Prop 65

Clear and Reasonable Warnings Draft (March 25, 2016)

Lead Agency Website

BPA Listing and Emergency Rules for Canned and Bottled Beverages and Foods
Prop 65 Summary

• Requires State to develop list of chemicals that cause cancer and reproductive toxicity
• Businesses must warn prior to exposure
  – Exemptions:
    • Risk assessment shows exposure is below OEHHA established MADL or NSRL or statutory criteria
• Difficult to prove product below threshold
• Civil enforcement leads lawsuits and settlements
  – Provide warnings based on “contains”
  – Business place warnings EVERYWHERE
  – Public ignores the warnings
Current Warning

WARNING

This Product May Contain A Chemical Known To The State Of California To Cause Cancer, Or Birth Defects Or Other Reproductive Harm.
Article 6: Clear and Reasonable Warnings Proposal
Background

• Governor’s Proposal (May 2013)
  – “Ending frivolous ‘shake-down’ lawsuits”
  – “Improving how the public is warned about dangerous chemicals”
  – “Strengthening the scientific basis for warning levels.”

• OEHHA has issued multiple proposals
  – Clear and Reasonable Warnings
  – Lead Agency Website
Background

• Major changes to safe harbor warning language
  – “can expose” vs “contains”
  – Chemical specific warning
• Font Size
• Pictogram Requirements
• Internet and Catalog warnings
  – Prior to sale
Clear and Reasonable Warnings Proposal

- Released March 25, 2016
  - Amends draft that ACA commented on January 25, 2016
- Likely last chance to comment
- Intend to finalize regulations by fall 2016
- Once finalized, companies can take advantage of new safe harbor provisions
  - Warning content
  - Some industry-specific tailored warnings
  - Clarifies responsibility of manufacturers and retailers
    - Catalog and internet sales
What OEHHA Did Not Change that ACA Requested be Amended or Opposed

• Sell-through period applicability still consumer products
  – Added definition of consumer product: “any article, or component part thereof, including food, that is produced, distributed, or sold for the personal use, consumption or enjoyment of a consumer.”

• Foreign Language requirement
  – Clarified “consumer information”: directions for use, ingredient lists, warnings, nutritional information

• Occupational Exposures Safe Harbor
  – A warning to an exposed employee about a listed chemical meets the requirements of this article if it fully complies with all warning information, training and labeling of the federal HCS

• ANSI pictogram and yellow color
Amendments: Internet/Catalog Warnings

• Internet
  – Must provide warning on product display page or a clearly marked hyperlink using the word WARNING on the product display page
  – Warning is not prominently displayed if the purchaser must search for it in the general content of the website

• Catalog
  – Warning must be provided in the catalog in a manner that clearly associates it with the item being purchased

• Must use content as set out in Section 25603(a)
  – Chemical specific warnings, longer warning content
  – If more than one endpoint (cancer, reproductive tox), must list at least one chemical for each endpoint

HOWEVER….
Internet/Catalog Warnings – For Products with Warning on Label

• Internet
  • If an on-product warning is provided, the warning provided on the website may use the same content as the on-product warning

• Catalog
  • If an on-product warning is being provided, the warning provided in the catalog may use the same content as the on-product warning

• NO chemical specific warnings!
• Shorter content!
Manufacturer vs Retailer Responsibility

• 25600.2(b) The manufacturer, producer, packager, importer, supplier, or distributor of a product may comply with this article either by:
  – **affixing a label to the product** bearing a warning that satisfies 25249.6 of the Act or
  – by providing written notice directly to the authorized agent for a retail seller… (establishes requirements for notice to retailer including requirement to provide warning language for products sold on the internet)

• Retailer is responsible for the **placement and maintenance** of warning materials, **including warning for products sold over the Internet**, that the retail seller receives pursuant to subsections (b) and (c)
Consumer Product Warnings Safe Harbor

• Pictogram must be no small than “WARNING”
• “WARNING” must be **bold** and in all **CAPITALS**
• Carcinogens:

