



CALIFORNIA PROPOSITION 65

Overview

Proposition 65 is a California law passed by direct voter initiative. Its goals are to protect drinking water sources from toxic substances that may cause cancer and birth defects and to reduce or eliminate exposures to those chemicals generally, for example in consumer products, by requiring warnings in advance of those exposures.

Proposition 65 is administered by California's Office of Environmental Health Hazard Assessment (OEHHA). Proposition 65 regulates substances officially listed by California as having a 1 in 100,000 chance of causing cancer over a 70-year period or birth defects or other reproductive harm in two ways. The first statutory requirement of Proposition 65 prohibits businesses from knowingly discharging listed substances into drinking water sources, or onto land where the substances can pass into drinking water sources. The second prohibits businesses from knowingly exposing individuals to listed substances without providing a clear and reasonable warning.

An official list of substances covered by Proposition 65 is maintained and made publicly available. Chemicals are added to or removed from the official list based on California's analysis of current scientific information. All substances listed show their known risk factors, a unique CAS chemical classification number, the date they were listed, and, if so, whether they have been delisted.

Proposition 65 remains politically controversial even after 25 years, in large part because, in effect, it puts the burden of proof on business instead of government to make a key scientific determination about safety levels for specific toxic chemicals that the businesses are knowingly exposing members of the public to. According to the California Environmental Protection Agency, "Proposition 65 has... increased public awareness about the adverse effects of exposures to listed chemicals.... [and] provided an incentive for manufacturers to remove listed chemicals from their products.... Although Proposition 65 has benefited Californians, it has come at a cost for companies doing business in the state." The law has also been criticized for the proliferation of "bounty hunter" lawsuits. Attorneys have collected more than two-thirds of the money paid by businesses to settle Proposition 65 lawsuits since 2000.

Proposition 65's effectiveness also remains controversial, with some pointing out the lack of any studies suggesting a decrease in cancer rates in the state.

Enforcement

Enforcement is carried out through civil lawsuits against Proposition 65 violators. These lawsuits may be brought by the California Attorney General, any district attorney, or certain city attorneys (those in cities with a population exceeding 750,000). Lawsuits may also be brought by private parties "acting in the public interest," but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation.

A Proposition 65 Notice of Violation must provide adequate information to allow the recipient to assess the nature of the alleged violation. A notice must comply with the information and procedural requirements specified in



regulations. A private party may not pursue an enforcement action directly under Proposition 65 if one of the government officials noted above initiates an action within sixty days of the notice. After 2003, private enforcers must also serve a certificate of merit (statement of expert consultation(s) supporting belief of reasonable and meritorious private action) as a means of preventing frivolous enforcement actions.

A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500 per day for each violation. In addition, the business may be ordered by a court of law to stop committing the violation. Other penalties may apply, including unfair business practices violations as limited under California Proposition 64 (2004).

Businesses can become compliant by learning upfront whether or not their products contain chemicals that match the current Proposition 65 list of 910 chemicals. Users can do this by searching in a Microsoft Excel chemical list or a website offering the search by chemical name or CAS Number. Product manufacturers may also learn if a chemical in their products has been removed from the Proposition 65 list, such as Saccharin, removed December 2010. Alternatively, they can post generic Prop 65 warnings just in case their products contain any listed chemicals.

Warning label



The following warning language is standard on products sold in California if they contain chemicals on the Proposition 65 list and the amount of exposure caused by the product is not within defined safety limits.

WARNING: This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

The wording can be changed as necessary, so long as it communicates that the chemical in question is known to the state to cause cancer, or birth defects or other reproductive harm. For exposures from other sources, such as car exhaust in a parking garage, a standard sign might read: "This area contains chemicals known to the State of California to cause cancer, or birth defects or other reproductive harm".

Abuse

Political controversy over the law, including industry attempts to have it preempted by federal law, have died down. However, enforcement actions remain controversial. Most of the Proposition 65 complaints are filed on behalf of straw man plaintiffs by private attorneys, some of whose businesses are built entirely on filing Proposition 65 lawsuits.

