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Proposition 65: A Primer

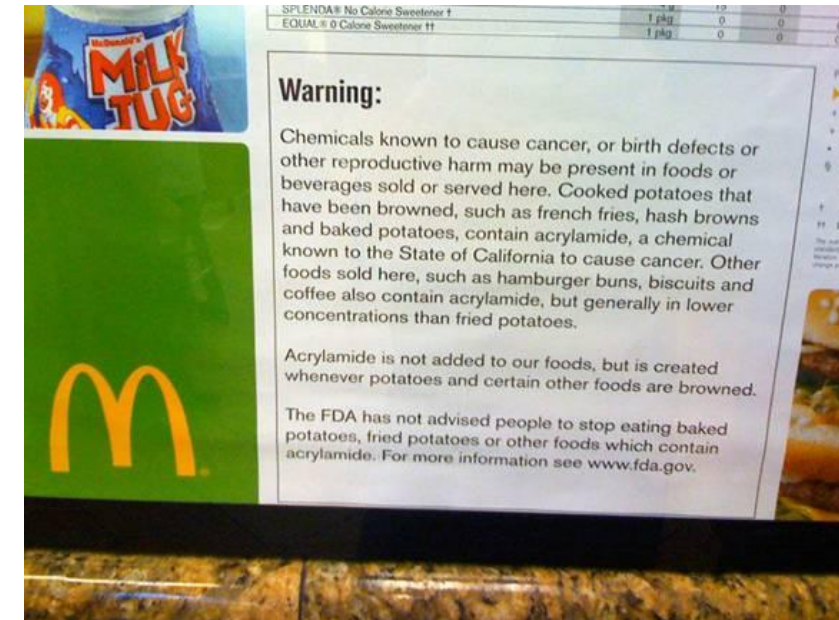
Presented By: Olivier Theard
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What is Prop 65?

- California law requiring that businesses warn California consumers before exposing them to chemicals that cause:
 - Cancer
 - Birth defects
 - Reproductive harm

Warnings and cancer and harm, oh my!



WARNING:

This product contains chemicals known to the State of California to cause cancer, and birth defects or other reproductive harm. Wash hands after handling.



To whom does Prop 65 apply?

- All participants in chain of commerce
- Must comply if you:
 - Manufacture, sell or distribute any product containing any one of listed chemicals directly or indirectly in California
 - Sell products on internet and do not block sale to California
 - Have physical presence of any kind in California (retail, office, warehouse, factory, etc.)

Which chemicals does Prop 65 apply to?

- California Office of Environmental Health Hazard Assessment (OEHHA) maintains list
- 1,000+ chemicals to date
 - Pesticides
 - Solvents
 - Metals
 - Common household products
- OEHHA continually updating, yearly at minimum

What does Prop 65 require?

- “Clear and reasonable” warning *before* knowingly and intentionally exposing consumers
 - Signs
 - Newspaper notices
 - Product and packaging labels
- Warning must:
 - Clearly communicate exposure
 - Be sufficiently understandable
 - Be sufficiently visible

When do you need to warn?

- Whenever listed chemical exposes individual at or above “safe harbor” threshold on per day basis
 - No Significant Risk Levels (NSRLs) for carcinogens
 - Maximum Allowable Dose level (MADL) for reproductive toxins based on No Observable Effect Levels (NOEL)
 - OEHHA has established threshold levels for approximately 300 chemicals
- If no established threshold, you bear burden of establishing

How can you determine exposure?

- Determining anticipated levels of exposure to listed chemicals can be complex
- **Do not** provide warnings that are not necessary (though some businesses do anyway)
- **Do** consult qualified professional if you believe exposure to listed chemical may not require warning

Who enforces Prop 65?

- California Attorney General
- District or City Attorney's Offices
- Aggressive bounty hunters
 - Recent dramatic increase in private bounty hunters
 - Law incentivizes private enforcement
 - Private parties pursue 95% of all Prop 65 actions
 - > 70% of money paid by alleged violators goes to plaintiffs' attorneys

Plaintiff's Burden

- Limited standing requirements for bringing Prop 65 case
 - Notice of Violation (NOV) served 60 days before lawsuit can be filed
 - Must allege violation of warning requirement
 - Must provide non-exclusive list of products containing chemicals and violators
 - Must include Certificate of Merit
 - Executed by attorney of noticing party
 - Consultation with person with relevant and appropriate expertise
 - Belief that case is reasonable and meritorious
 - Factual information not discoverable, but must be provided to AG's office

Defendant's Burden

- Defendant's burden of proof, based on scientific evidence through qualified expert:
 - Absence of alleged chemical
 - Exposure to listed carcinogen poses "no significant risk"
 - Exposure to listed reproductive toxin is lower than "maximum allowable does level"

What are the penalties?

