

NEW CALIFORNIA WARNINGS FOR ALCOHOLIC BEVERAGES AND CANNABIS PRODUCTS TAKE EFFECT AUGUST 30, 2018, NOW INCLUDING ADDENDUM REGARDING 2014 CONSENT AGREEMENT PARTIES AND PARTICIPANTS

August 5, 2018 | Barbara Snider, Senior Counsel, and John Hinman, Partner

ARE YOU READY? AND WHY IS IT IMPORTANT TO YOU?

On August 30th new regulations requiring warning signs about Proposition 65 dangers, cannabis exposure and BPA in packaging come into effect. It's a trifecta of new compliance requirements, and it's going to expose California alcohol and cannabis licensees to significant penalties for those that don't pay attention.

The Proposition 65 warnings – not the warning you are used to!

The California Office of Environmental Health Hazard Assessment (OEHHA) adopted new Proposition 65 warning requirements that take effect on August 30, 2018.¹ The new regulations significantly change the current regulations and require all suppliers, importers and distributors to change the warnings they currently provide to their retail customers.

And, although the new regulations relieve retailers of some burdens in providing the warnings, retailers are still responsible for the actual posting of required warnings provided to them and could be held liable for failure to do so. All ABC licensed retailers, on-sale (of all sorts including bars, restaurants, tasting rooms, entertainment venues and hotels) and off-sale (of all sorts) must have the signage posted in their premises in a conspicuous manner where the signs will be seen by the consuming public.

Failure to understand and comply with the New California Proposition 65 Warning Requirements is a bonanza for the Proposition 65 Plaintiffs Bar

The mandated Proposition 65 warnings apply to all products sold in California regardless of where the products are manufactured and, the bottom line is, if you violate these detailed regulations, you could face **significant monetary penalties and attorney's fees from the plaintiff's gathering to commence enforcement.**

The state Attorney General rarely files actions for Proposition 65 violations. However, the law allows any private individual to act "in the public interest" by serving any company with "notice" of some alleged violation. With few exceptions, the party serving the notice may file a civil suit any time after 60 days following the date the company receives the "notice" if the state Attorney General does not take the action over within those 60 days.

The penalties that are in the law may be imposed on a sliding scale ranging up to \$2,500 per day per violation - - going back as far as one year. And, the penalty is not dependent on how much product is sold. Should the case go to trial, a defendant who loses must pay all attorney fees and costs to the private attorney and, trust us, these fees are always significant. However, should the defendant win, the private individual suing does not have to reimburse the defendant for his attorney fees and costs.

Nearly all actions by private individuals end up being settled out of court and most often for a significant sum primarily because:

- (1) In these cases, the **defendant** must prove to prove a violation did **not** occur;
- (2) Very few insurance policies will cover the costs of Proposition 65 litigation;
- (3) Even if the defendant wins, the defendant cannot recover attorney fees from the other party; and
- (4) The cost of litigation is generally too high for any benefit received.

To further illustrate: in the years 2016 and 2017, there were a total of 687 private party “notices” that were settled out of court for a total amount of nearly \$18 million. Over \$14 million of the \$18 million was awarded directly to the private attorneys for “attorney fees and costs.”

Do we have your attention yet?

The New Rules

The California Code of Regulations implementing the Proposition 65 law has been restructured and many new provisions were added. These new regulations will be effective on August 30th. Some of the most significant changes in the rules include:

- (1) Changes to the “safe harbor” text for the mandated warnings.
- (2) New provisions addressing Internet sales warnings.
- (3) And clarification of the roles and responsibilities of manufacturers and retailers in providing the warnings.

The OEHHA developed new text for alcoholic beverages warnings. **You must use this exact wording for “safe harbor” from alleged violations.** Although the new regulations allow businesses to use the existing Prop 65 warning statements until August 30th, companies may use the new warnings now, before August 30th. **After August 30th, the old warnings will no longer provide you with a “safe harbor.”**

Important details in the new rules

Because it is critically important to pay close attention to the details in the regulations (to guard against alleged violations), this blog contains a great deal of detail on the new Proposition 65 rules.

