

DOES YOUR PRODUCT CONTAIN CHEMICALS THAT REQUIRE A WARNING?

*What You Need to Know about Proposition 65
and the Amendments that Take Effect
in August 2018*



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THE BASICS OF PROP 65

If you manufacture or sell consumer goods to California residents, chances are that the product contains *one of 900* chemicals which require a written warning to consumers under California's Proposition 65. Chemicals can be found in all sorts of products. Below are examples of three of those chemicals and typical products they are found in. The pictures below are examples of actual products that have been recently cited for failing to provide warnings.¹

Lead is often found in:

- Vinyl & leather (belts, zippers, purses, jackets)
- Crystal
- Brass (door knobs, faucets, valves)
- Jewelry
- Toys



Brass drain valve

Cadmium is often found in:

- Painted glassware (red, yellow, orange)
- Painted pottery
- Metal jewelry
- Belts
- Charms



Necklace

DEHP is often found in

- Plastic packaging
- Vinyl rainwear (shoes, ponchos)
- Vinyl backpacks
- Binders
- Electronics



Poncho

Penalties for failing to warn are stiff often requiring companies to pay thousands of dollars and to take action not otherwise required under the law (e.g., reformulate or stop selling the product).

And now Proposition 65 has been amended to impose stricter requirements that will **take effect on August 30, 2018** for *all products manufactured after that date*. This article gives a general overview on the law and amendments as it relates to **consumer products** (excluding food and other specialized products, and excluding environmental and occupational exposure).

Businesses are encouraged to start preparing for and complying with the new warning requirements as soon as possible.

WHAT IS THE LAW AND WHO MUST COMPLY?

Under Proposition 65, any person doing business who *knowingly and intentionally* exposes California consumers to one of the approximately 900 listed chemicals² known to cause cancer or reproductive toxicity must give a clear and reasonable warning to those consumers.³ There are three exceptions to this rule.

First Exception. No warning is required if a business can show that the anticipated exposure level falls at or below the “safe harbor” level.⁴ The Office of Environmental Health Hazard Assessment (OEHHA) has established safe harbor levels for many of the listed chemicals.⁵ The burden is on the defendant to show that the chemical content falls at or below the safe harbor level.⁶

The OEHHA has not established safe harbor levels for all chemicals. For chemicals that do not yet have a safe harbor level, businesses must provide a Proposition 65 warning, unless it can show “that the anticipated exposure level will not pose a significant risk of cancer or reproductive harm.”⁷ That is difficult to do.

Second Exception. Only businesses that *employ 10 or more people* are subject to Proposition 65.⁸ If a company employs 9 or less people, then it is exempt and not required to warn.

Third Exception. Businesses who do not sell products to California consumers are exempt from Proposition 65 (with the caveat below).

However, even out-of-state companies with less than 10 employees may need to comply with Proposition 65 if they sell products to a larger retailer who is not exempt. Most large retailers (like Target) sell to consumers in California, and will require all of its suppliers, regardless of exempt status to comply.

Suppliers should review their contracts with these retailers for compliance requirements. Likewise, non-exempt retailers should make sure their exempt suppliers comply with Proposition 65 warning requirements.

“ONLY BUSINESSES THAT EMPLOY 10 OR MORE PEOPLE ARE SUBJECT TO PROPOSITION 65.”

Below are some key provisions of the new rules as applied to consumer products (excluding food and certain specialized products which may apply different regulations). These new regulations go into effect *August 30, 2018*.

WHAT SHOULD THE WARNING SAY?



Under Proposition 65, warnings must be “clear and reasonable.” Proposition 65 suggests certain language that it considers to be “clear and reasonable.”

If a business uses the *suggested* “safe harbor” language (below), then it has complied with the language requirement of Proposition 65. Businesses are not

required to use the safe harbor language (or methodology). But if they do not, they must be prepared to defend the language and methodology they do use.⁹

CURRENT LAW

Under the current law, warnings are deemed “clear and reasonable” if they state that the product contains a chemical known to the State of California to cause cancer, or birth defects or other reproductive harm. It is not necessary to identify the chemical.¹⁰

For example, warnings for consumer products that contain a chemical known to the state of California should say:

“WARNING: This product contains a chemical known to the State of California to cause cancer.”¹¹

Businesses may continue to use these warnings on all products **manufactured prior to August 30, 2018 even if sold after that date.**¹²

