

# California Proposition 65— What's new and why could it cost you?

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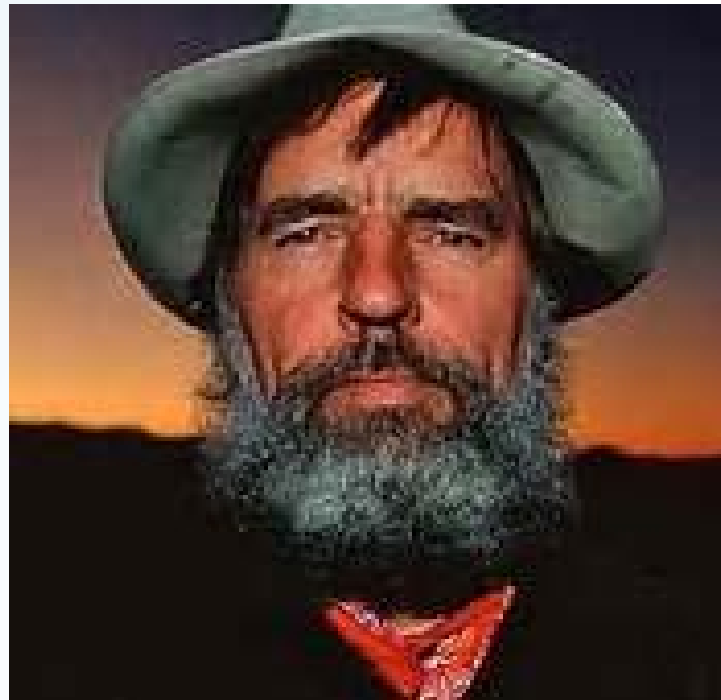
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# PPAI

- The Promotional Products Association International is the trusted leader in the promotional products industry delivering essential knowledge, resources and community to ensure the success of its members, those who manufacture, import and resell promotional products, and the promotional products industry itself.

“There is science, logic, reason; there is thought verified by experience. And then there is California.”  
--Edward Abbey

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# California Proposition 65

- CA Prop 65, also known as the Safe Drinking Water and Toxic Enforcement Act of 1986, was voted into law in November 1986 by a 63-37 percent margin.
- Purpose is to give consumers a chance to make an “informed decision” to protect themselves from exposure to certain chemicals that are known to the state of California to cause cancer, birth defects or other reproductive harm.

## The basics

- California's Office of Environmental Health Hazard Assessment (OEHHA) must annually publish a list of chemicals known to cause cancer, birth defects or other reproductive harm.
- In 1986 that list included 30 chemicals
- It now includes 900+ chemicals
- Once a chemical is listed by OEHHA, companies have 12 months to comply with warning requirements under the regulation

## What types of chemicals trigger the warning?

- The list contains a wide range of naturally occurring and synthetic chemicals that include additives or ingredients in pesticides, household products, foods, drugs, dyes or solvents. They may be used in manufacturing and construction or they may be byproducts of chemical processes, such as motor vehicle exhaust.

## Prop 65 requirements

- Prop 65 applies to
  - Any person in the course of doing business
  - Business that employs 10 or more employees
  - Environments and products



## Warnings only

Provide a “**clear and reasonable warning**” before knowingly and intentionally exposing anyone to a listed chemical

**WARNING:** This product contains a chemical known to the State of California to cause cancer.

**WARNING:** This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.

# PROPOSITION 65 WARNING

Chemicals known to the State of California to cause cancer and reproductive toxicity, including acrylamide, are present in coffee, baked goods, and foods or beverages sold here. Acrylamide is not added to our products but results from cooking, such as when coffee beans are roasted or baked. As a result, acrylamide is present in our brewed coffee, including coffee made at home or elsewhere from our beans, ground or instant coffee, and other foods sold here, in grocery stores or other retail locations.

Your personal cancer risk is affected by a wide variety of factors. The FDA does not advise people to stop drinking coffee or eating baked goods that contain acrylamide. For more information regarding FDA's views, see [www.fda.gov](http://www.fda.gov). For more information about acrylamide and Proposition 65, visit [www.oehha.ca.gov/prop65/acrylamide.html](http://www.oehha.ca.gov/prop65/acrylamide.html).

