

California's Proposition 65 Warnings and Cannabis Businesses

By Lauren Mendelsohn, Esq.

OVERVIEW

California's Proposition 65, a voter initiative passed in 1986, created the Safe Drinking Water and Toxic Enforcement Act, which requires that the seller of a product that contains chemical(s) known by the State of California to cause cancer or reproductive harm must provide a warning to anyone who buys the product, unless there is already a clear and sufficient warning printed on the label or package.¹ Warnings must also be given if there is a possibility of environmental exposure to a chemical on the list of substances that cause cancer or reproductive harm.² Penalties for violating Proposition 65's warning requirement can be as high as \$2,500 per day.

Proposition 65 is enforced by the California Attorney General's office; however, the law also gives a private right of action to individuals acting in the public interest, who may file a lawsuit alleging that a business is in violation of the law. Many private attorneys are involved in filing these notices, and the attorney fees awarded are usually significant.

The warning required under Proposition 65 must be "reasonably calculated" to be available to an individual prior to exposure, and must clearly communicate that the chemical in question is known to cause cancer or reproductive harm.³ "Exposure" in this context is defined as: "to cause to ingest, inhale, contact via body surfaces or otherwise come into contact with a listed chemical," and can occur through use of consumer products as well as through the environment.⁴

For products, the warning must be "prominently placed upon a product's label or other labeling or displayed at the retail outlet with such conspicuousness, as compared with other words, statements, designs, or devices in the label, labeling or display as to render it likely to be read and understood by an ordinary

individual under customary conditions of purchase or use."⁵ A system of signs, a public advertising system, or any other system that provides clear and reasonable warnings is also sufficient. This could include a warning printed on each customer receipt, or included as part of a membership agreement, if one exists, depending on the circumstances.⁶ For environmental exposure, in addition to the warning methods mentioned above, warnings can also be provided by a mailed or delivered notice to each occupant of the affected area at least once every three months, or via public media announcements targeted to the affected area at least once every three months.⁷

Currently, the consumer product warning for a carcinogen must include the following language:

"WARNING: This product contains a chemical known to the State of California to cause cancer." ⁸

The current environmental exposure warning for a carcinogen must include the following language:

"WARNING: This area contains a chemical known to the State of California to cause cancer." ⁹

The required warnings for chemicals known to cause reproductive harm are identical, except the word "cancer" is replaced with "birth defects or other reproductive harm."¹⁰

NEW RULES COMING

California's Office of Environmental Health Hazard Assessment (OEHHA), the agency that oversees Proposition 65 enforcement, issued new warning regulations in late 2016 that will go into effect on August 30, 2018. The new regulations are designed to provide consumers with more specific

notice of the chemicals contained in products sold within the state. Between now and August 30, 2018, businesses can choose to continue following the existing regulations or to begin following the new regulations immediately.¹¹

The new regulations place the burden to warn on manufacturers and distributors rather than on retailers, though there are instances when a warning by the retail seller is required. Additionally, as long as the consumer ultimately receives an adequate warning, an arrangement may be reached between a retail seller and a manufacturer, producer, packager, importer, supplier, or distributor to allocate legal responsibility for providing the warning.¹²

Warnings under the new regulations must be provided via signs and/or product labeling as applicable. For warning signs in retail establishments, the new regulations still require the warnings to be prominently displayed with conspicuous signage, so as to render them likely to be read and understood by an ordinary customer.¹³ Regarding additions to the warning, the warning may contain supplemental information “only to the extent that it identifies the source of the exposure or provides information on how to avoid or reduce exposure to the identified chemical or chemicals,” and any such supplemental information is not a substitute for the required warning.¹⁴

The new exposure warning messages must include the following:¹⁵

(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:

(A) For exposures to listed carcinogens, the words, “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. For more information go to www.P65Warnings.ca.gov.”

...

(E) Where a warning is being provided for an exposure to a single chemical the words “chemicals including” may be deleted from the warning content set out in subsections (A), (B), (C) and (D).