In addition, any business subject to a court-ordered settlement or final judgment establishing a warning method or warning content is deemed to be compliant with the new law so long as the business complies with that order or judgment.¹³

NEW LAW

The new law modifies the language it deems to be “clear and reasonable.”¹⁴ There are two types of warnings, the standard warning, and the “short-form” warning. The standard warning must:

- include the word “**WARNING**” in all capital letters and bold print;
- include a yellow caution triangle with a black exclamation point preceding the warning in a size no smaller than the height of the word “**WARNING**” (a black and white triangle may be used if the label or shelf tag is not printed using yellow);¹⁵
- state that the product “can expose” users to chemicals, and specifically name at least one chemical for each effect (cancer & reproductive toxicity), unless the chemical is known to cause both effects; and
- include a link to www.P65Warnings.ca.gov.

EXAMPLES OF THE NEW STANDARD WARNING:¹⁶

<p>⚠️ WARNING: This product can expose you to chemical[s] including [name of chemical], which is [are] known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.</p>	<p>For exposure to listed carcinogens.</p>
<p>⚠️ WARNING: This product can expose you to chemical[s] including [name of chemical], 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.</p>	<p>For exposure to listed reproductive toxicants.</p>
<p>⚠️ WARNING: This product can expose you to chemical[s] including [name of chemical], which is [are] known to the State of California to cause cancer and [name of chemical], 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.</p>	<p>For exposures to both listed carcinogens and reproductive toxicants.</p>
<p>⚠️ WARNING: This product can expose you to chemical[s] including [name of chemical], 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.</p>	<p>For exposures to a chemical that is listed as both a carcinogen and a reproductive toxicant.</p>

Standard warnings must “specifically name at least one chemical.”

For standard warning text, there is no special requirement for color, font or type size, only that it be prominently displayed on the label or sign conspicuously as compared with other words or designs on the label or sign, so that the warning is likely to be read and understood by an ordinary customer.¹⁷ The triangle should be yellow, unless the sign, label, or shelf tag for the product is not printed using the color yellow. The triangle should be on the left and the same height as the word, “WARNING.”¹⁸

THE ALTERNATIVE SHORT-FORM WARNING

Alternatively, a “short-form” warning may be provided on the product “label,” and the name of the chemical may be omitted.¹⁹ The short-form warning should include the following:

- the word “**WARNING**” in all capital letters and bold print;
- a yellow caution triangle with a black exclamation point preceding the warning in a size no smaller than the height of the word “**WARNING**” (where the label is not printed using the color yellow, the symbol may be printed in black and white); and
- a link to www.P65Warnings.ca.gov.




The “name of the chemical may be omitted” using the short-form warning on the product.

A “label” means “a display of written, printed or graphic material that is **affixed to a product or its immediate container or wrapper.**”²⁰ Hangtags are likely considered to be “labels” when they are affixed to the product.

The short-form warning requires that the type-size for the warning may be no smaller than the largest type size used for other consumer information on the product label, and must be a minimum 6-point type.²¹

The short-form warning “must be a minimum 6-point type.”

EXAMPLES OF THE SHORT-FORM WARNING:²²

 WARNING: Cancer - www.P65Warnings.ca.gov.	For exposure to listed carcinogens.
 WARNING: Reproductive Harm - www.P65Warnings.ca.gov.	For exposure to listed reproductive toxicants.
 WARNING: Cancer and Reproductive Harm - www.P65Warnings.ca.gov.	For exposures to both listed carcinogens and reproductive toxicants.


Example of the short-form warning (for chemical known to cause cancer and reproductive toxicity) affixed to a product:

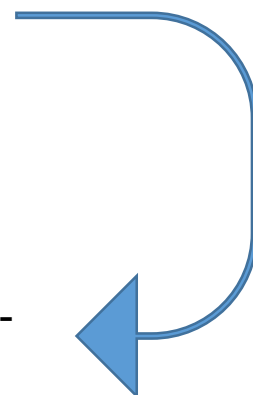


Warning on sticker



Warning on hangtag

 **WARNING:** Cancer and Reproductive Harm -
www.P65Warnings.ca.gov.



HOW SHOULD THE WARNING BE GIVEN?

GENERAL POSTING REQUIREMENTS

Under the new law, a business must conspicuously post Proposition 65 warnings to customers using one of the following methods:²³

1. posting a “product specific” standard warning on a posted sign, shelf tag, or shelf sign at *each point* of display;
2. posting a “product specific” standard warning via any electronic device that automatically provides the warning to a purchaser prior to the purchase of a product;
3. providing a standard warning on the label; or
4. providing short-form warning on the label (using the appropriate type size).

