

Businesses Required to Post Prop 65 Warnings for Two New Chemicals

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Following up on the recent modifications to Prop 65's "clear and reasonable" warning requirements (as discussed in our prior [Alert](#)), new warning requirements for newly listed chemicals have gone into effect, and the State agency responsible for administering Prop 65 has also proposed new rules to be used to calculate certain consumer product exposures.

As of November 10, 2018, many businesses which manufacture or sell products in California that contain either of two common perfluoroalkyl substances (PFAS) were required to provide warnings for those products or face potential enforcement action under the Safe Drinking Water and Toxic Enforcement Act of 1986, commonly referred to as "Prop 65."

Prop 65 prohibits businesses of 10 or more employees from knowingly and intentionally exposing individuals to chemicals known to the State of California to cause cancer or reproductive toxicity (Listed Chemicals), without first providing a "clear and reasonable" warning. After the Office of Environmental Health Hazard Assessment (OEHHA), the agency responsible for administering Prop 65, adds a chemical to the Prop 65 list, a business covered by Prop 65 has 12 months to comply with the Prop 65 warning requirement.

On November 10, 2017, OEHHA added perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) to the Prop 65 list on the basis that both chemicals are reproductive toxicants. PFOA and PFOS are two types of PFAS that have been used for decades in a number of consumer products, including nonstick products, carpets, paper coatings for food packaging, and fire-fighting foams, for their grease- and stain-resistant properties. Because these chemicals persist in the environment, accumulate in humans, and are suspected of causing negative health impacts, they have emerged as contaminants of concern in recent years.

OEHHA's listing of PFOA and PFOS in November 2017 triggered the requirement for covered businesses to provide Prop 65 warnings on products containing these chemicals no later than one year after the listing. Therefore, as of November 10, 2018, covered businesses became subject to the Prop 65 warning requirement for PFOA and PFOS. Certain entities, including cities, counties, states, government agencies, and operators of public water systems, are exempt from Prop 65.

Failure to comply with the newly effective warning requirements for PFOA and PFOS carries a penalty of \$2,500 per day per violation.

OEHHA PROPOSES CHANGES TO CALCULATION OF EXPOSURE LEVELS

In October, OEHHA proposed two amendments to Prop 65 regulations governing the calculation of potential food product and consumer product exposures to reproductive toxicants listed pursuant to Prop 65. If the amendments go into effect, they will impact the ability of covered businesses to demonstrate their food and consumer products do not require warnings.

Although Prop 65 prohibits exposing individuals to Listed Chemicals without providing a clear and reasonable warning, the warning requirement does not apply to exposures where the "level in question" will pose "no significant risk" (for carcinogens) or have "no observable effect" (for reproductive toxicants).

The first proposed amendment (to 27 C.C.R. Section 25821(a)) prevents a business seeking to provide evidence as to the "level in question" of a Listed Chemical in a food product based on an average of product samples from calculating that average by using products from different manufacturers, producers, or in different manufacturing facilities. As a result, businesses will now have to determine averages based on a single manufacturer, producer, and/or facility. The second amendment (to Section 25821(c)(2)) would require that, in calculating the reasonably anticipated intake and exposure rates to any consumer products (including food) for a reproductive toxicant, the exposure rate is to be calculated using the arithmetic mean from multiple samples, rather than the geometric mean (as used in some prominent Prop 65 cases).

These regulations, which OEHHA hopes will help avoid "incorrect or inconsistent" determinations of product-related exposures, will tighten businesses' ability to calculate exposure levels, and will impact numerous products subject to Prop 65 warning requirements. To date, courts and businesses have determined exposure levels on a case-by-case and varying basis.

OEHHA recently extended the notice and comment period on this amendment to November 26, 2018. Given the potential impact of the proposed amendments, businesses should consider whether to submit comments.

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