Additionally, on-product warnings for products containing a known cancer-causing agent require the symbol required in §25603(a)(1), the word “WARNING” in bold capital letters, and the following words: “Cancer – www.P65Warnings.ca.gov.” The name of the listed chemical is not required to be printed on a product warning label.¹⁶

The major differences between the current and the new “clear and reasonable” warning regulations are: (i) that the current regulations do not require that the specific listed chemical be identified, whereas the new regulations do; (ii) a change in the appearance of the warning sign, which will now require a yellow (or black-and-white) triangle with an exclamation point; and (iii) a clear preference for placing the burden to warn on manufacturers and packagers rather than retail sellers where possible, while also providing a mechanism to allocate legal responsibility for providing such warnings.¹⁷

EXCEPTIONS

Businesses that employ nine or fewer employees are exempt from the reasonable warning requirement.¹⁸ Additionally, only marijuana *smoke* is included on the Prop. 65 list of cancer-causing substances, so warnings may not be required for edible or topical marijuana products, provided they do not contain another chemical on the Prop. 65 list, such as certain pesticides. A warning still may be required on some marijuana products that can be vaporized, since certain chemicals used in vapor products may be included on this list.¹⁹

APPLICATION TO CANNABIS BUSINESSES

Marijuana smoke was added to the list of substances known by the State of California to cause

cancer in 2009.²⁰ Recently, a number of medical cannabis dispensaries throughout the state have received 60-day notices of allegedly violating the clear and reasonable warning requirement.²¹ Therefore, medical marijuana dispensary operators should provide a warning, since some products being sold (i.e., any marijuana intended for use by combustion or vaporization) can be used in a way that, according to the State of California, could expose the user to a cancer-causing agent. This is not required if all such products already have clear warnings on their packages or labels.²² Additionally, dispensaries that permit smoking or vaporizing on-site should provide a warning for environmental exposure.²³ These warnings must be placed in a location where an average customer is likely to see them.

Under the new regulations, which go into effect in August 2018, the burden placed on retailers will be minimized. Retailers of cannabis will not be responsible for providing the required warnings unless: (i) the retailer is responsible for introducing a listed chemical into a product; (ii) the retailer agrees to take on this responsibility; (iii) the retailer is selling the product under a brand or trademark that is owned or licensed by the retailer or an affiliated agency; (iv) the retailer obscured or did not conspicuously display warning labels or signage that were provided; or (v) the retailer has actual knowledge of potential consumer exposure that would require a warning, and there is no manufacturer, producer, packager, importer, supplier, or distributor of the product who is a “person in the course of doing business” and has designated an agent for service of process in California or has a place of business in California.²⁴

Retailers are explicitly authorized to enter into arrangements with providers of packaged smokeable or vaporizable marijuana products to allocate legal responsibility for providing Prop. 65 warnings. However, the providers of the packaged products have the option of including the required warning directly on the product label or providing an accompanying written warning to the retailer along with the product. If the latter method is chosen, then the notice must be renewed every six months

and the retailer is responsible for the placement and maintenance of the warning materials.²⁵

Below are examples of warnings that comply with the new regulations, which go into effect on August 30, 2018:



WARNING: This product can expose you to marijuana smoke, which is known to the State of California to cause cancer. For more information, go to www.P65Warnings.ca.gov.



WARNING: Entering this area can expose you to marijuana smoke. Marijuana smoke is known to the State of California to cause cancer. For more information, go to www.P65Warnings.ca.gov.

As noted, Proposition 65 can be enforced by both a public and private right of action, so individuals can serve businesses who they allege to be in violation of the Act with a 60-Day Notice of Violation and can then file a civil lawsuit against the alleged violator if an agreement to resolve the violation is not reached. A number of medical marijuana dispensaries have been targeted in this manner over the past years. Apparently, all of these cases resulted in either a settlement or a consent judgment.²⁶

Moreover, marijuana smoke is not the only chemical known to the State of California to cause cancer that a dispensary might encounter: pesticides such as myclobutanil and carbaryl are on the Proposition 65 list, and a number of medical cannabis dispensaries throughout California have recently received 60-Day Notices for edible cannabis products allegedly containing myclobutanil or carbaryl.