## Who enforces Prop 65?

- OEHHA administers the program
- The California Attorney General's Office, district and city attorneys enforces Prop 65
- **Private enforcers aka Bounty Hunters**

## What's the process?

- A 60-day notice of the alleged violation is provided to the alleged violator
- After that notice, the private enforcer can initiate litigation

# Penalties

- Failure to comply is enforceable by penalties up to **\$2500 per incident per day**
- Private enforcers enter into settlements and split the money with the state
- Court approves and enters judgement against business owner
  - Example:  
**Shipment of 500 mugs @ \$2500 per mug=  
\$1,250,000 per day**

## Who wins?

- 2016: 760 settlements = \$30 million
- 2015: 582 settlements = \$26 million
- 2014: 663 settlements = \$29 million

## Prop 65 is an exposure regulation

- Methods of exposure
  - Oral
  - Inhalation
  - Transdermal
  - Hand-to-mouth
- In most cases, exposure is measured in micrograms per day, based on average use of the product
  - Very difficult and expensive to defend a claim, since burden is on the maker

## Example of enforcement

- California recently added BPA to the Prop 65 list as a reproductive toxicant
- Hazard based on exposure
- California adopted a limit for BPA dermal exposures of 3 µg/day
  - FDA daily intake limit from food is about 2700 µg/day
- Prop 65 bounty hunters only have to show your product **contains** BPA
- You have to show the exposure is below the 3 µg/day limit



## “Reform” of Prop 65

- California Governor Brown issued principles for reform of Prop 65 in May 2013
  - “Ending frivolous ‘shake-down’ lawsuits”
  - “Improving how the public is warned about dangerous chemicals”
  - “Strengthening the scientific basis for warning levels”
- New regulations adopted on August 30, 2016
  - **They became effective on August 30, 2018**

8.30.2018

- These new rules do not apply to existing inventory
- The new warnings must be applied to all products manufactured on or after August 30, 2018



“WARNING: Cancer - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”



“WARNING: Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”



“WARNING: Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”

## New Prop 65 warnings

- The main changes focus on:
  - The wording
  - Timing of the warning
  - The application of the warning for internet sales
- Primary burden on all upstream entities—suppliers and distributors alike

## New Prop 65 warnings

- Wording
  - The warning must include the name of the listed chemical that prompted the obligation to warn
    - This must be the full name of the chemical
  - The warning must include the corresponding risk of harm
    - Cancer
    - Birth defects and/or reproductive harm
    - Cancer and reproductive harm

## New Prop 65 warnings

- Include a triangular yellow warning symbol with an exclamation point and must be as large as the “Warning”



- Directions to the OEHHA Prop 65 warning website [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)
- The warning must be in languages other than English if those languages are used on the product or packaging

# Current vs new Prop 65 warnings

**WARNING:** This product contains a chemical known to the State of California to cause cancer.

**WARNING:** This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.



**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. For more information, go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).



**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 birth defects or other reproductive harm. For more information, go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)



**WARNING:** Cancer- [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)



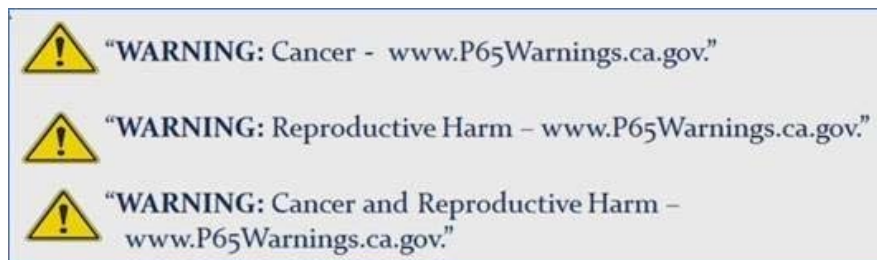
**WARNING:** Reproductive Harm- [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)



**WARNING:** Cancer and Reproductive Harm- [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

## Short form warnings

- This warning eliminates the need to identify the specific chemical that triggers the warning
- This warning must be in a type size no smaller than the largest type size used for other consumer information and in no case in a type size smaller than 6-point type



# Internet warnings

## Warnings must be provided to **consumers prior to or during purchase**

- Internet sellers will be required to provide separate warnings for products sold online, even if the products themselves contain a Prop 65 warning
- Automatically provide the warning to the purchaser prior to or during the purchase of the product
- The warning must be prominently displayed prior to the completion of purchase
- If you use the short form warning on the website, you must use the short form warning on the product



"WARNING: Cancer - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)."



"WARNING: Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)."



"WARNING: Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)."



# Catalog warnings

- Warnings must be provided to **consumers prior to or during purchase**
  - The current regulations require warnings prior to exposure or use
- Catalog sellers will be required to provide warnings for products sold in a catalog
  - If you use the short form warning on the product, you must use the short form warning on the internet



"WARNING: Cancer - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)."



