

Prop 65 Update: Big Changes to the Short-Form ... and Internet Warning Confusion (UPDATE)

Joseph J. Green

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Major new changes to the California Proposition 65 warning requirements went into effect on New Year's Day. After multiple attempts, California's Office of Health Hazard Assessment ("OEHHA") adopted long-awaited changes to the "short-form" warning, rendering it significantly less short. In addition, OEHHA makes a complete mess of the requirements for internet purchases, and includes new provisions for food products and motor vehicle and recreational marine vessel parts. [Please see update to "internet purchase" warning requirements below.]

While the changes are effective as of January 1, 2025, businesses have three years (until January 1, 2028) to comply with the new short-form and other requirements. Products manufactured and labeled prior to January 1, 2028, using the "old" version of the short-form warnings will not have to be relabeled (*i.e.*, there is an unlimited "sell-through" period).

Not So Short-Form

Prop 65 requires businesses to provide warnings to consumers prior to selling a product in California that could cause an exposure to a listed chemical. The law does not specify required warning text or methods, other than that the warning be "clear and reasonable" and provided to the consumer prior to exposure. However, OEHHA regulations specify warning language and methodology for various product categories which, if utilized, are deemed *de facto* compliant (a/k/a "safe-harbor" warnings). To avoid challenge, companies routinely utilize these "safe-harbor" warnings, including "short-form" versions that were originally introduced in the 2016 Prop 65 amendments. The brevity of this method, combined with this label's ability to comply with Prop 65 without disclosure of a specific chemical, has resulted in its widespread popularity with manufacturers, distributors, and retailers.

Long Form:

⚠ WARNING: 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 [birth defects or other reproductive harm]. For more information go to www.P65Warnings.ca.gov.

OLD Short-Form:

⚠ WARNING: CANCER [REPRODUCTIVE HARM] - www.P65Warnings.ca.gov.

The "short-form" warning originally was intended for use with products with limited label space, though the regulations do not include this limitation. OEHHA and activist groups have been critical of

the short-form for failing to provide consumers information about the chemical for which the warning is being provided, as well as its widespread use on products with sufficient label space for the full text warning.

Now, the short-form warning will require identification of at least one chemical per endpoint (cancer and reproductive harm) and two options for the text, as follows:

For exposures to listed carcinogens:

⚠ **WARNING:** Cancer risk from exposure to [name of chemical]. See www.P65Warnings.ca.gov.

or

⚠ **WARNING:** Can expose you to [name of chemical], a carcinogen. See www.P65Warnings.ca.gov.

For exposures to listed reproductive toxicants:

⚠ **WARNING:** Risk of reproductive harm from exposure to [name of chemical]. See www.P65Warnings.ca.gov.

or

⚠ **WARNING:** Can expose you to [name of chemical], a reproductive toxicant. See www.P65Warnings.ca.gov.

For exposures to both listed carcinogens and reproductive toxicants:

⚠ **WARNING:** Risk of cancer from exposure to [name of chemical] and reproductive harm from exposure to [name of chemical]. See www.P65Warnings.ca.gov.

or

⚠ **WARNING:** Can expose you to [name of chemical], a carcinogen, and [name of chemical], a reproductive toxicant. See www.P65Warnings.ca.gov.

For exposures to a chemical that is listed as both a carcinogen and a reproductive toxicant:

⚠ **WARNING:** Risk of cancer and reproductive harm from exposure to [name of chemical]. See www.P65Warnings.ca.gov.

or

⚠ **WARNING:** Can expose you to [name of chemical], a carcinogen and reproductive toxicant. See www.P65Warnings.ca.gov.

The regulations also now explicitly allow for use of the signal phrase “**CALIFORNIA WARNING**” or “**CA WARNING**” in lieu of simply “**WARNING.**”

The short-form can be used regardless of the size of the product package, but must be provided in a minimum 6-point font and “conspicuous” (*i.e.*, “conspicuousness as compared with other words, statements, designs or devices on the label, labeling, or sign, as to render the warning likely to be seen, read, and understood by an ordinary individual under customary conditions of purchase or use”). In sum, while OEHHA deleted language stating that font size of the warning must be no smaller than the type size used for other consumer information on the product, the warning must be obvious to the consumer.