Because marijuana smoke and other pesticides which may be found in cannabis products are currently listed as cancer-causing substances by the OEHHA, and because several dispensaries have been targeted for not providing such warnings, it is advised that medical cannabis dispensaries provide

the warnings called for under Proposition 65, despite some evidence suggesting that marijuana may actually help treat cancer.²⁷ It is also advised that packagers of cannabis products start preparing to include Proposition 65 warnings on their labels or to provide these warnings to retailers, or to make agreements with retailers as to who will take on this responsibility.



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Disclaimer: This information is not intended as legal advice. Please contact an attorney for specific questions about the law.

¹ 27 Cal. Code of Regs. § 25603 (operative until August 30, 2018).

² The Proposition 65 list can be found at <https://oehha.ca.gov/proposition-65/proposition-65-list>.

³ 27 Cal. Code of Regs. § 25601 (operative until August 30, 2018).

⁴ 27 Cal. Code of Regs. § 25102.

⁵ 27 Cal. Code of Regs. § 25603.1 (operative until August 30, 2018).

⁶ At least one locally permitted dispensary in Sonoma County has chosen to include a Prop. 65 warning on every printed receipt. See also American Herbal Products Association, *Background on California's Proposition 65: Warning Requirements for Marijuana Smoke and Other Substances* (March 2015).

⁷ 27 Cal. Code of Regs. § 25605.1 (operative until August 30, 2018).

⁸ 27 Cal. Code of Regs. § 25603.2 (operative until August 30, 2018).

⁹ 27 Cal. Code of Regs. § 25605.2 (operative until August 30, 2018).

¹⁰ 27 Cal. Code of Regs. § 25603 (operative until August 30, 2018).

¹¹ P. Mark Mahoney, *California Releases New Prop 65 Warning Regulations*, NAT'L LAW REV., Nov. 1, 2016, available at <http://www.natlawreview.com/article/california-releases-new-prop-65-warning-regulations>.

¹² 27 Cal. Code of Regs. § 25600.2 (operative August 30, 2018).

¹³ 27 Cal. Code of Regs. § 25601 (operative August 30, 2018).

¹⁴ 27 Cal. Code of Regs. § 25601(e) (operative August 30, 2018).

¹⁵ 27 Cal. Code of Regs. § 25603(a) (operative August 30, 2018).

¹⁶ 27 Cal. Code of Regs. § 25603(b) (operative August 30, 2018).

¹⁷ Side-by-side comparison of the current and new reasonable warning regulations available at <https://oehha.ca.gov/media/downloads/crnrr/side-sidearticle6090116.pdf>.

¹⁸ 27 Cal. Code of Regs. § 25102(h).

¹⁹ See <http://oehha.ca.gov/media/downloads/proposition-65/p65single05202016.pdf>.

²⁰ See <http://oehha.ca.gov/proposition-65/crnrr/availability-hazard-identification-materials-marijuana-smoke>.

²¹ You can search the 60-day Notice database at <https://oag.ca.gov/prop65/60-day-notice-search>.

²² 27 Cal. Code of Regs. § 25603.

²³ 27 Cal. Code of Regs. § 25605.

²⁴ 27 Cal. Code of Regs. § 25600.2 (operative August 30, 2018).

²⁵ 27 Cal. Code of Regs. § 25600.2(i) (operative August 30, 2018).

²⁶ To view the Attorney General's database of marijuana-smoke-related Prop. 65 60-Day Notices, visit <https://oag.ca.gov/prop65/60-day-notice-search> and search for "marijuana" in the "Source/Product" box.

²⁷ NIH resources on cannabis and cancer available at https://www.cancer.gov/about-cancer/treatment/cam/hp/cannabis-pdq#section/_7 and https://www.cancer.gov/about-cancer/treatment/cam/hp/cannabis-pdq#section/_9.