

BEWARE: New Prop. 65 Warning Requirements Apply to California Hospitality Industry in Fewer Than 90 Days

In fewer than 90 days, new Prop. 65 regulations will apply to a wide variety of hospitality operators in California. Gas stations and coffee houses have been required to post warning signs for years under the [California Safe Drinking Water and Toxic Enforcement Act of 1986](#), better known as Proposition 65 (“Prop. 65”). Different types of products have had to be labeled in accordance with the act. However, new standards applying to hospitality operators go into effect on August 30, 2018, which could result in fines of up to \$2,500 per day per violation and often attorneys’ fees.

The new regulations expressly apply to operators of a hotel (which is defined very broadly and includes everything from ski resorts to spas). They include posting notices behind the registration desk or as part of the registration process. As seen below, the [changes promulgated by California’s Office of Environmental Health Hazard Assessment](#) (“OEHHA”) also include, but are not limited to, revisions to the warning language itself, [a new Prop. 65 URL](#) which needs to be referenced, the inclusion of a pictogram, inclusion of the name of a listed chemical (except for on-product warnings) and font changes.

The Prop. 65 plaintiffs’ bar is one of the most active in California and defending the suits can be costly and challenging. More importantly, lawsuits can be prevented with some fairly simple steps to comply with the strict regulatory requirements.

Brief Overview of Prop. 65

Prop. 65 is a statewide initiative that regulates companies that make or sell their products in California in two ways. First, it requires companies whose products contain certain levels of chemicals to provide clear and reasonable warnings. Prop. 65 does not ban or restrict the sale of chemicals on the list or their inclusion in products, but it requires warnings if the listed chemicals are included. Second, it prevents companies from discharging these chemicals into the state’s water supply. All companies doing business in California and all products manufactured or sold in California are subject to the regulation with three exceptions: (1) the company has fewer than 10 employees, (2) government agencies, or (3) the products contain less than a threshold amount of the chemicals.

The penalties for violations can be staggering. Prop. 65 is enforced both by the California Attorney General and private lawsuits on behalf of the California Attorney General. The potential penalties for violations of Prop. 65 include a fine of up to \$2,500 per day. Additionally, one of the largest drivers of litigation is that the private enforcers (plaintiffs’ bar) can recover their attorneys’ fees. The total amount paid in settlements in 2017 was over \$25 million and of the more than \$18 million in judgments, \$13 million was attributed to attorneys’ fees.

What Counts as a “Hotel” for Prop. 65 Purposes

Proposition 65 requires the owner and/or the operator of a hotel to determine which of a [number of different types of warnings](#) may be required under the new regulations. Hotel is defined by the California Code of Regulations (CCR) broadly. It includes: any type of transient lodging establishment, including but not limited to, hotels, motels, bed and breakfast inns, resorts, spas, ski resorts, guest ranches, agricultural “homestays,” tourist

homes, condominiums, timeshares, vacation home rentals, and extended stay establishments in which members of the public can obtain transient lodging accommodations.

How Does a Warning for Hotel Owners and/or Operators Need to Be Given?

The new rules set forth how a hotel operator must convey the warnings. 27 CCR Section 25607.32(b) provides:

(b) For hotels, a warning meets the requirements of this subarticle if it complies with the content requirements in Section 25607.33 and is provided using either or both of the following methods:

(1) The warning is provided on a sign posted at the hotel's registration desk in no smaller than 22-point type in a location where it will be likely to be seen, read, and understood prior to the completion of the registration or check-in process, or

(2) The warning is provided to the hotel guest in electronic (directly or via a hyperlink) or hard copy form in the same size type as other consumer information prior to, or during the registration or check-in process.

(c) If written or electronic consumer information is given to hotel guests during the registration or check-in process in any language other than English, the warning must be given in both English and that language.

(d) In addition to the warning specified in this section, hotels must also provide warnings that comply with Sections 25607.1, et seq., for designated smoking areas, alcoholic beverages, food, enclosed parking facilities and consumer products, where such products are offered for sale at the facility.

What Do the Warnings Have to Say?

Unlike prior regulations, the regulations that go into effect after August 30, 2018, do not allow for general statements regarding exposure. The CCR for the Content of Hotel Exposure Warnings provides:

a) A warning for exposures to listed chemicals at hotels meets the requirements of this subarticle if it is provided using one of the methods required in Section 25607.32 and includes all the following elements:

(1) A symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline. Where the sign, label or shelf tag for the product is not printed using the color yellow, the symbol may be printed in black and white. The symbol shall be placed to the left of the text of the warning, in a size no smaller than the height of the word "WARNING."

(2) The word "WARNING:" in all capital letters and bold print, and:

(3) For exposures to listed carcinogens, the words, "[Name of one or more exposure source(s)] in this establishment can expose you to chemicals including [name of one or more chemicals] which is [are] known to the State of California to cause cancer. For additional information go to www.P65Warnings.ca.gov/hotels."

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(4) For exposures to a single carcinogen, the following words may be used, “[Name of one or more exposure source(s)] in this establishment can expose you to [name of chemical] which is known to the State of California to cause cancer. For additional information go to www.P65Warnings.ca.gov/hotels.”

(5) For exposures to listed reproductive toxicants, the words, “[Name of one or more exposure source(s)] in this establishment can expose you to chemicals including [name of one or more chemicals] which is [are] known to the State of California to cause birth defects or other reproductive harm. For additional information go to www.P65Warnings.ca.gov/hotels.”

(6) For exposures to a single reproductive toxicant, the following words may be used, “[Name of one or more exposure source(s)] in this establishment can expose you to [name of chemical] which is known to the State of California to cause birth defects or other reproductive harm. For additional information go to www.P65Warnings.ca.gov/hotels.”

(7) For exposures to listed carcinogens and reproductive toxicants the words, “[Name of one or more exposure source(s)] in this establishment can expose you to chemicals including [name of one or more chemicals] which is [are] known to the State of California to cause cancer and [name of one or more chemicals] which is [are] known to the State of California to cause birth defects or other reproductive harm. For additional information go to www.P65Warnings.ca.gov/hotels.”

(8) For exposures to a chemical that is listed as both a carcinogen and a reproductive toxicant, the words, “[Name of one or more exposure sources(s)] in this establishment can expose you to [name of one or more chemicals] which is [are] known to the State of California to cause cancer and birth defects or other reproductive harm. For additional information go to www.P65Warnings.ca.gov/hotels.”

Conclusion

This alert is intended as a reminder. This does not provide an exhaustive review of the regulations. Each property owner should conduct a detailed review to evaluate which regulations apply to their operation. For example, displaying a sign at check-in does not relieve the facility of displaying a warning at a parking lot. Proactively ensuring Prop. 65 compliance can help your company avoid costly fines and attorneys' fees..

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This document is intended to provide you with general information regarding new requirements under California's Prop. 65 for the hospitality industry. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.