

RetailLawBCLP

CALIFORNIA ADOPTS NEW PROP. 65 WARNING REGULATIONS

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California's Office of Environmental Health Hazard Assessment (OEHHA) has adopted new Proposition 65 warning regulations. The new regulations will take effect in two years, on August 30, 2018. In the interim, businesses may choose to comply with either the current or new regulations.

Prop. 65 prohibits businesses from knowingly and intentionally exposing California consumers to a chemical known to the state of California to cause cancer or reproductive harm without first providing a "clear and reasonable warning." As we reported on a draft of the regulations in April 2016, the new regulations substantially change what constitutes a clear and reasonable warning.

Products with label warnings manufactured prior to the effective date of the new regulations would continue to receive protection from liability. Parties to existing settlement agreements or court-approved consent judgments also can continue to provide warnings that comply with those agreements or orders.

Regulations Seek to Reduce Burden on Retailers

The new regulations seek to put the primary responsibility for providing warnings on product manufacturers or suppliers, who must either label their products with any required warnings or provide notice and warning materials to retailers. The manufacturer or supplier must specifically identify the product requiring a warning, provide all necessary warning materials, receive written or electronic confirmation of receipt from the retailer's authorized agent, and renew the notice every six months for the first year and annually thereafter. The manufacturer or other supplier of a product must notify a retailer within 90 days if a new chemical or endpoint (cancer or reproductive toxicity) must be included in a product warning.

A retailer can still be held responsible for failure to provide a required warning for the retailer's private label products or where the retailer has:

- knowingly introduced or caused a listed chemical to be created in a product ;

- covered, obscured or altered a product's warning label;
- received a warning notice and materials from the manufacturer or supplier, but sold the product without supplying the warning; or
- actual knowledge of the potential consumer exposure requiring the warning, and there is no manufacturer or supplier who is subject to Prop. 65 (has 10 or more employees) and a place of business in California or a designated agent for service of process in California. Actual knowledge will be presumed within five days of receiving a 60-day notice of violation.

The new regulations provide that, regardless of the above, a retailer may enter into a contact with the manufacturer or supplier of a product that specifically allocates the legal responsibility for providing a warning. Retailers should also revise their terms and conditions with suppliers to identify an authorized agent to receive notices, and the manner that notices must be sent.

The regulations also provide that a retailer must promptly provide the name and contact information of a product manufacturer or supplier to the Attorney General or private plaintiff upon written request.

Regulations Allow Electronic Warning, and Require Warning Prior to Internet Sales

The regulations continue to allow a product-specific warning to be provided on a sign, shelf tag, shelf sign at each point of display of the product, or on a product tag or label.