Proposition 65 has also been criticized because the majority of settlement money collected from businesses has been used to pay plaintiffs' attorney fees. Businesses paid over \$14.58 million in attorney fees and costs in 2012, 71% of all settlement money paid.

Labeling requirements conceded the reality that listing and classifying substances did not help the consumer if the contents of a purchase were unknown. At the same time, there were no other labeling requirements to support



the proposition. Industry critics and corporate defense lawyers charge that Proposition 65 is "a clever and irritating mechanism used by litigious NGOs and others to publicly spank politically incorrect opponents ranging from the American gun industry to seafood retailers, etc."

In addition, because the law allows private citizens to sue and collect damages from any business violating the law, there have been cases of lawyers and law firms using Proposition 65 to force monetary settlements out of California businesses. The Attorney General's office has cited several instances of settlements where plaintiff attorneys received significant awards without providing for environmental benefit to the people of California, resulting in the requirement of the Attorney General's approval of pre-trial Proposition 65 settlements.^[37] The Attorney General also objected to efforts in settlements between private parties to pre-empt the Attorney General's right and duty to protect the public interest against future violations.^[28]

Recent reform efforts

In 2013, a consensus bill, AB 227, introduced by Assemblyman Mike Gatto (D-Los Angeles), effectively offered to protect certain small companies in specified circumstances from the threat of citizen enforcement lawsuits, by providing them with a streamlined compliance procedure. The bill was passed unanimously and was enacted on October 10, 2013.

Following the success of AB 227, Gov. Jerry Brown announced on May 7, 2013 that his office plans to introduce a proposal to reform Proposition 65. Since Brown's initial announcement, his office has held meetings with Proposition 65 stakeholders, but has been tight-lipped about what was accomplished by the meetings. According to Cal/EPA Secretary Matthew Rodriguez, the Governor's office plans to release a white paper after concluding its stakeholder meetings. The white paper may form the basis of a legislative proposal by the Governor.

Assembly Bill 1252, introduced by Assemblyman Brian Jones (R-Santee) during the 2015-2016 legislative session, proposed giving small businesses two weeks to fix violations before a lawsuit can be filed. The legislation died in committee.

Reformulation of consumer goods

Over the years, Prop 65 has led to consent agreements for a variety of consumer products, such as bibs, bicycles, products containing brass, cookware, cosmetics, exercise mats, ceramic ware and glassware, clothing, fake leather upholstery, headphone cables, jewelry, lunchboxes, poker chips, luggage, and accessories.

In early 2011, a number of new Prop 65 consent agreements were reported, covering vinyl inflatable structures, vinyl lounge chairs, inspection lights with clamp handles, brass door handles, cadmium in jewelry and a revised judgment for fashion accessories.

In the latter part of 2011, further consent agreements were reported. These included reformulations of up to 1000 ppm DEHP for book covers and jackets. Further reformulations for lead content also concluded. For fashion jackets



and belts with components that can be handled, touched or mouthed, two tests are necessary for compliance: less than 1.0 µg lead using method NIOSH 9100 and less than 100 ppm lead using EPA 3050B.

More recently, since December 2011 and during the first half of 2012, a further number of consent settlements for Prop 65 have been concluded, enforcing reformulation of a range of additional products by specifying the limits of heavy metals and organic chemicals.

Summary of settlements

In externally decorated glassware the cadmium and lead content are limited, with lower concentrations permitted for the lip or rim region. Lead content is also restricted in ceramic ware with exterior decorations, booster cables, and safety pins in varying concentrations. In the case of safety pins the preliminary limit is 300 ppm for 2012, but a much lower limit of 100 ppm will come into force in 2013. For the grips of hand tools the content of lead and certain phthalates are restricted. Various specific phthalates are also restricted in varying concentrations in notepads with vinyl coverings, purses, slippers, flip flops with rhinestones and similar plastic footwear, ear buds and headsets, and exercise/fitness mats. Restriction on volatile organic compounds(VOCs) is defined for smoothing solution products, and in this case a specific warning is mandatory in the material safety data sheets if the product releases detectable amounts of formaldehyde.