

California's Proposition 65 Without a Product Warning, You May Pay the Price

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Businesses of all sizes struggle to keep up with environmental laws. Most businesses are aware of federal and state environmental requirements that apply to their manufacturing operations. If you sell goods in California, you need to take extra precautions to limit your potential liability. You may open your mail one day and find a letter from a California law firm or an environmental group advising you that:

- Your California sales since 1998 have been in violation of California's Proposition 65.
- Your products contain a hazardous substance, that is, one of hundreds of chemicals that appear on a list of chemicals known to the State of California to cause cancer or birth defects.
- Your products fail to contain a clear warning to consumers of the chemicals contained within your product.
- You have and will continue to be in violation of Proposition 65 every day until you either include the required warning on your product or reformulate your product so it does not contain the offending substance.
- You must pay thousands of dollars of penalties and attorneys fees.

What should you do? The best advice is to take the letter and notice of an alleged violation very seriously. Consult a qualified attorney. If you have products for sale in California and have not yet received this type of a letter, you should seriously consider evaluating your products to check if you may be subject to a Proposition 65 action.

For years, California has led the nation in breaking new ground on a variety of legal issues. Minnesota has followed California's lead with regard to regulating exposure to chemicals by banning heavy metals such as lead in certain paints and coatings.

California's Proposition 65, also known as the Safe Drinking Water and Toxic Environment Act of 1986, is a broad environmental consumer protection measure that was enacted into law by California's citizens in 1986. Manufacturers of goods for sale in the State are required to place a warning on their product when a consumer may be exposed to a chemical known to the State to cause cancer or reproductive toxicity.

Proposition 65: Designed to Protect Consumers. Businesses who manufacture art supplies, car batteries, brass faucets, ceramic tableware, crystal, engines, household cleaning products, marine motors, power tools have all been subject to Proposition 65 enforcement actions. There have been attempts to extend the law to the sale of many seemingly innocuous products such as chocolate, cigars, dental fillings, liquid paper, lamps and vinyl mini-blinds. The prospect of liability has resulted in the postings or warnings on products of all kinds and even at entrances of public spaces such as hotels where one may come into contact with such a substance.

Absence of Warnings May Bring Penalties. Failure to include or post the warning may, depending on the number of sales and possible exposures, result in substantial penalties, namely \$2,500 per violation per day, or a Court order halting all sales. Propositions 65 enforcement is carried out through civil lawsuits brought by California's Attorney General, District Attorneys or, with proper notice, by private citizen and or an attorney acting on behalf of a citizen. Private parties may keep 25% of any penalty that may ultimately be assessed against a violator and may also be entitled to an award of their attorney fees.

Lead, mercury, dyes, solvents, food additives, pesticides and metals that appear on the extensive list promulgated by the State of California. Man-made or naturally occurring chemicals are subject to enforcement. Proposition 65 also requires employers to inform their employees of hazardous substances to which they are exposed at the job site.

Only very limited defenses exist to a claim of a violation of Proposition 65. For example, a defendant may assert that exposure to a product poses no significant risk. However, a defendant must prove that exposure at up to 1,000 times the level contained within the product will not cause cancer or adverse reproductive effects.

Proposition 65 Enforcement: A Cottage Industry. Although California's Attorney General and District Attorneys have filed cases, environmental groups have been even more proactive in using the law against businesses.

Out of state firms who are not aware of the reach of the law have been seen as "easy" targets. Environmental groups have successfully sued various industries for alleged Proposition 65 violations. Sales of products containing lead have been subject to special scrutiny. Past targets have included fishing tackle, Tiffany lamps and plumbing supplies. Environmental groups identify specific products that contain listed chemicals and then bring separate cases against individual suppliers. Proposition 65 actions often come in waves and affect entire industry sectors for years.

Businesses whose products contain listed Proposition 65 chemicals may be assessed penalties of up to \$2,500 per violation for each day that any individual was exposed to a product that contained the listed chemicals but lacked the required warning. In light of the substantial penalties that may accrue as well as exposure to attorneys fees, businesses that ship products to California should take all necessary steps to comply with California's Proposition 65. At Moss & Barnett, we have assisted clients in assessing their exposure to Proposition 65 liability, developing warnings and establishing effective compliance programs to avoid liability.

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