

## ENVIRONMENTAL ALERT

SEPTEMBER 24, 2018

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### Recent changes to California's Proposition 65 warning requirements: Why they are important, and why they may apply to you



#### So, you sell or distribute a "consumer product" into the state of California...

On Aug. 30, 2018, California amended its [Proposition 65](#) warning regulations. Officially known as the Safe Drinking Water and Toxic Enforcement Act of 1986, Proposition 65 requires businesses to inform Californians about exposures to chemicals known to the state of California to cause cancer, birth defects or other reproductive harm through warnings that must accompany all sales of consumer products into California.

**Notably, this includes all online and catalog sales, and applies to all businesses selling or distributing a consumer product into the state of California, even if they do not have a physical facility in the state.**

In essence, Proposition 65 requires the state of California to maintain (and continually update) a [list of chemicals](#) known to the state to cause cancer, birth defects or other reproductive harm. If a consumer product being sold to a consumer in California contains one of these listed chemicals

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in a quantity that exceeds any safe-harbor limit set by the state, then the consumer product must be accompanied by a Proposition 65 warning. While the regulations allow businesses some flexibility in determining where and how such a warning must be provided to the consumer, in all cases the warning must be provided before the point-of-sale, which can become very important in the context of online and catalog sales.



Many businesses would be well-served to review their business presence in California to ensure that their existing practices are in compliance with Proposition's 65 longstanding labeling requirements.

The recent amendments to the rule revised the safe-harbor language requirements of these consumer product warnings, which can appear either as a label directly on the product, on a shelf display, in a product description for online sales, etc. **Importantly, the revisions do not impose requirements to label a consumer product where there were none before: the law only revises the warning language that needs to appear on a consumer product that would already have needed a Proposition 65 warning under the preexisting requirements.** However, many businesses would be well-served to review their business presence in California to ensure that their existing practices are in compliance with Proposition 65's longstanding labeling requirements, as it is more likely than not that if a business sells a product online, some of those products are going to consumers in California.

It is easiest to illustrate the impact of these revisions by example. Say that consumer product X being sold to consumers in California is manufactured by a company based in Ohio, with no manufacturing, warehousing or retail location of any kind in the state of California. Consumer product X contains lead, which appears as one of the 900+ chemicals on the Proposition 65 list, in a quantity above the safe-harbors limits set by the state (known as No Significant Risk Levels and Maximum Allowable Dose Levels).

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Consumer product X would have required a warning label under Proposition 65 as the rule was in effect prior to the Aug. 30 2018 revisions. Under the former regulations, the safe-harbor warning language would have looked like this:

**WARNING:** This product contains a chemical known to the State of California to cause cancer and/or reproductive harm.

Under the revised regulations, a consumer product that is manufactured after the Aug. 30, 2018, effective date will need to be accompanied by warning language that looks like this:



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

... or, under certain circumstances, may need to include the name of the listed chemical in the warning language itself. The rule provides very specific instances when this “long form” version of the warning language must be used: for example, this would apply to all consumer products that are food.



**WARNING:** This product can expose you to lead, which is 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](http://www.P65Warnings.ca.gov).

**So, you have a physical presence in the state of California (even if you're not dealing in consumer products)...**

Proposition 65 also specifies requirements applicable to businesses that have a physical presence in the state of California. This could include manufacturing, warehousing, retail, etc. These requirements fall into two categories: environmental and occupational warning requirements.

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The environmental warning requirements are aimed at providing the public with information about the potential exposure to chemicals known to the state to cause cancer or reproductive harm before entering your establishment. These requirements can often be satisfied by posting warning language near all public entrances, in required type-size, and in a place that a consumer would likely see the warning before or immediately upon entering the establishment.

The occupational warning requirements are aimed at providing training to employees who are working in a facility that stores or maintains Proposition 65 chemicals in any capacity, including but not limited to consumer products that contain Proposition 65 chemicals. These requirements can be satisfied through one of a few different employee safety training programs set out in the regulations.

For more information please contact [Emily Lane](#), [Bob Karl](#), or any member of Porter Wright's [Environmental Practice Group](#).