Honest – the details matter!

New definitions added to the rules

Important new or revised definitions include:

“Consumer product” means any article, or component part thereof, including food, that is produced, distributed, or sold for the personal use, consumption or enjoyment of a consumer.

“Consumer product exposure” means an exposure that results from a person’s acquisition, purchase, storage, consumption, or any reasonably foreseeable use of a consumer product, including consumption of a food. (This means simply purchasing the product creates “exposure”.)

“Retail seller” means a person or business that sells or otherwise provides consumer products directly to consumers by any means, including via the internet.

“Sign” means a physical presentation of a written, printed, graphic, or electronically provided communication, including shelf signs, other than a label or labeling, posted in a conspicuous manner that is associated with the exposure requiring a warning under the Act and is clearly visible under all lighting conditions normally encountered during business hours and under such circumstances as to make it likely to be seen, read, and understood by an ordinary person.

Responsibility for providing the mandatory warning

Every in-state and out-of-state manufacturer/distributor/importer/retailer who sells an alcoholic beverage to a California consumer must provide a “clear and reasonable” warning to the end consumer prior to the consumer purchasing the product.

Although companies with 9 or fewer employees are generally exempt from providing the required warning, know that if you sell products to a larger retailer who is not exempt, the large retailer may require you to comply with the Proposition 65 warning requirement regardless of your size or location. It is always a good practice to check your general retailer vendor agreements, and the terms of any retailer generated purchase order.

The same rules apply to an exempt small importer or distributor if the manufacturer of the product has over 9 employees. Even if you, as the distributor or importer, are exempt, the larger manufacturer is NOT exempt. Again, you must check your contracts regarding how they set forth the responsibilities and liabilities of each party related to providing the warnings.

Specific Warnings Required for Alcoholic Beverages

The old text and rules regarding alcoholic beverages warnings will be repealed on August 30, 2018 and the new regulations will be the only rules that apply and that will provide “safe harbor” from any allegation of a violation.

Below is a summary of the most important changes that affect the alcoholic beverage warnings. (Note: Specific warnings related to the sale/distribution of cannabis products in California are noted at the end of this blog.)

- Alcoholic beverages manufacturers/distributors have primary responsibility to provide the warnings.
- Unlike most manufacturers who may include the Proposition 65 warning directly on the label, alcoholic beverages manufacturers are precluded from putting the Proposition 65 warning on labels because all alcoholic beverages labels must be approved by the TTB (Alcohol & Tobacco Tax and Trade Bureau and contain the federal government warning which is not the same as, nor compliant with, the California Proposition 65 warning. **The federal government warning on the label will not provide “safe harbor” under California law.**
- The manufacturer/distributor/importer’s warning signs must be provided to each retailer with a written notice provided directly to the retailer or its authorized agent and the information provided must also include text to be used for online product pages.

- The manufacturer/distributor/importer must obtain and keep a written reply from the retailer. The reply may be sent either electronically or in writing but must confirm that the retailer has received the notice.
- While the new rules state the manufacturer/distributor's notice must be received by the retailer no later than February 28, 2019, failing to provide the notice at any time after the August 30th deadline will leave you open to a violation claim, so do it now.
- The required notice to the retailers must be renewed annually.
- The retailer is responsible for the placement and maintenance of warning materials, including warnings for products sold over the Internet.
- The retailer can be found liable if he/she fails to adequately post the warnings provided by the manufacturer.
- The regulations allow manufacturers/distributors/importers and retailers to contract with each other to specify which party must provide the required warnings. (Always check your contracts!)

The new text and content for the alcoholic beverages Proposition 65 warnings

- The text of the new warning must include the word "WARNING" in all uppercase.
- The mandatory text for alcoholic beverages must now include the Prop 65 warning website address.
- The new rules provide two options for the warning signs:

(1) Posting an 8½ by 11-inch sign in no smaller than 22-point type, placed at eye level in a location that is readable and conspicuous to customers as they enter the area where alcoholic beverages are sold, or

(2) Posting a notice or sign no smaller than 5 by 5 inches placed at each retail point of sale or display to assure that it is readable and conspicuous. This type of warning notice must be in a type size no smaller than 20-point type and be enclosed in a box (as shown below).