As noted above, labels are materials that are “affixed to a product or its immediate container or wrapper,”²⁴ and likely include hangtags.

POSTING ONLINE

Businesses selling a product *online* must do two things under the new law:

NUMBER 1: They must comply with the general posting requirements above; **and**

NUMBER 2: They must *also* display a warning online using one of the following methods:²⁵

- on the product’s display page;
- via a hyperlink using the word “**WARNING**” on the product display page; or
- by prominently displaying the warning to the purchaser prior to completing the purchase (e.g., on the checkout page or a pop-up that appears when the purchaser puts in a California zip code).²⁶

If a business uses a short-form warning on its label, then they may use that same short-form warning online.²⁷ An example of an online warning is attached as Exhibit A. Importantly, if a business only sells online, the only way to *also* comply with the general requirements is a warning on the product label.

POSTING IN A CATALOG

Similar to posting online, businesses who sell products in a catalog must comply with the general posting requirements above and *also* provide a standard warning in the catalogue in a manner that clearly associates it with the product being sold.²⁸ A short-form warning may be used instead of a standard warning if a short-form warning is used on the product label.

WHAT LANGUAGE SHOULD BE USED FOR THE WARNING?

If a product's warning sign or label includes consumer information (*e.g.*, directions for use) about the product in a language other than English, the warning must also be provided in that other language in addition to English.²⁹

WHO IS RESPONSIBLE FOR PROVIDING THE WARNING?

Under the law manufacturers, packagers, importers, suppliers, and distributors (together referred to as “**Suppliers**”) are expressly given the lion's share of responsibility for providing Proposition 65 warnings to retailers (or middlemen), who in turn, pass the warnings along to the consumer.³⁰ This is true of the current law, but the new law spells out specifically how to comply.³¹

Under the new law (which provision may be relied upon only starting August 30, 2018), Suppliers meet their obligations by either:³²

OPTION 1: providing a Proposition 65 warning on the product label (*e.g.*, affixed to a product or its immediate container or wrapper); or

OPTION 2: providing written notice to the “authorized agent” for the retailer (or middleman), who is subject to Proposition 65, which:

- states that the product may result in exposure to one or more listed chemical;
- includes the exact name or description of the product or specific information for the product like a UPC;
- includes all warning materials, such as labels, labeling, shelf signs or tags, and warning language for products sold online; and
- receipt is confirmed electronically or in writing by the retailer's authorized agent.

RENEWAL REQUIREMENTS: Notice to the authorized agent under Option 2 must be renewed, and receipt confirmed electronically or in writing, no later than February 28, 2019, during the first year after August 30, 2018, and then annually during the period that the product is sold in California by the retail seller.³³ If a different or additional chemical is added to the warning, then an additional notice is required within 90 days.³⁴

RETAILERS' RESPONSIBILITIES: Under either Option 1 or 2, the retailer is then responsible for placement and maintenance of the warning materials (including online sales) received from Suppliers.³⁵

MIDDLEMAN SALES: Manufacturers who do not sell directly to the retailer (but to a middleman) may comply by either labeling the product (Option 1), or provide the warning and notice materials to the authorized agent of the middleman (Option 2). Manufacturers should contractually require the middleman to pass along the materials to the retailers and then the consumer.³⁶

RETAILERS ALSO BEAR RESPONSIBILITY for providing their **own warning** when they:³⁷

- sell their own branded product;
- knowingly introduce or create a listed chemical into a product;
- have covered up or altered a warning label previously affixed to the product;
- have received notice and warning materials from a Supplier but fail to post them;
- have actual knowledge that the product requires a warning, and there is no Supplier who
 - is “person in the course of doing business”; and
 - has designated an agent for service of process or has a place of business in California.

This last bullet point is important. In short, retailers bear responsibility if the retailer does business with an exempt, out-of-state Supplier.

Specifically, a “person in the course of doing business” means a business that has 10 or more employees.³⁸ Therefore, if a retailer does business with an out-of-state Supplier who employs less than 10 employees, and that Supplier does not have a designated service of process agent or a place of business in California, **then it is the retailer’s responsibility to provide warnings and may not rely upon the Supplier.** Under these circumstances, the retailer should require compliance contractually.

