



CALIFORNIA PROPOSITION 65 CLEAR & REASONABLE WARNING REQUIREMENTS

The following general information is not intended as legal advice. AHFA members are urged to seek the advice of an attorney for specific circumstances involving Proposition 65 labeling and enforcement. The information below was updated in August 2017.

Summary

In November 2015, California's Office of Environment Health Hazard Assessment (OEHHA) published a notice of proposed rulemaking to repeal and add a new Article 6 to Title 27 of the California Code of Regulations – otherwise known as Proposition 65. Specifically, Article 6 defines what constitutes a “clear and reasonable warning.”

Providing this “clear and reasonable warning” is at the core of Prop 65, which is a “right to know” law passed by California voters in 1986. It requires manufacturers and retailers of products to notify California workers and consumers if any Prop 65-listed chemicals are present in products or the workplace environment. But the original law did not define what constitutes “clear and reasonable.” OEHHA has been working since 2013 to clarify the concept within the law.

Following the November 2015 notice, AHFA submitted written comments and also participated in a public hearing on the proposed new regulations in January 2016. On March 25, 2016, OEHHA published a 15-day notice of modification and opened another public comment period (in which AHFA also participated). On August 30, 2016, OEHHA released the final amendment.

Q. What does the new amendment require?

OEHHA's original proposal, released in January 2015, included a list of 12 chemicals that manufacturers would have been required to list by name on the warning label if any of the 12 were present in a product sold in California. AHFA was among groups that sharply criticized this proposal.

The final amendment adopted in August 2016 dropped the “dirty dozen,” but still modified the on-product warning label. There are three versions of on-product warnings: One for carcinogens; one for reproductive toxicants; and one for both carcinogens and reproductive toxicants. All three are shown below:



WARNING: Cancer – www.P65Warnings.ca.gov



WARNING: Reproductive Harm – www.P65Warnings.ca.gov




WARNING: Cancer and Reproductive Harm – www.P65Warnings.ca.gov

Note: The warning pictogram of a black triangle with an exclamation point in the center does NOT need to be in color, unless there is other color on the product label. The pictogram must be no smaller than the word WARNING.

This shorter, on-product warning “must be in a type size no smaller than the largest type size used for other consumer information on the product.” It must be a minimum of 6-point type. The word “WARNING” must be in all CAPS and boldface.


The new regulation also imposes material changes to warnings for shelf signs. These may also be used on the product, in electronic notice before online purchases and in product-specific catalog warnings. *The key change is that one or more listed chemicals must be identified by name.* If the chemical is not both a carcinogen and a reproductive toxicant, *then two chemicals must be listed*, one for cancer and one for reproductive harm:

 **WARNING:** This product can expose you to chemicals including [name a listed chemical] which is known to the State of California to cause cancer and [name another listed chemical] which is known to the State of California to cause birth defects or other reproductive harm. For more information, go to www.P65Warnings.ca.gov.

Note that ALL warnings now require the use of the warning pictogram, which, again, may be printed in black and white if there is no other color on the sign or label. The use of the word “WARNING” in all caps and boldface and the addition of the Prop 65 web address also are required in all warning statements.

Q. *Can furniture manufacturers place the warning on the law label?*

Yes. Thanks to AHFA’s advocacy on this issue, OEHHA defined a safe harbor warning specifically for the furniture industry that takes into account the needs, constraints and parameters of our industry. Manufacturers may place the on-product warning on the law label or on the manufacturer’s label on the product. This on product warning must read:

 **WARNING:** This product can expose you to chemicals including [name a listed chemical] which is known to the State of California to cause cancer or birth defects or other reproductive harm. For more information, go to www.P65Warnings.ca.gov/furniture.

Unlike the content of other Prop 65 safe harbor warnings, the furniture safe harbor warning requires only one listed chemical to be named. As with other warnings, the pictogram and the word WARNING in all caps and boldface are required.

This warning must be “affixed to the furniture in the same manner as other consumer information or warning materials that are provided on the product...” as noted in Section 25607.12(a)(1). In meetings with OEHHA, AHFA advised that the two primary warning locations would be the law label or the manufacturer’s label.

In selecting the font size for the Prop 65 warning, manufacturers are advised to consider the surrounding text. The warning must be displayed “with such conspicuousness as compared with other words, statements, designs or devices on the label ... to render the warning likely to be read and understood...”

Q. *Do retailers have new obligations for displaying Prop 65 warnings?*

Yes. The safe harbor warning for furniture products described above can be deemed to comply with the law ONLY if the retailer posts an 8 ½- by 11-inch sign in a 28-point font or stamps a notice on the customer’s receipt in 12-point font. The posted/stamped notice must read:

NOTICE: Some furniture products can expose you to chemicals known to the State of California to cause cancer or birth defects or other reproductive harm. Please check on-product label for warning information.

Q. What if the retailer does not comply with this posting requirement?

Previously, Prop 65 placed the burden of providing warnings on the manufacturer, producer or packager, but the amended regulation extends a level of responsibility to retailers.

Retailers become responsible for providing the above listed warnings (on an 8 1/2-by11-inch sign or a stamp on the customer's receipt) IF the manufacturer, producer, importer or distributor:

- 1) affixes the prescribed warning label to the product AND
- 2) Provides a written notice directly to the retail seller stating that the product may result in an exposure to one or more listed chemicals AND
- 3) Provides the necessary warning materials, including the store signs and/or language for the receipt stamp (or the warning language for e-commerce sites) AND
- 4) Receives a written or electronic confirmation from the retail seller that these materials have been received.

That last item – the written confirmation that the warning materials have been received – must be “renewed” six months after the first notice, and then at least annually after that.

And, if a new chemical is added to the warning, additional notice must be given to the retail seller within 90 days.

Q. What is the retailer's responsibility?

The retail seller is responsible for the placement and maintenance of warning materials received from the manufacturer, importer or supplier. The retailer is specifically prohibited from obscuring, covering or altering an on-product warning. Retailers also must have the name and contact information for all their suppliers and provide these to OEHHA, public enforcers or any private enforcer who supplies a 60-day Notice of Violation. (The entity requesting this information must provide a description of the product with specificity “in accordance with Article 9, section 25903(b)(2)(D).”)

Q. Who enforces Proposition 65?

Any individual “acting in the public interest” may seek to enforce Prop 65 by filing a lawsuit against a business alleged to be in violation of the law. The California Attorney General, or any district attorney or city attorney may also enforce the law, but the majority of cases are filed by attorneys specializing in Prop 65 cases. OEHHA administers the Prop 65 program and determines which chemicals are listed, but the agency has no enforcement power.