



California's Proposition 65

**The Safe Drinking Water
and Toxic Enforcement
Act of 1986**

**HUNTON &
WILLIAMS**

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PROPOSITION 65

This pamphlet provides general background information about California's Proposition 65. It is not intended as a substitute for competent legal advice.

PROPOSITION 65 — COMPLIANCE AND DEFENSE

In light of the large number of lawsuits brought under California's Proposition 65 ("Prop. 65" or the "Act"), many businesses have faced aggressive tactics from private parties seeking to enforce this controversial law.

Proposition 65 is likely the most stringent toxic chemical control statute in the nation. It applies to all businesses with 10 or more employees doing business in California. It requires that any person *exposed* to one or more of the 800 chemicals on the Proposition 65 list first receive a warning that the state has determined the chemical in question may cause cancer, birth defects and/or reproductive harm. It also prohibits the release of any listed chemical into any drinking water source. The Proposition 65 list contains prominent industrial chemicals, additives and/or ingredients in common household and office products, toys, jewelry, foods, drugs, dyes, pesticides, solvents, etc. Listed chemicals may also be used in manufacturing and construction, or they may be by-products of production or combustion processes.

For chemicals that *cause cancer*, the "no significant risk level" is defined as the level of exposure that would result in not more than one excess case of cancer in 100,000 individuals exposed to the chemical over a 70-year lifetime.

For chemicals that are listed as *causing birth defects or reproductive harm*, the "no observable effect level" is determined by identifying the level of exposure that has been shown to not pose any harm to humans or laboratory animals. Proposition 65 then requires this "no

observable effect level" to be divided by 1,000 in order to provide an ample margin of safety.

Enforcement

Proposition 65 provides for aggressive enforcement due largely to the Act's *bounty hunter* provision. That provision allows private persons or organizations to bring actions against alleged violators of the Act on behalf of the "general public," after providing notice to the California Attorney General and local prosecutors. If the Attorney General or local prosecutor does not take action within 60 days after the notice issues, the private party may then file a lawsuit.

Violations of Proposition 65

Failure to comply with Proposition 65's strict warning mandates can lead to fines of up to \$2,500 per day, per violation, with *bounty hunters* keeping 25 percent of the penalty amounts. Plaintiffs also are entitled to reimbursement of their costs of bringing a Proposition 65 suit, **including** their attorney fees, which is often the real reason private parties bring these actions. *Bounty hunters* have defined settlement monies as "payments in lieu of penalties" to avoid having to turn over 75 percent of the penalty proceeds to the state. If the Attorney General brings an unfair business practices claim, a Proposition 65 defendant can be required to pay additional penalties of up to \$2,500 per day. Plaintiffs typically seek, and courts frequently grant, injunctive relief to ensure offending conduct is prevented in the future.

In sum, the financial liability facing a business not complying with the mandates of Proposition 65 can be significant and onerous.

Key Exemptions

- Businesses with fewer than 10 employees (including part-time workers) are exempt from the Act.
- Releases and exposures below the "no significant risk level" or the "no observable effect level" are exempt. However, these levels are exceptionally difficult to meet and, in litigation, are the defendant's burden to prove.

Compliance with Proposition 65

Effective compliance strategies begin with a thorough audit of a business's operations and products to determine what, if anything, may be implicated by Proposition 65's requirements or by providing a compliant warning. Among other things, a covered business should assess whether it releases (environmental exposure), or its products contain (products exposure), Proposition 65-listed chemicals, even in trace concentrations. Once a plaintiff establishes that a listed chemical is

Top Noticing Parties

California Attorney General's Office*	Russell Brimer*
Center for Environmental Health*	Jamie Te'o
Consumer Advocacy Group*	Michael DiPirro*
Whitney R. Leeman, Ph.D.*	Dr. Richard F. Sowinski
Anthony E. Held, Ph.D., P.E.*	Mateel Environmental Justice Foundation*
Environmental Research Center*	Consumer Defense Group*
As You Sow*	American Environmental Safety Institute
	The McKenzie Group*

*We have defended suits against this noticing party.

present (a very low threshold), the burden of proof to demonstrate that an actionable exposure is not occurring switches to the defendant business.