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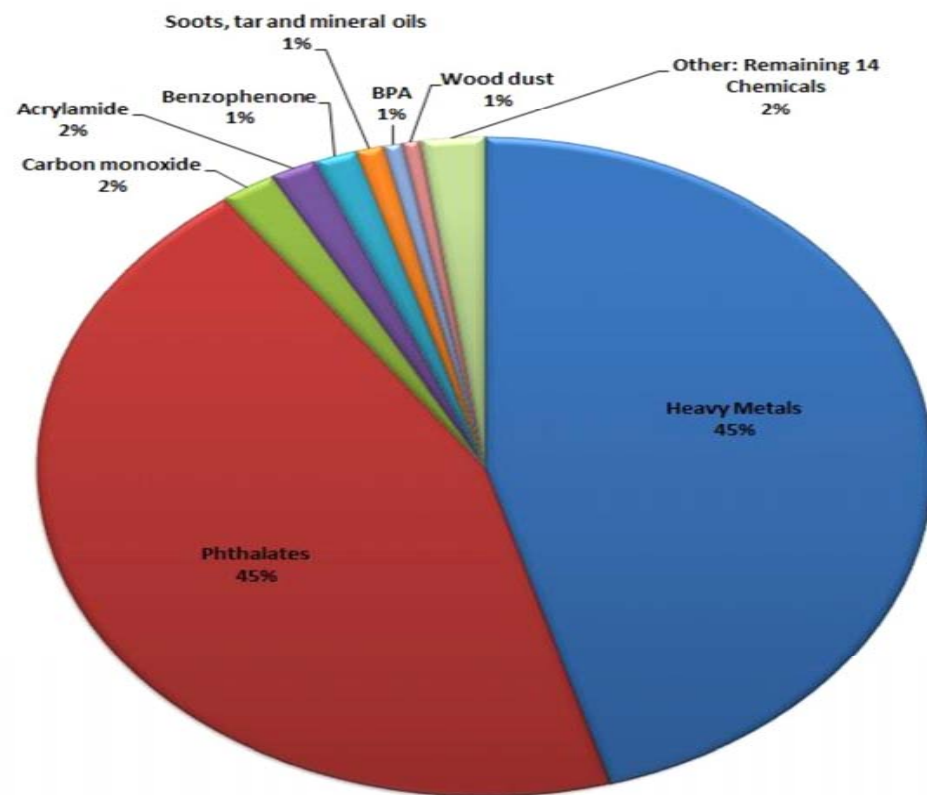
## Potential issues

- We can expect the new warning style to raise questions and concerns
- We can expect enforcers to carefully scrutinize products—particularly ecommerce portals
- Litigation
  - Third party sellers on internet
  - Attack on warning language
  - Retailers (end buyers) asserting immunity

# Litigation Trends

Lead  
Phthalates  
(DEHP and DINP)

TOP TARGETED CHEMICALS IN 2016



# Trends

- Leading product categories noticed for violation:
  - Food & Beverage
  - Plumbing/HVAC
  - Healthcare
  - Personal Accessories
  - Clothing
  - Tools/Equipment – Hand
  - Sports Equipment

## DEHP Trends

- Gym bags
- Recreational gear bags Fitness balls
- Hats
- Grooming kits/make up bags
- Wireless cable charger
- Jewelry box
- Gloves
- Travel cases
- Messenger bags

# Lead Trends

- Brass (e g: key chains, pens, coffee mugs, pen holders)
- Fastening and trim on clothing (zippers, trim on sports clothing)
- Protective/decorative coatings on products
- Jewelry
- Decorative figurines
- Candles
- Toys

## Environmental warnings

- If workers or visitors to your California facilities will be exposed to Prop 65 listed chemicals, consider posting a Prop 65 warning in your facility
- You will also want to create a “map”—a floor plan delineating the affected area of the facility.
- The warning should be provided close enough to the source of exposure for the person seeing the warning to determine where and how they may be exposed

## Options for managing Prop 65

- Inventory your products and identify all products that trigger the obligation to warn
  - Check chemical list published and updated by the OEHHA and can be found at [www.oehha.ca.gov](http://www.oehha.ca.gov)
- Review the testing process
  - Test for all 900+ chemicals?
  - Know what chemicals are in the product and test the product if it contains chemicals noted on the OEHHA list
  - Engage a certified toxicologist to review the product to determine appropriate warning language



## Options for managing Prop 65

- LABEL with appropriate Prop 65 warning statement
- Update all catalogs and ecommerce sites to include warnings
- Communicate warning requirements
- Train the team

## Options for managing Prop 65

- Ask the customer if the product will or could be distributed in California and tell the supplier
- Ask if the product would be displayed or sold at retail
- Check chemical list published and updated by the OEHHA and can be found at [www.oehha.ca.gov](http://www.oehha.ca.gov)
- Confirm with the supplier than none of the 900+ chemicals are in the product
- Ask for test reports
- LABEL with appropriate Prop 65 warning statement
- Update all catalogs and ecommerce sites to include warnings
- Communicate warning requirements to customers
- Train the team

# Record keeping

- Establish document retention policies
- Organize contracts and test reports by supplier
- Include document destruction policies as well

# Training

- Salespeople should be trained to ask:
  - What is the artwork?
  - What is the risk factor? Children? California? Electronics?
  - Where is it going?
  - How will it be distributed?
  - Method of shipment?
  - Does the client have any specific requirements?

# Product Responsibility Resources

PPAI: [www.ppai.org](http://www.ppai.org)

PPAI Corporate Responsibility:  
<http://www.ppai.org/corporate-responsibility/>

Questions? [AnneS@ppai.org](mailto:AnneS@ppai.org) 972-258-3041