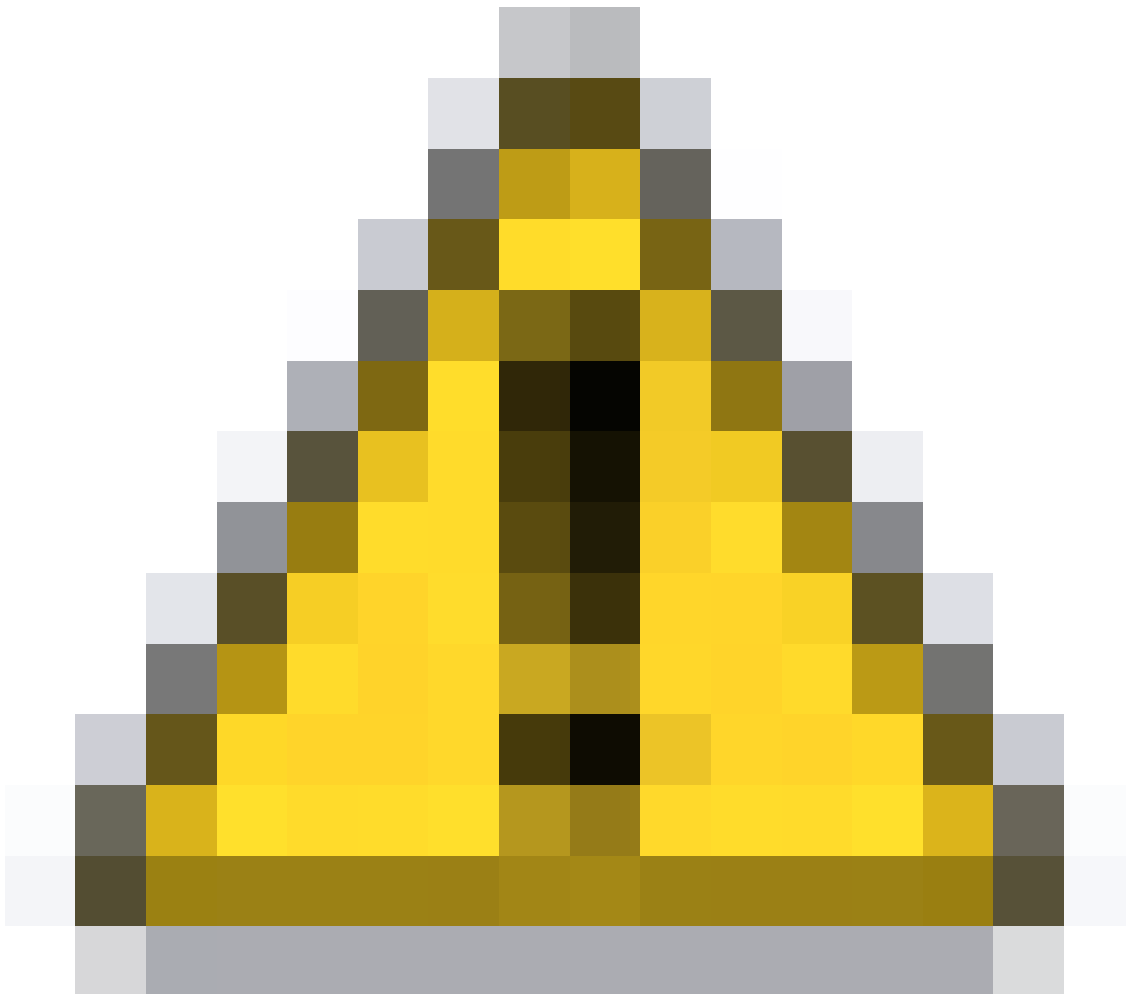
The regulations also allow, for the first time, a product-specific warning to be provided via any electronic device or process that automatically provides the warning to the purchaser prior to or during the purchase of the product.

For internet sales, the regulations require, for the first time, that a warning must be provided on the product display page, or a clearly marked hyperlink using the word "WARNING." This is a departure from the current regulations, which do not expressly address internet sales and provide only that a warning must be provided prior to exposure.

