

California Proposition 65: OEHHA Publishes Second Modification to Proposed Rules to Short-Form Warnings

Article By:

Misha L. Nishiki

Jennifer MikoLevine

Malcolm C. Weiss

On April 5, 2022, the California Office of Environmental Health Hazard Assessment (OEHHA) published a [second 15-day notice of modification](#) to its proposed Proposition 65 *safe harbor* “short-form” warning regulations. If adopted, the amendments would significantly impact businesses’ use of the short-form warnings.

Background to Proposition 65 Warnings

California’s Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop 65) mandates that businesses notify California consumers about certain exposures to Prop 65 listed chemicals through “clear and reasonable” warnings. There are currently two forms of “safe harbor” warnings which, if used, ensure compliance with statutory warning requirements: 1) long-form warnings and 2) short-form warnings. A major difference between the two is that the long-form warning requires disclosing at least one [Prop 65 chemical](#) that could result in exposure from the product’s use, whereas the short-form warning previously required only a statement of the potential health hazard. Due to this difference, the short-form warning has been a popular option since its introduction in 2016.

Proposed Amendment History

OEHHA originally published proposed amendments to the short-form warning regulations in January 2021 (California Regulatory Notice Register (Register No. Z2020-1229-01)) and received over 150 written comments. The majority of comments urged OEHHA to not adopt the proposed regulations, including comments submitted by Hunton clients. Subsequently, OEHHA published a notice of modification in December 2021. Of the approximately 36 comments received at this time, the majority again urged OEHHA to not adopt the proposed regulations based on a plethora of business, consumer and other concerns.

Changes in the Newly Proposed Amendments

In response, on April 5, OEHHA announced further changes to its proposed short-form warning regulations. OEHHA's current proposal offers some increased flexibility. For example, the previous proposal only allowed the use of the short-form warning on small labels (i.e., labels with surface areas of 5 or 12 square inches). The current proposal eliminates this restriction. The current proposal also extends the regulation's operative date (from the previously proposed one year to two years following the effective date). This allows businesses additional time to implement changes. It should be noted that one of the most contentious changes originally proposed, the requirement that the short-form warning contain the name of one or more Prop 65 chemicals, was left intact.

If adopted, key modifications to the short-form warnings include:

- *Listing of Chemicals.* The short-form warning would require identifying the name of one or more chemicals known to cause cancer and/or reproductive toxicity.
- *Flexibility in Font Type Size.* The short-form warning font type size would no longer be required to be the same as the largest type size providing consumer information. Note, however, that the existing provision requiring a minimum of 6-point type size when using short-form warnings remains unchanged.
- *California Specific Signal Words.* The short-form warning would qualify that it is a California-specific warning, by adding "**CA**" or "**CALIFORNIA**" before the existing "**WARNING:**" language. This addition should clarify for consumers that the warning label is included pursuant to California law.

OEHHA apparently has abandoned an amendment that would have eliminated the option to use the short-form warning content on websites or in a catalog. Thus, if a business uses the short-form warning on a product, it may continue to also use the same short-form warning on its website or in its catalogs.

OEHHA is now accepting written comments on the second modification to proposed rules until April 20, 2022.

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