- Civil penalties up to \$2,500 per day per violation + attorneys' fees and costs
- Injunctions may be obtained to prevent threatened or occurring violation

What's next?

- New warning language requirements effective **August 30, 2018**
- Current language:
 - “Warning: This product contains chemicals known to the state of California to cause cancer and birth defects or other reproductive harm.”
- New language:
 - “Warning: This product can expose you to chemicals including [name of chemical], which is [are] known to the State of California to cause cancer and birth defects or other reproductive harm. For more information, go to www.p65warnings.ca.gov.”
 - Warning: Cancer and reproductive harm – www.p65warnings.ca.gov.”
 - Longer warning preferred, but decision is function of space

What should you do to comply?

- ✓ Assess whether your business releases or your products contain Prop 65-listed chemicals
- ✓ Determine whether consumers or bystanders may be exposed at levels that necessitate warning
- ✓ If warning required, determine what warning must say
- ✓ Provide written notice to authorized retailers
- ✓ Audit your website
 - Warning should be visible without an extra click

§ 25607.19. Recreational Marine Vessel Warning - Content

(a) A warning for exposures that occur during the operation or maintenance of a recreational vessel meets the requirements of this subarticle if it is provided using the method required in Section 25607.18 and includes all the following elements:

(1) The symbol required in Section 25603(a)(1).

(2) The word “**WARNING**” in all capital letters and bold print.

(3) The words, “Operating, servicing and maintaining a recreational marine vessel can expose you to chemicals including engine exhaust, carbon monoxide, phthalates, and lead, which are known to the State of California to cause cancer and birth defects or other reproductive harm. To minimize exposure, avoid breathing exhaust, service your vessel in a well-ventilated area and wear gloves or wash your hands frequently when servicing this vessel. For more information go to www.P65warnings.ca.gov/marine.”

§ 25607.18. Recreational Vessel Exposure Warnings – Method of Transmission

- (a) A warning for exposures that occur during the operation or maintenance of a recreational vessel as defined in California Harbor and Navigation Code Section 651(t) meets the requirements of this subarticle if it complies with the content requirements in Section 25607.19 and is provided as follows:
 - (1) The warning is printed in the owner’s manual for the specific recreational vessel, in no smaller than 12-point type enclosed in a box printed or affixed to the inside or outside of the front or back cover of the manual or on the first page of the text, and;
 - (2) The warning is provided on a hang tag readily visible from the helm of the vessel printed in no smaller than 12-point type.
- NOTE: Authority cited: Section 25249.12, Health and Safety Code.
Reference: Sections 25249.6 and 25249.11, Health and Safety Code.

§ 25607.15. Diesel Engine Exposure Warning (Except Passenger Vehicle Engines) – Content

- (a) A warning for a consumer product exposure to diesel engine exhaust from products other than passenger vehicle engines meets the requirements of this subarticle if it is provided using the combination of methods required in Section 25607.14 and includes all the following elements:
- (1) The symbol required in Section 25603(a)(1).
 - (2) The word “WARNING” in all capital letters and bold print.
 - (3) The words, “Breathing diesel engine exhaust exposes you to chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.”
 - Always start and operate the engine in a well-ventilated area.
 - If in an enclosed area, vent the exhaust to the outside.
 - Do not modify or tamper with the exhaust system.
 - Do not idle the engine except as necessary.
- For more information go to www.P65warnings.ca.gov/diesel.”

Common Issues and Concerns

- “I shipped inventory without a warning. What do I do?”
- “A supplier told me I need to warn. What do I do?”
- “I got served with a notice of a lawsuit. What do I do?”

What should you do?



- You can test to see if you actually need a warning
- You can add warning later and mitigate harm
- Plaintiff's firms are not looking to destroy you. You can settle by:
 - Warning
 - Paying a "reasonable" amount of money

Thank you!

- Questions?



Olivier Theard

213.617.5427

otheard@sheppardmullin.com



SheppardMullin

Beijing | Brussels | Century City | Chicago | London | Los Angeles | New York | Orange County | Palo Alto
San Diego (Downtown) | San Diego (Del Mar) | San Francisco | Seoul | Shanghai | Washington, D.C.

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