



What You Need to Know About Proposition 65: Statutory Overview, Legislative Amendments, and Potential Impact on the Automotive Component Part Industry

Debra Albin-Riley
555 West Fifth St., 48Fl.
Los Angeles, CA
213-443-7545
debra.riley@arentfox.com

Victor Danhi
55 Second St., 21Fl.
San Francisco, CA
415-757-7563
victor.danhi@arentfox.com

Arent Fox LLP

Washington, DC | New York, NY | Los Angeles, CA | San Francisco, CA

What is Proposition 65?

- Prop 65, the “Safe Drinking and Toxic Enforcement Act of 1986,” provides that no person shall “knowingly and intentionally” expose another to a chemical known to the State of California to cause cancer or reproductive toxicity without providing a clear and reasonable warning.
- This law requires businesses to notify customers that hazardous chemicals may be present in products they buy or places they go.

What is Proposition 65?

- Prop 65 also prohibits anyone from knowingly discharging or releasing a chemical known to the State of California to cause cancer or reproductive toxicity into the state's drinking water or onto land where such chemical passes or will probably pass into any source of drinking water.



The Governor's Prop 65 List

- Prop 65 requires the Governor to publish a list of chemicals known to the State to cause cancer or reproductive toxicity. The list must be revised at least once per year. Currently there are approximately 800 chemicals on the list.
 - **Examples:** asbestos, lead, chromium, cadmium
- A copy of the Prop 65 list and other helpful information about Prop 65 is available at the Office of Environmental Health Hazard Assessment (“OEHHA”) website, <http://oehha.ca.gov/prop65.html>



Purpose and Intent of Prop 65

- Proposition 65 was intended by its authors as an environmental protection law, to protect California citizens and the State's drinking water sources from chemicals known to cause cancer, birth defects or other reproductive harm, and to inform citizens about exposures to such chemicals.
- The law has been criticized in recent years for permitting a cottage industry of aggressive lawyers to file lawsuits with little or no merit simply to extract settlements.

Businesses Exempt from Prop. 65

- Small businesses with fewer than 10 employees, governmental agencies, and public water systems are exempt from the warning requirement and discharge prohibition of Prop 65.



Consumer Product Warning Requirements

- The warning message for consumer products subject to Prop 65 must contain the following message:
 - For consumer products that contain a chemical known to the State to cause cancer:



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

C.C.R. § 25603.2

Consumer Product Warning Requirements - cont.

- For consumer products that contain a chemical known to the State to cause reproductive toxicity:
 - “WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.”

C.C.R. § 25603.2



Warning Requirement Exemptions

- Warnings are not required on consumer products if the responsible entity can show:
 - the exposure occurred less than 12 months after the listing of the chemical on the Prop 65 list OR
 - the exposure poses “no significant risk” (“NSR”) of causing cancer or will produce no observable reproductive health effect.
- Health & Safety Code § 25249.10(b), (c)

Prop 65 Enforcement

- Prop 65 allows the CA Attorney General, local district attorneys, and citizens (“private attorneys general”) to sue to enforce the Act.
 - Since 2008, nearly 2,000 complaints have been filed by private attorneys general.
- Notice of Violation (“NOV”) must precede filing of lawsuit by 60 days.
- Lawsuit may be filed if NOV is not addressed within 60 days.

Notice of Violation (“NOV”)

- Document served on the alleged violator at least 60 days before the filing of a lawsuit alleging violation of either the Prop 65 warning requirement or the discharge prohibition.
- NOV provides a non-exclusive list of the types of product(s) containing the subject chemical(s) and the violators -- the manufacturers, suppliers, retailers, and/or distributors of those products.



Scientific Evidence Required to Serve NOV

- Certificate of Merit
 - Required document with NOV which is executed by attorney for the noticing party, stating that the attorney has consulted with one or more persons with relevant and appropriate expertise who has reviewed facts, studies, or other data regarding exposure to the listed chemical and based on that info, the person believes there is a reasonable and meritorious case.
 - Factual information supporting the Certificate shall be served on the Attorney General.

