, and complying with, the regulations and their revisions over time is the best way to avoid exposure to a potentially expensive Proposition 65 claim."



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This is a very difficult burden to meet and therefore most business which receive a Notice of Violation or which face actual litigation settle rather than litigate claims that exposure to a listed chemical violates Proposition 65 because no warning has been given.¹⁴

Such businesses are at a significant disadvantage in litigation because the claimant can, if successful, obtain an award of attorneys' fees, whereas the businesses have no such right even if the court concludes they are not liable.

The penalty for violating the warning requirements of Proposition 65 can be up to \$2,500 a day, which may be civilly enforced by the Attorney General, certain local prosecutors and, if the government does not prosecute, by a private individual acting as a "*private attorney general*."^{15 16}

The Short-Form Warning

Since the warning requirements under Proposition 65 are specifically governed by Title 27 of the Code of Regulations, it is important for the regulated community to keep track of changes in the regulations over time.

For example, providing a long-form warning may be difficult to place on some products' relatively small label.¹⁷

As a result, the regulated business may, pursuant to 27-25603 (b), opt to use a short-form warning.

A short-form warning may be provided on the product label using all the following elements—the symbol required in subsection (a)(1), and the word "**WARNING:**" in all capital letters, in bold print. For exposures to listed carcinogens, the words, "*Cancer - www.P65Warnings.ca.gov*;" for exposures to listed reproductive toxicants, the words, "*Reproductive Harm - www.P65Warnings.ca.gov*;" and , for exposures to both listed carcinogens and reproductive toxicants, the words, "*Cancer and Reproductive Harm - www.P65Warnings.ca.gov*."

Note that, additionally "*The entire short-form 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 the warning appear in a type size smaller than 6-point type.*"¹⁸

It is important to notice that the above-referenced regulations provide no size restriction on product labels.

Thus, business have taken the opportunity to use the short-form warning even where the product label is itself big enough to support the long-form label.

This concern, among others, has led to OEHHA proposing new restrictions¹⁹ on the use of short-form labels. For example, 27-25602 (a) (4) (on short-form warnings) under the present regulations reads:

"A consumer product exposure warning meets the requirements of this subarticle if it complies with the content requirements in Section 25603 and is provided using one or more of the following methods...(4) A

short-form warning on the label that complies with the content requirements in Section 25603(b). The entire 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 the warning appear in a type size smaller than 6-point type.”

The proposed new language, with changes, reads:

“(4) A short-form warning on the label that complies with the content requirements in Section 25603(b). The short-form warning may only be used if: (A) The total surface area of the label available for consumer information is 12 square inches or less, and; (B) the package shape or size cannot accommodate the full-length warning described in Section 25603(a), and; (C) The entire warning is printed must be 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 the warning appear in a type size smaller than 6- point type.”

Further, if a short-form warning is provided on a product label, a short-form warning may be used in a business’ catalogues, as specified below.²⁰

The new regulations also amend the short-form warnings to be given for internet and catalog their purposes pursuant to new proposed sections 27-25602 (b) and (c), which provide changes from the language of the existing regulation and /or from previous proposed iterations that:

“(b) For internet purchases, a warning that complies with the content requirements of Section 25603(a) must also be provided by including either the warning or a clearly marked hyperlink using the word “WARNING”, or the words “CA WARNING:” or “CALIFORNIA WARNING:” on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase. ~~If warning is provided using the short-form warning label content pursuant to Section 25602(a)(4), the warning provided on the website may use the same content. If the warning is provided using the short-form warning label content pursuant to Section 25602(a)(4), the warning provided on the website may use the same content.~~ For purposes of this sub-article, a warning is not prominently displayed if the purchaser must search for it in the general content of the website.”

“(c) For catalog purchases, a warning that complies with the content requirements of Section 25603(a) must also be provided in the catalog in a manner that clearly associates it with the item being purchased. ~~If a short-form warning is being provided on the label pursuant to~~


Section 25602(a)(4), the warning provided in the catalog may use the same content. If a short-form warning is being provided on the label pursuant to Section 25602(a)(4), the warning provided in the catalog may use the same content.”²¹

Avoiding Potential Claims

As many businesses have already learned, there is a legal cottage industry focused of pursuing Proposition 65 claims against employers which have 10 or more employees.

As Proposition 65 regulations change, so do the obligations of these employers.

Defending against a Proposition 65 claim is difficult because, once the claimant shows that there is exposure to a listed carcinogen or reproductive toxicant, the burden shifts to the employer to demonstrate that the chemical poses no danger to human health.

Keeping abreast of, and complying with, the regulations and their revisions over time is the best way to avoid exposure to a potentially expensive Proposition 65 claim. 

¹ Given the length of this article, it is not possible to survey either the entire scope of Proposition 65 or the regulatory changes that are occurring in 2022. This article is designed merely to provide the broad outline of the Proposition and to provide an example of the constantly changing Proposition 65 regulatory environment. The reader should consult Health & Safety Code 25249.5 through 25249.13 and 27 CCR Sections 25601-25607.2 for a complete explication of both the Proposition and its regulatory framework.