WHAT ARE THE PENALTIES FOR NON-COMPLIANCE?

Penalties for failing to provide a Proposition 65 warning are stiff. They can be as high as \$2,500 per violation per day.³⁹

Private bounty hunters have made searching for Proposition 65 violations a cottage industry. Finding violators is easy. They simply purchase a product and inexpensively test it. If the test yields a result showing the product contains an excess of the safe harbor level, they send out a Notice of Violation notifying the Attorney General and the violator (and others) of the violation.⁴⁰ If no governmental entity takes action within 60 days, the bounty hunter-turned-plaintiff will file a lawsuit seeking significant damages (to cover their attorney's fees) and often demand that the company reformulate the product, no longer sell the product, and/or add additional wording to the warning that is not otherwise required.



Penalties “can be as high as \$2,500 per violation per day.”

HOW TO DETERMINE CHEMICAL COMPOSITION?



Businesses can determine chemical composition by, among other ways: analyzing material spec sheets, testing the product (and all components) at a U.S. certified lab, and/or conducting preliminary tests using an X-ray Fluorescence analyzer (for lead, cadmium), among other ways.

The results of the tests and how they are applied to Proposition 65 requirements are complicated and often require expert analysis. Products should be tested at a lab that is familiar with Proposition 65.

NOW WHAT?

Businesses should get a Proposition 65 compliance plan in place both internally and with their affiliates. Companies should take the following steps:

- ❑ Determine whether the company is exempt. If it has 10 or more employees and sells products to California consumers, then it is not exempt - skip to box 3.
- ❑ If the business is otherwise exempt, determine whether it distributes products to non-exempt retailers. If so, the business should review its contract with the retailer to see if the retailer requires Proposition 65 warning compliance. If compliance is required, go to next step.
- ❑ Audit products and gather information about chemical content.
 - Make a list of products sold in California.
 - Get chemical information about those products and component parts from suppliers, manufacturers (e.g., spec sheets).
 - Find out if manufacturers or suppliers have tested those products and/or component parts for chemical composition. If so, obtain and review those test results (test results from Asia might not be sufficient).
- ❑ Test the products
 - Engage a US accredited lab (preferably California based) to test products for Prop 65 chemicals.
 - Make sure the lab is proficient in Proposition 65 and ideally, the types of products being sold.
- ❑ Provide warnings
 - Products manufactured before August 30, 2018, even if sold afterwards can use the suggested warning language from the current law.
 - Products manufactured after August 30, 2018 should use the suggested new warning language.
- ❑ Businesses should make sure the retailers they sell or distribute to are compliant
 - Periodically check stores and warning placement.

EXHIBIT A
EXAMPLES OF USING SHORT-FORM WARNING ONLINE

1. VIA HYPERLINK ON PRODUCT PAGE

PURSE STORE, INC.



- LEATHER PURSE
- COLOR: TAN
- \$49.99
- FREE SHIPPING


[ADD TO CART](#)

WARNING

HYPERLINK PAGE:

PURSE STORE, INC.

PROPOSITION 65 WARNING

 **WARNING:** Cancer and Reproductive Harm -
www.P65Warnings.ca.gov.

2. VIA WARNING ON PRODUCT PAGE

PURSE STORE, INC.



- LEATHER PURSE
- COLOR: TAN
- \$49.99
- FREE SHIPPING

⚠ WARNING: Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

[ADD TO CART](#)

3. VIA WARNING ON CHECKOUT PAGE

PURSE STORE, INC.

ORDER SUMMARY



ITEM:	TAN LEATHER PURSE
PRICE:	\$49.99
SHIPPING:	\$0.00
TAX:	\$0.00
TOTAL:	\$49.00

NAME:	Joe Buyer
ADDRESS:	123 Main St. Springtown, CA 11111

⚠ WARNING: Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

[PLACE YOUR ORDER](#)

ENDNOTES

¹ Notices of violations were sent to the companies selling these products claiming non-compliance with Proposition 65. As of the writing of this article, the outcome and/or defense to those notices is unknown.

² For the list of chemicals see: <https://oehha.ca.gov/proposition-65/chemicals>.

³ Cal. Health & Safety Code § 25249.6. The term “expose” means to “cause to ingest, inhale, contact via body surfaces or otherwise come into contact with a listed chemical....” 27 Cal. Code Reg. (“CCR”) § 25102(i).