Regulations Create New Safe Harbor Warning

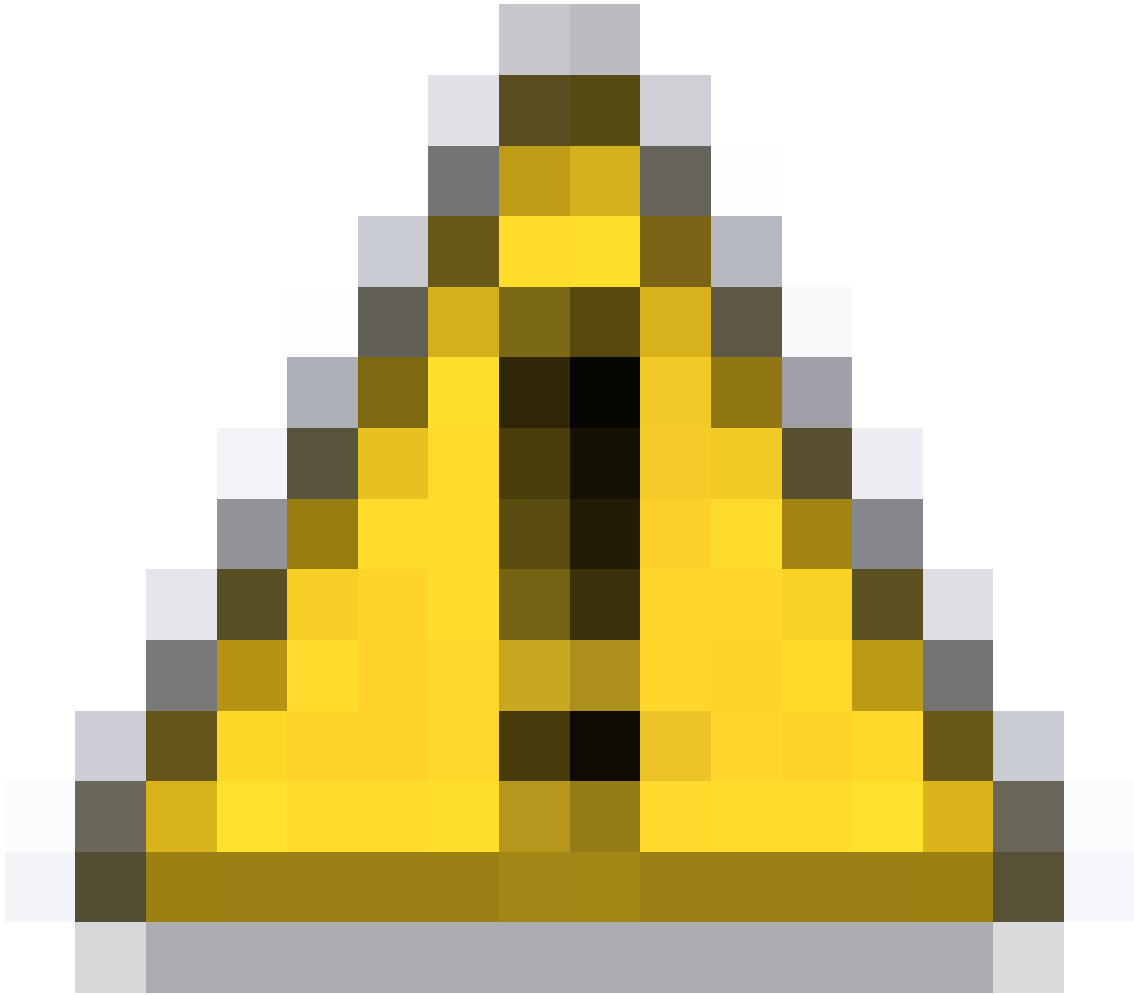
The regulations require that a warning list the name of one or more chemicals for which the warning is being provided. This is a departure from the current regulations, which do not require the name of any chemical to be included.

The regulations also require, for the first time, a symbol involving a black exclamation point in a yellow equilateral triangle with a black outline. Where a sign or label does not use the color yellow, the warning can be provided in black and white. The triangle must appear in a size no smaller than the word "WARNING," which should appear in all capital letters and bold print. The warning should state:

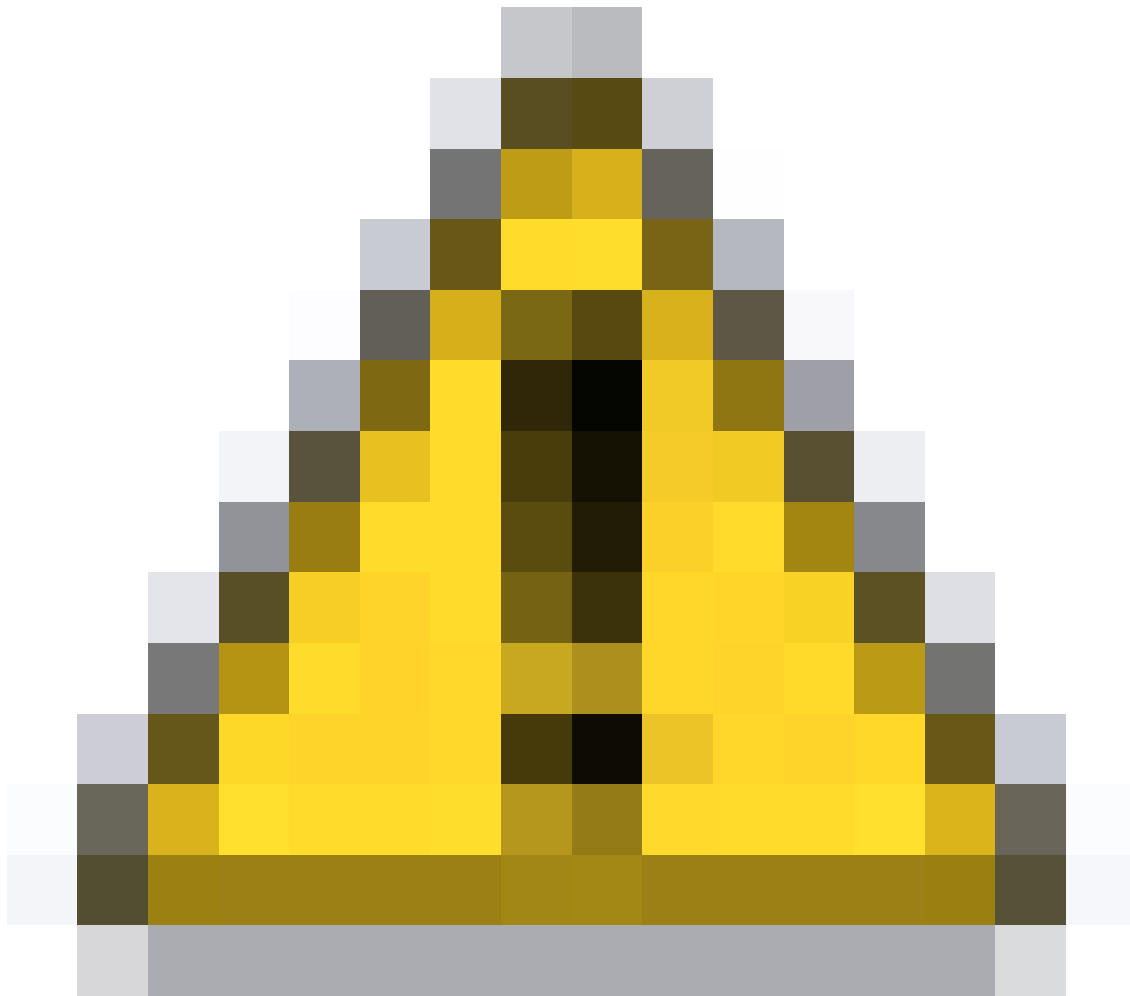


WARNING: This product can expose you to chemicals including [one or more listed chemicals] which is [are] known to the State of California to cause cancer [and/or birth defects or other reproductive harm]. For more information, go to www.P65Warnings.ca.gov.

Warnings on product labels can be shortened as follows, and do not require that a specific chemical be listed. They must appear in the same size as other consumer information, and in no less than 6-point type.