Automobile Component Part Industry & Prop. 65

- Exemplar Prop 65 Chemical List for Automobile Component Parts:
 - Lead (car batteries, automobile paint, vinyl floor mats, auto bulbs)
 - Asbestos (brake linings)
 - Toluene (solvent in vehicle touch-up paint)
 - Chromium and Cadmium (automobile paint)
 - Diethylhexyl phthalate (“DEHP”) (seat belt pads and steering wheel covers)
 - Di-n-butyl phthalate (“DBP”) (automotive terminal kits)



Recent NOVs to Automotive Parts Suppliers & Manufacturers

- Automotive Accessories & Tools
 - June 2013: NOV to retailer of automotive storage organizers with vinyl/PVC handles containing DEHP, known to cause birth defects for failure to provide Prop 65 warnings.
 - March 2012: NOV to manufacturers and retailers of automotive tools (oil filter wrenches) containing butyl benzyl phthalate (“BBP”) and DEHP, known to cause developmental toxicity for failing to provide Prop 65 warnings.

Automobile Component Part Cases – Warnings

- Manufacturer of automobile touch-up paint containing industrial solvent toluene, a reproductive toxin, was held exempt from Prop. 65 warning requirement. *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150.
 - The defendant has the burden to establish that the exposure to a toxin on the list meets the criteria for exemption under specified amounts.
 - A defendant is exempt from the Prop. 65 warning requirement if the level of exposure is 1,000 times below the “no observable effect level (“NOEL”) or max. allowable dose level.

Automobile Component Part Cases

- August 2013: Manufacturers and sellers of automotive terminal kits allegedly containing diethylhexyl phthalate (“DEHP”) and di-n-butyl phthalate (“DBP”) are sued under Prop 65 for failing to provide required warnings.
- June 2012: Manufacturers, suppliers, and retailers of steering wheel covers, seat belt pads, and CD organizers are sued under Prop 65 for failing to provide clear and reasonable warnings regarding DEHP in their products.

Automobile Component Part Cases – Cont.

- April 2012: The manufacturer of “The Club” steering wheel lock and 20 other companies are sued for failing to warn under Prop 65 that their products contain DEHP in their products.
- Sept. 2007: Manufacturers of lead-based wheel balancing weights are served with 60-Day notices alleging that the products, which often fall off cars and trucks, release lead into California’s waterways and into sources of drinking water.

Potential Penalties for Prop. 65 Violations

- Injunctive relief.
- Civil penalties up to \$2,500 per day per violation.
- Factors a court shall consider to impose civil penalties:
 - the nature & extent of the violation;
 - the number and severity of the violations;
 - the economic effect of the penalty on the violator;



Civil Penalties Factors - Continued

- Whether the violator took good faith measures to comply with the law and the time in which the measures were taken;
- The willfulness of the violator's misconduct;
- The deterrent effect that the imposition of the penalty would have on both the violator and the community as a whole; and
- Any other factor that justice may require.

Health & Safety Code § 25249.7

Prop 65 Settlements

- Key components to a typical Prop 65 settlement (which requires court approval):
 - civil penalties;
 - agreement to place requisite warnings on consumer products and/or in owner's manuals;
 - company commitment to reformulate products to remove or reduce levels of offending chemicals;
 - reasonable attorneys' fees



Proposed Legislative Amendments

- Gov. Jerry Brown proposed an overhaul of Prop 65 in May 2013 because it was being misused by “unscrupulous lawyers” filing cases
 - Gov. Brown’s proposed revisions:
 - limited attorney’s fees
 - required plaintiffs to present more information to support their claims
 - reconsidered levels of cancer-causing chemicals to better reflect human danger
 - Status: Proposals were never incorporated in any bill this year.
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Legislative Amendment – A.B. 227

- Businesses that receive a NOV have 14 days to address the alleged violation and pay a \$500 civil penalty for each facility at issue in order to avoid litigation.
 - Limited applicability: businesses that fail to post a clear & reasonable warning re: exposure to alcoholic beverages, tobacco smoke, **engine exhaust**, and potentially harmful chemicals formed during food prep.
 - Status: Signed by Gov. Brown on 10/5/13; amendment was effective immediately.
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Practical Suggestions

- Invest in a Prop 65 compliance program.
- Consider applying warnings to products preemptively.
- Manufacturers and retailers should require sellers to notify them of the presence of any restricted chemicals and to provide indemnity for any costs stemming from a chemical the supplier failed to disclose.
- Consider joining a joint defense group with companies in the same industry.