⁴ Cal. Health & Safety Code §§ 25249.6, 25249.10(c). A business is exempt from providing a warning if it can prove that the exposure to the chemical “poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer, and that the exposure will have no observable effect assuming exposure at one thousand (1000) times the level in question for substances known to the state to cause reproductive toxicity....” *Id.*, at § 25249.10(c).

⁵ For established safe harbor levels see: <https://oehha.ca.gov/proposition-65/general-info/current-proposition-65-no-significant-risk-levels-nsrls-maximum>.

⁶ Cal. Health & Safety Code § 25249.10(c).

⁷ 27 CCR § 25701, *et seq.*; 27 CCR § 25801, *et seq.*; see also OEHHA Businesses and Proposition 65 at <https://oehha.ca.gov/proposition-65/businesses-and-proposition-65>.

⁸ Cal. Health & Safety Code § 25249.11(b). When computing whether a business employs ten or fewer employees, all full-time and part-time employees on the date of the exposure is counted. 27 CCR § 25102(h).

⁹ Cal. Health & Safety Code § 25249.6; 27 CCR § 25600(f) (operative August 30, 2018).

¹⁰ 27 CCR § 25603.2 (a) (operative until August 30, 2018).

¹¹ 27 CCR § 25603.2 (a)(1) (operative until August 30, 2018).

¹² 27 CCR § 25600(b) (operative August 30, 2018).

¹³ 27 CCR § 25600(e) (operative August 30, 2018).

¹⁴ 27 CCR § 25603(a) (operative August 30, 2018); 27 CCR § 25601(a), (b) (operative August 30, 2018).

¹⁵ To download the triangle symbol click here: <https://www.p65warnings.ca.gov/warning-symbol>.

¹⁶ 27 CCR § 25603(a) (operative August 30, 2018); 27 CCR § 25601(a), (b) (operative August 30, 2018).

¹⁷ 27 CCR § 25601(c) (operative August 30, 2018).

¹⁸ 27 CCR § 25603(a)(1) (operative August 30, 2018).

¹⁹ 27 CCR § 25603(b), (c) (operative August 30, 2018).

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- ²⁰ 27 CCR § 25600.1(i) (operative August 30, 2018).
- ²¹ 27 CCR § 25602(a)(4) (operative August 30, 2018).
- ²² 27 CCR § 25603(b), (c) (operative August 30, 2018).
- ²³ 27 CCR § 25602(a) (operative August 30, 2018). For more information, see OEHHA Proposition 65 Clear and Reasonable Warnings Questions and Answers for Businesses at https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa.pdf (“OEHAA General Q/A”).
- ²⁴ 27 CCR § 25600.1(i) (operative August 30, 2018).
- ²⁵ 27 CCR § 25602(b) (operative August 30, 2018). For more information, see OEHHA Proposition 65 Clear and Reasonable Warnings Questions and Answers for Businesses: Internet and Catalog Warnings, at https://www.p65warnings.ca.gov/sites/default/files/art_6_business_qa_internet_warning_s.pdf (“OEHHA Q&A Internet / Catalogue”).
- ²⁶ OEHHA Q&A Internet / Catalogue, at Q/A4.
- ²⁷ 27 CCR § 25602(b) (operative August 30, 2018).
- ²⁸ 27 CCR § 25602(c) (operative August 30, 2018); *see also* OEHHA Q&A Internet / Catalogue.
- ²⁹ 27 CCR § 25602(d) (operative August 30, 2018); *see also* OEHAA General Q/A, Q/A 34-36.
- ³⁰ 27 CCR § 25600.2 (operative August 30, 2018).
- ³¹ Cal. Health & Safety Code § 25249.11; 27 CCR § 25600.2(a) (operative August 30, 2018).
- ³² 27 CCR § 25600.2(b) (operative August 30, 2018).
- ³³ 27 CCR § 25600.2(c)(1) (operative August 30, 2018).
- ³⁴ 27 CCR § 25600.2(c)(2) (operative August 30, 2018).
- ³⁵ 27 CCR § 25600.2(d) (operative August 30, 2018).
- ³⁶ OEHHA Q&A, Q/A13.
- ³⁷ 27 CCR § 25600.2(e) (operative August 30, 2018).
- ³⁸ Cal. Health & Safety Code § 25249.11(b).
- ³⁹ Cal. Health & Safety Code § 25249.7(b)(1).
- ⁴⁰ Cal. Health & Safety Code § 25249.7(d).