

California Prop 65: What does a business need to understand about Prop 65 Compliance and Litigation Defense

By Janathan L. Allen
Janathan L. Allen, APC



PUBLICATION VOLUME 3.0



 **ALLEN • BARRON** INC.
Law • Tax • Accounting
Janathan L. Allen, APC 



California Proposition 65

What does a business need to know about California Prop 65?

California initially passed Proposition 65 (which was called “The Safe Drinking Water and Toxic Enforcement Act of 1986”) as a voter initiative in 1986. The primary issue facing business owners today is the provision of a consumer notice which identifies the specific chemicals or compounds contained within a product or food which are known by the State of California to cause cancer, birth defects or reproductive harm.

While there have been various interpretations of the laws and legal proceedings to hammer out the details, a final date for businesses to come into compliance with specific notifications associated with Prop 65 has been established. It is **August 30, 2018**.

After this date all businesses – brick and mortar or online – with sales into the State of California must be in full compliance with Prop 65 or face substantial financial and legal consequences.

Who Needs to Know About California Proposition 65 or “Prop 65”?

Should you be concerned about upcoming Prop 65 deadlines regarding the manufacture, distribution or sale of commercial or consumer products? Your company can still obtain a “safe harbor” as a defense to litigation or threatened litigation, as long as the warning is in compliance with the new regulations. Allen Barron’s Prop 65 attorneys can provide sound counsel on this and all Prop 65 issues. It is important for any business with more than 10 employees who produces, manufactures, distributes or offers any commercial or consumer products for sale within the State of California to understand their responsibilities under Prop 65. This includes all retailers with physical locations in the State of California as well as those who offer catalog sales or online purchases to California residents.

How will Allen Barron’s integrated services provide you help to come into compliance with California’s Prop 65?

What risks does your company face for failure to comply with this powerful law?



Prop 65 – An overview:

“No person in the course of doing business shall knowingly or intentionally expose an individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving a clear and reasonable warning to such individual, except as provided in Section 25249.10.” - Cal. Health & Safety Code §25249.6.

Prop 65 generally concerns all types of potential exposure to hundreds of chemicals known by the State of California to cause cancer or reproductive toxicity. Exposure may be the result of inhalation, direct mouthing or ingestion, hand-to-mouth pathway or dermal absorption. Exposure can occur in many ways including, but not limited to environmental, occupational or consumer products exposure.

The law defines a consumer products exposure as “an exposure which results from a person’s acquisition, purchase, storage, or other foreseeable use of a consumer good, or any exposure that results from receiving a consumer service.” - Cal. Code Regs. 22 tit. §12601(b).

It is important to understand there are two sets of regulations under the statute, which are amended from time to time. One set, the “Regulations,” is issued by the OEHHA. The second set, known as the “Enforcement Regulations” is issued by the Office of the Attorney General and governs private enforcement of Prop. 65

How can i find out if our product contains a Prop 65 chemical?

Prop. 65 requires the Governor to publish, at least annually, a list of chemicals known to the state to cause cancer or reproductive toxicity. Cal. Health & Safety Code §25249.8. Chemicals may be included on the Prop. 65 list only if there is a sufficient showing that they in fact cause cancer or reproductive toxicity.

For example, The California Court of Appeals recently held that styrene and vinyl acetate, chemicals listed by the International Agency for Research on Cancer (IARC) as possibly carcinogenic, could not be automatically added to the Prop. 65 list.

A complete and updated list of chemicals can be found on the OEHHA website, <https://oehha.ca.gov/proposition-65/proposition-65-list>.



What do you risk if you fail to comply with Prop 65:

The failure to comply with California's Prop 65 exposes you and your company to civil penalties of up to \$2,500 per day for every day of violation, as well as plaintiff's legal fees, the legal costs to represent and defend the action(s) against you as well as many forms of restitution. A typical settlement in these cases easily reaches tens of thousands to hundreds of thousands of dollars.

