

# Prop 65 Compliance Tips: Further Notes from the Prop 65 Annual Conference

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September 24, 2020

With so much great content from Monday's annual Prop 65 Clearinghouse Conference, here is a follow up post highlighting some of the compliance tips shared by panelists:

- Compliance Tip #1: **TEST** your products ... but how much and what to test? You can't test everything that goes out your door. And you can't test for every chemical. What is practical/feasible? Prioritize products and chemicals for which 60-Day Notices of Violation have been filed, especially recently. Discuss with a respected lab. Focus on top sellers - sales are used to determine settlement amounts and top sellers pose the biggest financial risk. Group products that share common components or ingredients; testing at the component/ingredient level may be able to cover a range of products. Ensure testing is representative and that results can be extended to all products of the same type. Remember that if you switch suppliers, previous testing likely is no longer representative.
- Compliance Tip #2: Develop a **Compliance Plan**. Put it in writing. The plan provides tools to support a Prop 65 defense - and can help mitigate risk of receiving a notice of violation. The plan also can support a lower penalty level as it can show good faith efforts to comply.
- Compliance Tip #3: Maintain **communication with supply chain** partners. Seek indemnity provisions. Consider requiring suppliers to provide certifications or test results to demonstrate the presence or amount of Prop 65 chemicals in their materials.
- Compliance Tip #4: **Risk assessment**. Use test results to assess exposure potential and complete a risk assessment. Exposure levels are compared to "safe harbor" levels, which OEHHA has adopted for about one-third of listed chemicals; if one has not been adopted, consider retaining a toxicologist to develop one based on a thorough review of the scientific literature. The assessment can serve as a rebuttal to a plaintiff notice of violation and, while the plaintiff may challenge some of the assumptions that go into the risk assessment, it can provide a basis for guiding settlement discussions and highlighting issues for litigation.
- Compliance Tip #5: Understand the **Lab Data** (from the plaintiff and your own). What does that test result number mean? Is it scientifically valid? Is it supported by the underlying lab data? Was the correct lab methodology used and implemented appropriately? Test equipment calibrated/sufficiently sensitive? Check duplicate samples and chain of custody. Verify lab and technicians credentials.
- Compliance Tip #6: Section 25900 provides an **affirmative defense** if you have testing with the past year. No knowing or intentional exposure if you have testing showing non-detect using a proper

test method within one year of receiving a notice. Must be on representative product. All test results must be non-detect. Testing by a certified lab (most US labs are; many foreign labs are not). Unfortunately, there are no reported cases on the defense and it can be complicated to demonstrate.

- Compliance Tip #7: Correctly **assess exposure**. Big difference between content of a chemical and actual exposure to the chemical requiring a warning. Review the product to determine if the chemical is present in a way that provides for potential exposure through the average or normal "reasonably foreseeable use." You don't have to evaluate extreme possibilities. Use pre-existing settlements (often expressed as content values) as a guidepost but remember that these levels are not surrogates for actual exposure and may not be relevant to your specific product or use.

As always, stay tuned to the Kelley Green Law blog for insights and analysis of Prop 65 issues.