⚠️ **WARNING:** This product can expose you to chemicals such as [name of one or more chemicals], a chemical [or chemicals] which is [are] known to the state of California to cause cancer. For more information go to www.P65Warnings.ca.gov/product

• Reproductive Toxicants:

⚠️ **WARNING:** This product can expose you to chemicals such as [name of one or more chemicals], a chemical [or chemicals] which is [are] known to the state of California to cause cancer. For more information go to www.P65Warnings.ca.gov/product
Consumer Product Warnings Safe Harbor

• For exposures to both carcinogens and reproductive toxicants:

⚠️ **WARNING:** This product can expose you to chemicals such as [name of one or more chemicals] a chemical [or chemicals] which is [are] known to the State of California to cause cancer, and [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/product

• For exposures to a chemical that is listed as both a carcinogen and a reproductive toxicant

⚠️ **WARNING:** This product can expose you to chemicals such as [name of one or more chemicals], a chemical [or chemicals] 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/product
On-Product Warning Safe Harbor

• NO names of chemicals required to be listed, shorter

• ⚠️ **WARNING:** Cancer –
  www.P65Warnings.ca.gov/product

• ⚠️ **WARNING:** Reproductive Harm–
  www.P65Warnings.ca.gov/product

• ⚠️ **WARNING:** Cancer and Reproductive Harm–
  www.P65Warnings.ca.gov/product

• Type size must be in type size no smaller than the largest type size used for other consumer information on the product.

• No smaller than 6 point font
ACA Advocacy

• Call with OEHHA on April 5, 2016
  – Discussed industrial products issue
    • OEHHA seemed open to changes
  – ANSI pictogram (color and pictogram issues)

• Comments due to OEHHA April 26, 2016

• Likely will continue to support and sign on to Cal Chamber Comments
Lead Agency Website Regulations
Final Lead Agency Website Regulation

• OEHHA developed a Prop 65 website. Went LIVE April 1, 2016
  – Provide information on chemicals exposure
  – Provide information on reducing and avoiding exposure
  – Links to authoritative entities

• OEHHA Can require manufactures to report
  – No testing requirement
  – Only need to report the data you “control”
  – CBI protections
  – Trade associations can respond
    • If two companies receive requests
What OEHHA Can Request

• Contact information
• Name of listed chemicals
• Anticipated routes and pathways of exposure to the listed chemical(s) for which the warning is being provided.
• Estimated level of exposure to listed chemicals.
• Any related information concerning exposures to listed chemicals
What OEHHA Can Request

• For product warnings:
  – Location of the chemical or chemicals in the product.
  – Concentration (mean, minimum, maximum) of the chemical or chemicals.
  – The matrix in which the listed chemical or chemicals is found in the product and the concentration of the listed chemical(s) in the product matrix, if known.
Prop 65 website

• [https://p65warnings.ca.gov/](https://p65warnings.ca.gov/)
• 3 fact sheets
  – Mercury
  – Formaldehyde, and
  – Benzene
• References to formaldehyde exposure from paint and coatings
BPA Listing and Emergency Rules for Canned and Bottled Foods and Beverages
BPA Listing

- May 11, 2015: BPA added to Prop 65 list of chemicals known to cause reproductive toxicity
- May 11, 2016: warnings required for products that cause exposure to BPA, even for products already on the shelf
  - Must warn unless show that the exposure is 1,000 times below the no observed effect level
- Due to litigious nature of Prop 65, recommended that provide warning if product contains BPA at any level
- May need to ask suppliers
BPA Emergency Rules

• May 17, 2016: OEHHA promulgated emergency regulation allowing temporary use of standard point of sale warning message for BPA exposures from canned and bottled foods and beverages
  – Manufacturer must provide signs, retailer must post
• Expires in 180 days, OEHHA will promulgate interim measure for 1 year
• BPA Dermal MADL: 3 micrograms/day
• No oral exposure MADL yet
Questions?

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