What is the "Clear and Reasonable Warning" Requirement Established by California's Prop 65?

California law requires all parties associated with the manufacture, distribution or sale of a consumer or commercial product to provide a Clear and Reasonable Warning before exposure to any of the more than 800 chemicals specified on the Prop 65 list. The chemicals listed within the regulations include many chemicals, compounds, additives or ingredients present in many commercial, consumer and household products including but not limited to:

- Appliances
- Over-The-Counter Drugs
- Toys
- Bicycles and Helmets
- Jewelry
- Rugs and Floor Coverings
- Luggage
- Pesticides
- Food
- Beverages Including Craft Beer Production



WARNING!
New Proposition 65 Warning
Regulations Taking Effect

How Will This Warning Look in Application?

Prop 65 establishes the Clear and Reasonable Warning "must clearly communicate that the chemical(s) in question is known by the State of California to cause cancer, birth defects or other reproductive harm."

Contact Allen Barron, Inc. to learn more about recent changes to Prop 65 warning requirements and to ensure your business is in full compliance. **866-631-3470**

Who will pursue my company for Prop 65 violations?



There are many California agencies and plaintiffs attorneys who are looking for a way to bring an action against your company for Prop 65 violations. It often begins with the plaintiff's formation of a group with a self-serving name such as "Consumers for a Safe CA" or something similar. The group will choose one person, usually with a "scientific background" to serve as the plaintiff in multiple lawsuits.

Your products or a group of products are tested by the plaintiff, usually with no advance notice or warning to you the manufacturer, distributor, retailer, catalog or online vendor. When the testing reveals the presence of one of the 800 plus chemicals listed on the OHEEA's Prop 65 website, the plaintiff usually sends notice to the offices of various District

Attorneys (DAs) and/or the California (or appropriate) State Attorney General's office to determine if the state or local agency will pursue the matter of Prop 65 enforcement. In the vast majority of these cases the local and state agencies leave the case to be prosecuted by the plaintiff's attorneys.

At this point the plaintiff's attorneys will send you and all associated parties/defendants a 60 day notice declaring you are in violation of California's Prop 65. The notice will provide limited details. You need the experienced and proven business litigation defense attorneys at Allen Barron to protect your interests, investigate the matter, defend your legal and financial interests and seek the best possible resolution of your case.



Fast Action is Required

Our proven Prop 65 litigation defense attorneys will work to limit the escalation of plaintiff's attorney's fees, protect you against potential civil penalties and ultimately seek relevant disclosures from the plaintiff's attorneys. The plaintiff's attorneys, many times, seek a "quick settlement" without offering reasonable terms or the opportunity to remedy the Prop 65 violation. If no "correction" or settlement can be reached, the plaintiff's attorneys file one or more lawsuits.



How can our attorneys help?

Defending a 60 day notice or Prop 65 lawsuit

Once lawsuits are filed the plaintiff will seek civil penalties of up to \$2,500 per day for every day of the violation, as well as legal fees and “restitution” which can take many forms resulting in substantial financial consequences.

The best opportunity for defense lies in investigating the scientific facts underlying the assertions of the plaintiff, and our attorney’s ability to mount an aggressive defense while seeking a reasonable solution of settlement in the matter before lawsuits are filed. There are only a few cases on record where the defendant in Prop 65 cases has prevailed, and they have not been able to recover their own legal expenses.

The expense and burden of a Prop 65 case usually falls on your shoulders as a defendant. Our attorneys work with you to come into Prop 65 compliance in advance of the approaching deadline. When a dispute arises we are often able to work with other

“defendants” to consolidate cases and limit the costs of mounting a Prop 65 defense.

Safe harbors, SUDS and naturally occurring exemptions

The OEHHA has provided Safe Harbor numbers for many of the chemicals on the list. For example, a warning is not required if it can be proven that “no significant risk” is presented by your product. Retailers should work with our attorneys to obtain a “Safe Use Determination” or SUD. The SUD is a written statement issued by the OEHHA which interprets and applies Prop 65 and associated regulations to your unique set of circumstances and facts. If an identified carcinogen or regulated chemical listed under Proposition 65 naturally occurs within the food it may not constitute an “exposure” under the laws and regulations associated with Prop 65.