(3) The manufacturer or distributor must provide these signs to retailers:

WARNING: Drinking distilled spirits, beer, coolers, wine and other alcoholic beverages may increase cancer risk, and, during pregnancy, can cause birth defects. For more information go to www.P65Warnings.ca.gov/alcohol.

Warnings in a language other than English

All alcoholic beverages warnings must be in English. In addition, if the product information, the label or the shelf tag is presented in another language, a second warning sign in that same language must also be provided.

Electronic Warnings on the Internet and Warnings in Catalogs

Alcoholic beverages Proposition 65 warnings for online sales must provide the full warning text in a text box as described above and the warning must be “clearly associated” with the item being purchased. OEHHA states the warning “must be displayed with such conspicuousness as compared to other words” as to assure the warning is “likely to be seen, read, and understood by an ordinary individual under customary conditions of purchase or use.” The warning must be always be provided to the consumer prior to the finalizing the purchase.

Placement of the Warning on the Internet

These three methods for providing the warning on the Internet are acceptable:

- (1) place the full text in a text box as described above directly on the product display page,
- (2) put the word “WARNING” on the product display page with a hyperlink that provides one-click immediate access to the full text, or
- (3) include the warning as part of the check-out process prior to the final purchase. It is acceptable to provide the warning, for example, as a pop-up whenever a purchaser enters a California zip code.

A warning symbol alone without the hyperlink on a product display page is not compliant if the actual warning language is located elsewhere on the site and the purchaser must search for it in the general content of the website.

Alcoholic Beverages Customer Pick-up

When stores or tasting rooms allow customers to order by telephone or online and later pick up the order at the physical location, the Proposition 65 warning signs should be at the pick-up counter to assure the warning is seen before finalizing and picking up the purchased products.

Direct-To-Consumers Alcoholic Beverages Shipments

If an alcoholic beverage is being shipped directly to a consumer using a “package delivery service,” the alcoholic beverage warning must additionally be on or in the shipping container or package “in a type size no smaller than the largest type size used for other consumer information on the product.” And in no case, may the type size be smaller than 8-point. The rule requires that the warning “be readable and conspicuous” to the consumer prior to consumption of the alcoholic beverages.

A quick word about BPA warnings

Besides the alcoholic beverages warnings, effective August 30th, California is once again requiring a warning for any alcoholic beverages that contain any BPA (Bisphenol A) as part of the packaging. California has put BPA on the list of chemicals requiring a warning. Although the federal Food & Drug Administration determined that any possible migration of BPA into the food is at safe levels and disagrees with the California listing, under the new Proposition 65 rules, any manufacturer with packaging containing any BPA must provide the warning.

BPA is commonly used in linings for beverage cans and bottle caps and in some synthetic corks. The only way to assure that your beverage packaging does not contain BPA is to obtain a letter of certification from the suppliers. If you are not sure, the safest way to proceed is to simply post the new BPA warning in tasting rooms, product catalogs and internet listings.

The warning requirements for BPA mirror the specifications for alcoholic beverages requiring the same size and sign placements described above.

The “safe harbor” text is:

<p style="text-align: center;">WARNING</p> <p>Many food and beverage cans have linings containing bisphenol A (BPA), a chemical known to cause harm to the female reproductive system. Jar lids and bottle caps may also contain BPA.</p> <p>You can be exposed to BPA when you consume foods or beverages packaged in these containers.</p> <p style="text-align: center;">For more information, go to: www.P65Warnings.ca.gov/BPA</p>
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Rules Applicable to Cannabis Producers

In 2009, the State of California added marijuana smoke to the list of substances known by the State to cause cancer. The OEHHA Fact Sheet states that marijuana smoke contains several thousand different compounds and that at least 33 of them are also on the Proposition 65 list. These include the carcinogens arsenic, benzene, cadmium, hexavalent, chromium, formaldehyde, lead, mercury and nickel. Additionally, there is also an issue regarding pesticides such as myclobutanil or carbaryl having been found in certain cannabis products.