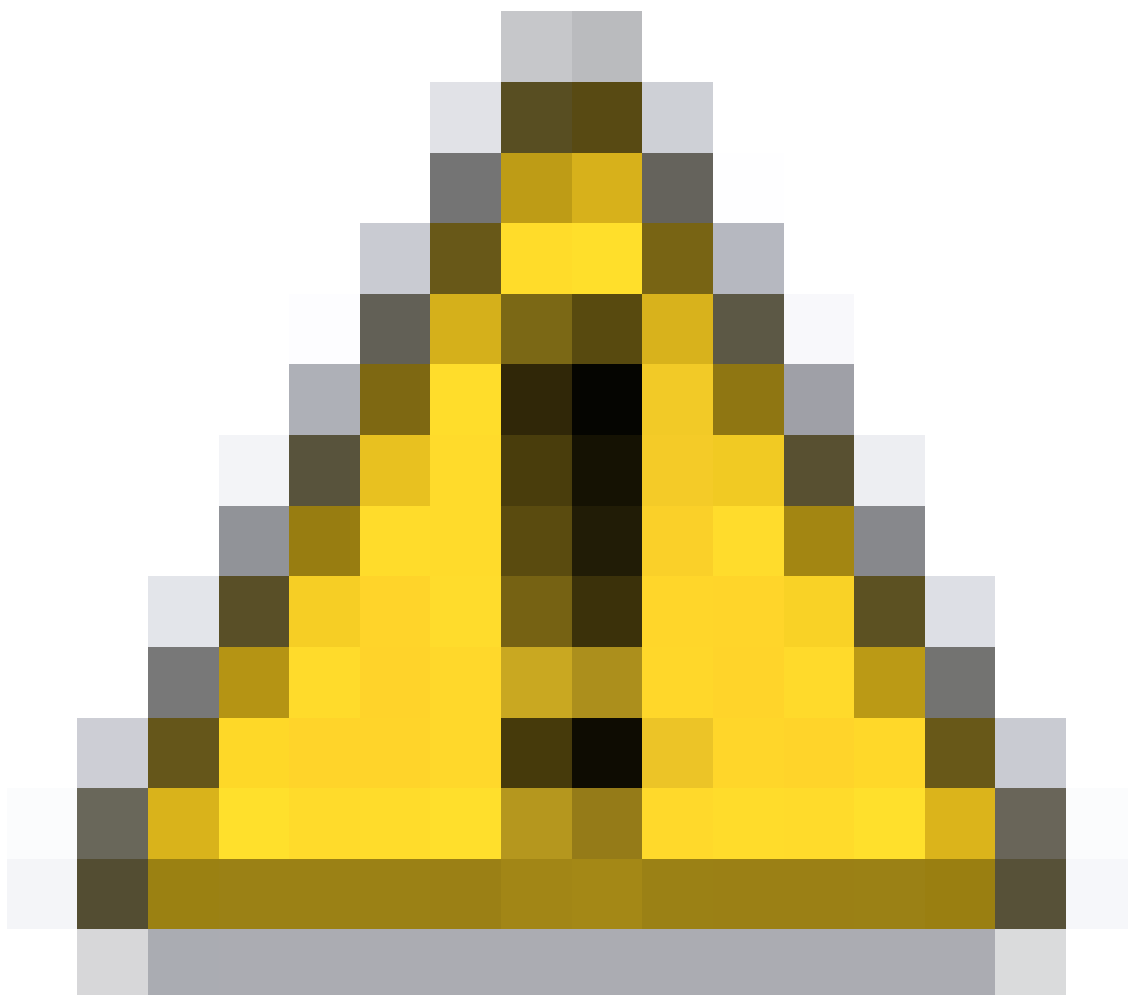


WARNING: Cancer – www.P65Warnings.ca.gov/product



WARNING: Reproductive Harm - www.P65Warnings.ca.gov/product

For food products, the warning should state:



WARNING: Consuming this product 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/or birth defects or other reproductive harm]. For more information, go to www.P65Warnings.ca.gov/food.

Warnings may include supplemental information only to the extent that it identifies the source of the chemical exposure or provides information on how to avoid or reduce exposure. Where a shelf sign or product label provides consumer information in a language other than English, the warning must also be provided in that language.

Additional Warning Requirements for Alcohol, Furniture, and Other Products

The regulations specify additional warning requirements for alcoholic beverages sold at retail stores; food and alcoholic beverages sold at restaurants; prescription drugs; dental care; raw wood products; furniture products; diesel engines; vehicles; recreational vessels; enclosed parking facilities; amusement parks; petroleum products; service station and vehicle repair facilities; and designated smoking areas.

MEET THE TEAM



Merrit M. Jones

San Francisco

merrit.jones@bclplaw.com

[+1 415 675 3435](tel:+14156753435)

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