How can you protect yourself from exposure to Prop 65 risks and financial liabilities?

Allen Barron’s Proposition 65 attorneys work with you to come into compliance with all “Clear and Reasonable Warning” requirements established under Prop 65. If you have received a 60 day notice we work aggressively to defend your interests while seeking authorization from appropriate legal entities for you and your company to correct potential Prop 65 violations.

There are several potential defense strategies. These include but are not limited to the effectiveness and compliance of existing warnings and documentation, Statutes of Limitations, defective plaintiff’s notices and providing evidence to prove no warning was required because the exposure levels associated with the product(s) does not violate the regulations established by Proposition 65.

Allen Barron’s Prop 65 attorneys work to negotiate prompt settlements of any potential disputes prior to the filing of a lawsuit. Our attorneys work to identify other potential defendants to help defray costs and leverage resources to mount a successful defense.

Integrated expertise of multiple disciplines while lowering the time and cost of California Prop 65 compliance and litigation defense

Allen Barron integrates the legal, tax, accounting, litigation and business consultation services necessary to assist your business in all phases of California Prop 65 compliance or litigation defense. We approach complex questions such as Prop 65 from a higher perspective than any other single organization.

We help your company to understand not only your requirements under the law, but how to integrate this strategy into the practical operations of your business. We help you to assess the legal, financial and tax implications of these decisions and how to avoid the risks of a 60 Day Notice or a lawsuit.

Take Action to Protect Your Company Today

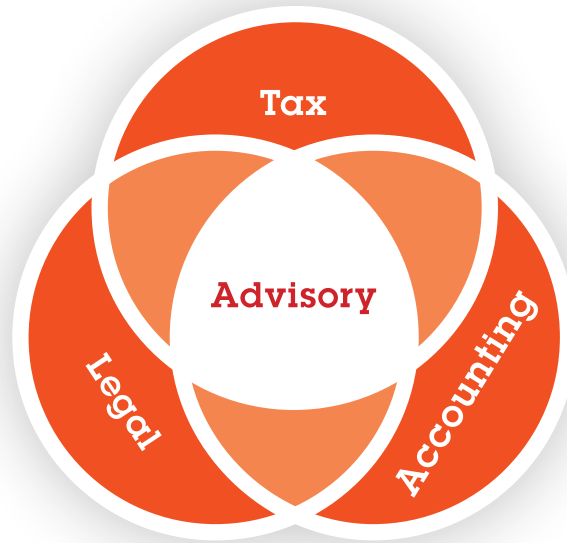
Are you concerned about coming into compliance with California Prop 65 as a manufacturer, distributor,

retailer, catalog house or online point of sale for consumer products and commercial goods sold within the State of California? How can you provide a Clear and Reasonable Warning and ensure compliance with all regulations under this complex statute?

Is there a Safe Harbor, Safe Use Determination or SUD, or Naturally Occurring Exemption which would reduce your exposure to litigation and financial consequences under Prop 65? What should you do if you receive a 60 day Notice or are served papers regarding a lawsuit? We invite you to call **866-631-3470** for a free consultation with an experienced California Prop 65 compliance and litigation defense attorney. Learn how we can help you to avoid costly Prop 65 financial liabilities and protect the profitability of your business.

One vendor. One valued business partner. Allen Barron.





- **How can your company become Prop 65 compliant?**
 - **What are the business risks of Prop 65?**
 - **What do you need to know about Prop 65?**
- **What should you do if you receive a 60 day notice or are served with a lawsuit?**



866-631-3470
www.allenbarron.com

 **ALLEN • BARRON** INC.
Law • Tax • Accounting
Janathan L. Allen, APC 