Warnings for Internet Purchases - A Total Mess (UPDATE)

The amendments make highly confusing and, frankly, irrational changes to the provisions governing internet purchases. The final regulatory text *seemingly* strikes the requirement that products sold online require warnings provided both on the website and accompanying the product (*e.g.*, on the product package or receipt delivered to the customer or similar method). Indeed, OEHHA dropped proposed language from the final rule that specified “In addition, the warning must also be included: on or with the product when delivered to the consumer ... on labeling accompanying the product ... or as otherwise specified”

For a glorious moment it appeared that OEHHA had eliminated a major practical hassle for companies hesitant to include Prop 65 warnings on products not sold in California, but obviously find it difficult to have separate product labeling for one state.

Alas, we cannot have nice things. OEHHA issued “clarifying” guidance stating that it

removed the provision quoted above ... [as] that language was merely a clarification of the existing language and did not change existing law. Existing language already requires two warnings for internet purchases – one prior to purchase and one “also” prior to exposure.

Nonsense. The statutory requirement is that the warning be provided prior to exposure. (“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.”) Historically, before the advent of internet purchases through the current day, a satisfactory warning may be provided through a number of mechanisms, including through a product specific warning in a store. Nowhere and at no time do the regulations specify that two different warnings (prior to purchase and prior to use) need to be provided.

The new “internet purchase” regulations read as follows:

For internet purchases, a warning meets the requirements of this subarticle if it complies with the content requirements of Section 25603 and the warning also must be provided using one or more of the following methods:

(A) a warning on the product display page, or

(B) a clearly marked hyperlink using the word “WARNING” or the words “CA WARNING” or “CALIFORNIA WARNING” on the product display page that links to the warning, or

(C) an otherwise prominently displayed warning provided to the purchaser prior to completing the purchase. 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 subsection, the warning is not prominently displayed if the purchaser must search for it in the general content of the website.

Section 25603 states that “a warning meets the requirements of this subarticle if it is provided using one or more of the methods required in Section 25602 and includes all the following elements” The section then proceeds to detail the familiar text and other content (such as the yellow triangle symbol) of the long- and short-form warnings.

Section 25602(b) governs the methods for providing warnings for “internet purchases” and specifies

three on-line options for doing so – none of which indicate that a warning also must be provided on the product package or otherwise with delivery of the product. So long as the warning includes the required text and other content, that’s all the warning you need.

Nevertheless, OEHHA’s convoluted guidance says that the regulatory text actually means something else. [Presumably, OEHHA believes that their interpretation is valid because the regulation states that an internet purchase warning must meet Section 25603’s content requirements “and the warning also must be provided” using one of the three on-line methods. If so, that is an awfully thin reed to rely on; use of the word “also” in that statement does not refer back to other methods of warning delivery but to the fact that the warning must meet the textual content requirements.]

In sum, while it appeared that OEHHA had made rational changes to the internet purchase warning requirements, in fact, they have made things more confusing. While lawyers like me know to look at the guidance documents because of such shenanigans, it is not unreasonable for businesses to rely upon the regulatory text, particularly when it is not all that confusing! And in this case, as shown above, the text is clear on what is required for internet purchases - clear that is unless you are OEHHA.

I would like to think that no court would accept OEHHA's twisted version of the regulatory text – and I do believe that providing a clear internet warning prior to purchase is sufficient to satisfy Prop 65 warning obligations. However, given that California courts often defer to OEHHA or the Attorney General’s interpretation of requirements, it is hard to counsel clients that compliance with the explicit regulatory text governing internet purchases is sufficient to insulate a business from Prop 65 enforcement.

It shouldn’t be this difficult.

Grace Period for On-Line Retailers

Finally, the regulations provide a 60-day grace period for on-line retailers to update webpage warnings after receiving a notice of the change from the manufacturer or after a 60-day notice of violation is received from a plaintiff.

Other Amendments

Food Product Warnings: The amendments specify that the short-form warning is an option for food products. The only difference is that “short-form” food product warnings do not require the yellow triangle symbol and include a food-specific web address (www.P65Warnings.ca.gov/food).

Motor Vehicle/Marine Vessel Parts: As with other categories of products/exposures, OEHHA has now adopted warning language tailored to address exposures from: (1) “Passenger or Off-Highway Motor Vehicle Parts”; and (2) “Recreational Marine Vessel Parts.”