² California Health & Safety Code § 25249.11. Defined as an employer of 10 or more persons.

³ *Id.* § 25249.6.

⁴ 27 California Code of Regulations §§ 25601-25607.2.

⁵ *Id.* §§ 27-25603 to 25603.3.

⁶ *Id.* §§ 27-25604 to 27-25605.

⁷ *Id.* §§ 27-25606.

⁸ *Id.* §§ 27-2607-2607.26.

⁹ *Id.* §§ 27-25608 (b).

¹⁰ California Health & Safety Code § 25249.8 (b).

¹¹ *Id.* 25249.8 (a)-(c).

¹² The most recent list is dated December 31, 2021 and can be found <https://oehha.ca.gov/proposition-65-list>.

¹³ California Health & Safety Code § 25259.10 (c).

¹⁴ If the claim at issue is brought by a private party acting as a private attorney general, the prospective defendant must be given 60 days' notice before suit can be brought and the private party must be able to show that no specified government entity is diligently pursuing an action on account of the alleged violation. 27-25249.7 (c)-(d).

¹⁵ California Health & Safety Code § 252499 (b).

¹⁶ *Id.* 25249.7 (c).

¹⁷ See 27-25603 (a) (1), which sets forth iterations of the long-form warning; e.g., the warning requires a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline. Where the sign, label or shelf tag for the product is not printed using the color yellow, the symbol may be printed in black and white. The symbol shall be placed to the left of the text of the warning, in a size no smaller than the height of the word "WARNING," and the word "WARNING:" in all capital letters and bold print, and, for exposures to listed carcinogens, the words, "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. For more information, go to www.P65Warnings.ca.gov".

¹⁸ 27 California Code of Regulations § 27-25602 (a) (4).

¹⁹ *Id.* § 27-25602 (e). The revised regulation discussed herein is expected to be finalized shortly; and when finalized, businesses will have a year before the revision becomes effective.

²⁰ *Id.* § 27-25602 (c).

²¹ For all the short-form warning revisions taking place, please review CCR §§ 27-25602, 27-25603 and 27-25607.1.



Proposition 65: A Primer and An Alert Test No. 162

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Businesses in California must have 10 or more employees before the businesses are subject to Proposition 65 requirements?
 True False
2. Proposition 65 was enacted by the Legislature.
 True False
3. Proposition 65 is only concerned with chemicals known to cause cancer.
 True False
4. Proposition 65 requires warnings to people only in indoor environments.
 True False
5. Proposition 65 does not apply to canned foods.
 True False
6. The government publishes a list of chemicals which states whether they cause cancer or reproductive toxicity.
 True False
7. Whether a chemical is deemed to cause cancer or reproductive toxicity is determined by committees designated by the government to make those determinations.
 True False
8. The law requires the list of cancer-causing chemicals and reproductive toxicants to be updated at least once a year.
 True False
9. Once a business has been charged with failing to provide a Proposition 65 warning regarding a listed chemical, it is impossible for the business to show that the warning is unnecessary.
 True False
10. Only the State Attorney General is authorized to file a lawsuit against a business for violation of Proposition 65.
 True False
11. Violations of proposition 65 are criminal offenses.
 True False
12. The government provides language that the business can use to give the required warnings.
 True False
13. Proposition 65 does not require that businesses subject to the proposition give warnings on the business' web page.
 True False
14. If a business elects to sue a "short-form" warning, the size of the warning is regulate by Proposition 65.
 True False
15. The warning required by Proposition 65 must include a symbol.
 True False
16. A short-form warning can be used no matter the size of the product label.
 True False
17. Proposition 65 regulates warnings to be given for Internet purchases.
 True False
18. Businesses which violate Proposition 65 can be subject of \$2,500 a day in penalties.
 True False
19. A business allegedly violating Proposition 65 must be given 60 days' notice by the government before being subject to government lawsuit.
 True False
20. The State Office of Environmental Health Hazard Assessment has not promulgated regulations regarding Proposition 65.
 True False

Proposition 65: A Primer and An Alert MCLE Answer Sheet No. 162

INSTRUCTIONS:

1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the \$20 testing fee for SFVBA members (or \$30 for non-SFVBA members) to:

San Fernando Valley Bar Association
20750 Ventura Blvd., Suite 104
Woodland Hills, CA 91364

METHOD OF PAYMENT:

- Check or money order payable to "SFVBA"
- Please charge my credit card for \$ _____.

Credit Card Number

CVV code / /
Exp. Date

Authorized Signature

5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0495.

Name _____
Law Firm/Organization _____
Address _____
City _____
State/Zip _____
Email _____
Phone _____
State Bar No. _____

ANSWERS:

Mark your answers by checking the appropriate box. Each question only has one answer.

1. True False
2. True False
3. True False
4. True False
5. True False
6. True False
7. True False
8. True False
9. True False
10. True False
11. True False
12. True False
13. True False
14. True False
15. True False
16. True False
17. True False
18. True False
19. True False
20. True False