

Proposition 65 Proposed Updates

Frivolous Lawsuits

Some law firms have abused Prop 65 by filing large numbers of lawsuits against small retail establishments for minor or questionable violations. This litigation can be costly for small businesses to fight, and resulting settlements generate attorney's fees but do not result in significant public health protection.

Cap or otherwise limit attorney's fees

- Require court finding, when approving settlement, that the award of attorneys' fees is reasonable under existing California law and also reasonable in light of: (1) the novelty of the alleged violation, the notice of violation, and any resolution, and (2) the amount of time that passes, and the amount of necessary litigation that occurs between the alleged violator's receipt of the notice of violation and correction of the violation.
- For settlement approval, require plaintiff's counsel to submit a statement of all fees collected over the past five years for Proposition 65 enforcement over the same chemical.

Require a stronger certificate of merit

- Where a certificate of merit (COM) alleges exposures to chemicals in consumer products, require supporting information to include test results and other information to demonstrate that users would be likely to actually be exposed to the listed chemical(s).

Require that the COM be disclosed when the lawsuit is filed

- For alleged consumer product violations, require the noticing party to provide supporting information for the COM to the alleged violator if the violator agrees to provide any test results for the noticed products at the same time. Parties must agree to keep information confidential, and the information is not admissible unless obtained by other means or by mutual agreement. Exchange under this provision would not result in waiver of any privileges (e.g., attorney-client, attorney work product).

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- Amend the requirement for the Attorney General to maintain supporting information in confidence (Health & Safety Code, § 25249.7(i)) to expressly allow the Attorney General to lodge the supporting information for a court's *in camera* review.

~~Eliminate or R~~educe the amount of money that can go into settlement funds in lieu of penalties. Also, require a stronger nexus between any payment and the case.

- Prohibit payments in lieu of penalties (“PILPs”) that exceed the amount of a civil penalty.
- Require settlements to describe with specificity activities to be funded from PILPs, and require recipient entity to maintain adequate records to document how funds were spent.
- Require funded activities to have a “clear and substantial” nexus to the specific basis for the matter giving rise to the settlement, and provide that “future enforcement of Proposition 65” is not a sufficient nexus.

Warnings

Certain Prop 65 warning signs – known as area warnings - are too general and do not adequately inform the public about what they are being exposed to and how they can protect themselves.

- General information signs should:
 1. Name the chemical(s) involved in the exposure. If multiple chemicals are involved, only the three with the highest exposure levels need to be named but the sign should say that there are also others in the area;
 2. Designate the harm posed by each named chemical as one or more of the following: cancer, male reproductive harm, female reproductive harm, and/or harm to a developing baby according to listing designations;
 3. Specify the general location of the chemical in the area (eg. in the air, in food sold here, on painted surfaces, etc);
 4. If applicable, list steps to be taken to minimize exposures (eg. wash hands after touching certain surfaces).

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5. Provide a URL and a QR code (readable by a Smartphone) that directs users to an OEHHA-maintained website that provides more information about Prop 65 and chemicals commonly subject to area warnings.

Safe Harbor Levels

For reproductive toxicants, the statute requires that exposures fall 1000-fold below the level causing “no observable effects” to avoid the warning and drinking water discharge provisions. This level is unrealistically low for some chemicals and is not consistent with current risk assessment methods for well-studied chemicals.

- When the no observable effect level is based on human studies rather than animal studies, exposures falling 100-fold below the level would not require warnings or be subject to the discharge prohibition.