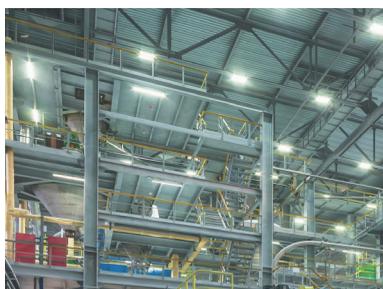
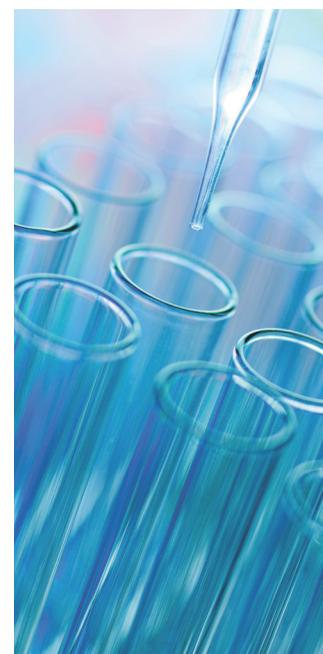
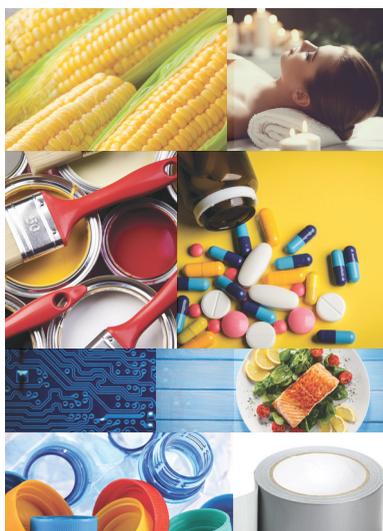


California's Proposition 65

The Safe Drinking Water and Toxic Enforcement Act of 1986



NEW WARNING REGULATIONS APPROVED AUGUST 2016



Overview

California's Safe Drinking Water and Toxic Enforcement Act of 1986 (referred to as "Prop 65") is one of the most onerous toxic chemical control statutes in the nation. Prop 65 prohibits businesses with 10 or more employees, including those that ship products into California, from:

- Exposing people in California to listed chemicals without a "clear and reasonable" warning; and
- Discharging or releasing listed chemicals to "sources of drinking water" in the state.

The Prop 65 list contains over 900 chemicals that are identified as carcinogens, reproductive toxins, or both, and continues growing. The list contains chemicals, metals, additives, and/or ingredients in common commercial, household, and office products, including toys, jewelry, foods, drugs, dyes, pesticides, and solvents. Listed chemicals may also be used in manufacturing or construction, or may be by-products of production or combustion processes.

If a chemical is listed, Prop 65 requirements apply unless (1) the amount discharged is not a "significant amount," or (2) the exposure to: a) a carcinogen will not pose a "significant risk of cancer", or b) a reproductive toxin will have "no observable effect" on people. These standards are exceptionally difficult to meet and, in litigation, are the defendant's burden to prove. Government agencies and public water utilities are exempt from Prop 65's requirements. A limited piece of "good news" is that new regulations specify warning content and delivery methods which, if followed, can help insulate you from claims. However, we expect these recent changes will also increase the number of law suits brought by private parties and that resolving claims will be more complex due to the complexity and specificity the new regulations require. The new regulation becomes operative August 30, 2018. [See the OEHHA website for the new warning regulations here.](#)

Enforcement and Penalties

Prop 65 allows for public and/or private enforcement. Plaintiffs only need to allege a violation has occurred and do not need to allege or show harm, injury, or damage to people, property, or the environment. The financial liabilities of not complying with Prop 65's mandates can be significant. Failure to comply is enforceable by penalties of up to \$2,500 per day, per violation! In addition, plaintiffs often seek, and courts routinely grant, injunctive relief, including product reformulation to remove offending chemicals, to ensure the alleged objectionable conduct is cured. Bringing a Prop 65 action is relatively easy and lucrative

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for private plaintiffs and their counsel. Private plaintiffs, often referred to as "Bounty Hunters," retain 25 percent of the assessed penalty amounts (the balance goes to the state), and are entitled to reimbursement of attorneys' fees and costs. In 2016, attorneys' fees and costs comprised 72 percent of the \$30.1 million paid by defendant companies in Prop 65 settlements. Given the relative ease and potential payoff of bringing suit, businesses often face aggressive litigation tactics from plaintiffs' counsel.

Private plaintiffs' attorneys have made millions!