The Attorney General’s database shows a recent increase in “notices of violations” being sent to California medical cannabis businesses for marijuana smoke exposure and/or edible cannabis products allegedly containing myclobutanil or carbaryl. Because of this, the OEHHA advises cannabis product cultivators, manufacturers and retailers to provide the Proposition 65 warnings.

The cannabis warnings must include the pictogram warning symbol (an exclamation point in a yellow triangle) and the “safe harbor” text:



WARNING: This product can expose you to marijuana smoke, which is known to the State of California to cause cancer. For more information, go to www.P65Warnings.ca.gov

And for areas where consumption is allowed:



WARNING: Entering this area can expose you to marijuana smoke. Marijuana smoke is known to the State of California to cause cancer. For more information, go to www.P65Warnings.ca.gov.

Proposition 65, BPA and Cannabis. If you manufacture, distribute or sell any of these products we encourage you to pay expedited attention to the signage details. It is far less expensive to take the time now than it will be after you get the visit from the inspector, or from the private attorney looking for a payday.

The magic word is “safe harbor.” Know where the safe harbor is and dock there!

ADDENDUM

This addendum applies to those companies who were parties to the Consent Agreement in *Bonilla v. Anheuser-Bush, et. al.* (Case No. BC537188, Superior Court, Los Angeles County 2014) and **for those who opted-in to the Consent Agreement.**

While many concerns of this group of industry members are being addressed by their trade associations, the new requirements specifying where the notices must be posted by industry members (i.e., the Internet Sales Warnings, and the delivery invoice warnings for products delivered from retail premises) may still create issues.

Bonilla was a 2014 case brought under the original Proposition 65 legislation. Many industry members, especially those that belonged at the time to the major industry trade associations (Wine Institute, Beer Institute and DISCUS) opted in to the consent agreement, which resulted in then-compliant signage being sent to retailers by a sign company created and funded by the trade associations.

The parties to the Consent Agreement specifically agreed that the consent judgment would constitute a full, final and binding resolution “of any violation of Proposition 65

that has been or could have been asserted in the public interest against the Releasees [Defendants and opt-in Defendants] arising out of exposure to the Covered Products.”

The agreed upon language states:

“WARNING: Drinking Distilled Spirits, Beer, Coolers, Wine and Other Alcoholic Beverages May Increase Cancer Risk, and, During Pregnancy, Can Cause Birth Defects.”

This agreed upon text was incorporated into the Proposition 65 regulations as the “safe harbor” warning.

The new regulation effective August 30, 2018 uses the exact same language, except it adds the requirement to list the Proposition 65 website reference in the warning and requires the warning to be posted on the supplier’s website where it can be seen by a consumer.

Although the parties to the Consent Agreement have a safe harbor using the agreed upon text (above), because of the lack of an express reference in the Consent Agreement to future changes in the legislation and the potential risk of having to respond to claimants who have not diligently excluded parties to the Consent Agreement, we recommend that manufacturers add the website reference to the text (and post the warning on their websites). We also understand from the Wine Institute and the Beer Institute that new signage containing the updated language has been furnished to the sign company and already sent to retailers, and that the BPA product registry is available to members of the Associations without charge, and to non-members for a fee.

If an industry member part of the Consent Agreement group receives a Notice of Violation, it will be that member’s responsibility to prove compliance because of the Consent Agreement. If you have questions about your status regarding the notice requirements please contact your counsel, or your trade association.

ⁱ Proposition 65 is known as the “Safe Drinking Water and Toxic Enforcement Act of 1986.” The law is found in California Health & Safety Code § 25249.5 *et. seq.* and the specific regulations implementing the law are found in 27 CCR §25600 *et. seq.*