2016 - \$21,561,113	2009 - \$14,608,177
2015 - \$17,828,941	2008 - \$17,804,104
2014 - \$21,047,746	2007 - \$8,972,737
2013 - \$16,812,396	2006 - \$8,534,065
2012 - \$20,435,722	2005 - \$9,890,488
2011 - \$15,891,728	2004 - \$14,995,489
2010 - \$13,620,981	

Source: California Attorney General's Office

Responding to a Prop 65 Lawsuit

Private parties seeking to enforce Prop 65 must give 60 days' advance written notice of their intent to sue. The notice of violation (NOV) must also be served on the California Attorney General, as well as other public officials. If a public enforcement agency does not take action within 60 days, the private party lawsuit may proceed. In most cases, there is no opportunity to cure.

NOVs should be scrutinized to ensure compliance with Prop 65's requirements. If defective, this can reduce a business's potential liability because the statute of limitations for Prop 65 claims is only one year. NOVs alleging an exposure to a listed chemical must be accompanied by a "certificate of merit," certifying that the issuer consulted with a person with "relevant and appropriate experience or expertise," who reviewed the pertinent facts related to the exposure, and based on that review, there is a "reasonable and meritorious case for the private action."

Once a plaintiff establishes that a listed chemical is present, even at a very low level, the *burden of proof*, to demonstrate that an actionable exposure has not occurred, shifts to the defendant business. Because this is a difficult burden to meet, most Prop 65 cases are resolved through negotiated settlements. On occasion, however, there may be viable reasons to litigate.

Any settlement in a private Prop 65 enforcement action (other than voluntary dismissal) must be reported to the California Attorney General. Judicially-approved settlements with a private party can preclude other private parties from bringing the same claim. Prior to approval, the court must find:

- Required warnings comply with Prop 65;
- Any award of attorney’s fees is reasonable;
- Any penalty is reasonable based on specified criteria; and
- The settlement is in the public interest.

The California Attorney General must receive 45 days’ advance notice of in-court settlements. The Attorney General has standing to appear in the settlement hearing and can appeal any settlement approved over its objection.

Top Noticing Entities:

California Attorney General’s Office*	Center for Advanced Public Awareness*
Center for Environmental Health*	Environmental Research Center*
Consumer Advocacy Group*	As You Sow*
Whitney R. Leeman, Ph.D.*	Anthony E. Held, Ph.D., P.E.*
Michael DiPirro*	Russell Brimer*
Mateel Environmental*	John Moore*
Justice Foundation*	Peter Englander*
Public Interest Alliance, LLC*	Laurence Vinocur*
Isabel Ruggeri*	Kingpun Cheng*
Shefa LMV, LLC*	Susan Davia*
Anthony Ferrerio*	

***We have resolved suits brought by all these parties.**

Compliance

Effective compliance strategies begin with a thorough audit of a business’s operations and products to determine what, if anything, may be implicated by Prop 65. Among other things, a covered business (effectively, every business in the chain of commerce) should assess whether it is exposing individuals to any Prop 65-listed chemical through environmental exposures (from chemical releases), product exposures (from products containing listed chemicals), or occupational exposures (during employment).

Compliance with Prop 65’s warning requirements fully insulates a company from exposure liability, regardless of exposure levels. It is, therefore, critically important that a business receive expert assistance in drafting and implementing compliant warning programs. Warnings can either be specific as to the chemical(s) involved or general (“safe harbor” warnings). A number of other requirements also apply to warning content and how the warnings are communicated, especially pursuant to the regulations that become operative in August 2018.

Compliance can also be achieved by demonstrating that an exposure will produce no significant risk of cancer or no observable effect on reproduction, even at minute exposure levels. However, because actionable exposures can occur even at trace concentrations, this can be difficult and expensive to prove.

Though Prop 65 does not apply to businesses with less than 10 employees, exempt businesses should consider providing compliant warnings or notifying their customers to avoid indemnity demands from retailers for products in their stores. In addition to warnings, companies may take other actions to protect against Prop 65 liability, including implementing legal protections such as contractual indemnities, certificate programs, and testing routines.

Our Firm

Hunton & Williams has more than 700 lawyers serving clients in 100 countries from 19 offices worldwide. Our California lawyers are on the front lines of emerging environmental issues. We routinely counsel clients in litigation, regulatory matters (including Prop 65, air and water quality, water resources, hazardous chemicals, land use, and climate change issues), and transactional matters (including due diligence, agreement drafting and negotiation, procurement of environmental insurance, and permit transfers). We have extensive experience working with regulatory agencies on behalf of clients, including the US EPA, Cal/EPA, California Department of Toxic Substances Control, State Water Resources Control Board and Regional Boards, California Office of Environmental Health Hazard Assessment, California Air Resources Board, and South Coast Air Quality Management District (and other air quality districts), as well as other potentially responsible parties and neighboring property owners. Please contact one of our lawyers on the back of this brochure if you wish to speak with us.

For more information visit: www.HuntonProp65.com

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