For claims associated with exposures to listed chemicals from products, compliance can be achieved either by demonstrating there is no actionable exposure or by first providing a compliant warning. Safe harbor or specific warning language can be used, where applicable. It is critically important that a business receive expert assistance in drafting and implementing an adequate warning program to help ensure that the statutory requirements are satisfied.

Although implementation of a compliance strategy will not necessarily immunize a business for past Proposition 65 violations or future enforcement actions, it will minimize the accrual of any additional potential liability from non-compliance.

Defending Against a Proposition 65 Lawsuit

A business targeted by a *bounty hunter* for Proposition 65 enforcement will first receive a 60-Day Notice of Violation and Intent to Sue, which is intended to give the Attorney General and local prosecutor the opportunity to intervene in the action. The Act delineates specific requirements for a 60-Day notice. Notices should be carefully scrutinized since defective notices may require a plaintiff to begin the entire process anew if a court holds that the notice is defective. This can reduce a business's potential liability since the statute of limitations period for Proposition 65 claims is only one year.

After analyzing the notice, the validity of the plaintiff's claims must be examined to determine whether viable defenses exist. The majority of Proposition 65 claims, though, are resolved through settlements, and it is critical to negotiate proper settlement terms, including gaining protection against suits from others and for past conduct. If there are viable defenses, litigation strategies must also be analyzed. Note, however, in Proposition 65 cases, the deck is stacked heavily against defendants, so most cases are resolved through a negotiated settlement (e.g., a consent judgment).

When negotiating a settlement, defendants must keep in mind the requirements of Proposition 65. California's Attorney General's office, which has standing to appeal Proposition 65 settlements, and California appellate courts have recently scrutinized several Proposition 65 settlements. One court held that a defective notice doomed such a settlement, notwithstanding the parties' support of the settlement, because it gave the Attorney General inadequate opportunity to investigate the claims. Another appellate court held that a trial court must determine whether a consent judgment is in the "public interest" before entering it. In the latter case, the consent judgment was not entered because the proposed settlement was read as forfeiting the public's right to pursue similar or unknown claims against the defendants, and because the settlement permitted the defendants to withdraw from the settlement at any time until the consent judgment was entered. Negotiated settlements often occur because:

- exposure warnings may be required for trace chemical concentrations;
- companies must technically/scientifically demonstrate a warning is not required;
- plaintiffs' lawyers are experienced and crafty in forcing settlement; and
- going to trial is expensive.

With effective assistance, businesses can minimize Proposition 65 headaches up front and experienced defense counsel can help you resolve Proposition 65 allegations.

In past years, private plaintiffs' attorneys have settled claims amounting to millions of dollars:

2010 - \$13,620,981	2006 - \$13,613,065
2009 - \$14,608,177	2005 - \$10,288,062
2008 - \$24,537,330	2004 - \$15,367,637
2007 - \$11,846,737	

Source: California Attorney General

Our Firm

Since its establishment in 1901, Hunton & Williams has grown to more than 900 attorneys serving clients in 100 countries from 18 offices around the world. Hunton & Williams' depth and breadth of experience extends to more than 100 separate practice areas, including the firm's environmental practice. The Hunton & Williams environmental team is one of the most prominent environmental practices in the nation. Formed in 1970, soon after passage of the National Environmental Policy Act and the Clean Air Act, our environmental team initially represented individual electric utilities in nuclear, Clean Air Act and Clean Water Act matters. We have one of the most substantial environmental practices in the nation, involving every major federal environmental statute and most state environmental matters.

Our Los Angeles attorneys are on the front lines of emerging environmental issues — in federal and state courts and with federal and state regulatory agencies, including the U.S. EPA, Cal/EPA, the Department of Toxic Substances Control, the State Water Resources Control Board (and Regional Boards), the Office of Environmental Health Hazard Assessment, California Air Resources Board and the South Coast Air Quality Management District (and other air quality districts).

Our Los Angeles attorneys counsel clients on environmental products litigation and enforcement; regulatory issues; air quality permitting; land use; international and domestic climate change issues; air quality and permitting; water resources; water quality issues; Proposition 65; Green Chemistry; Superfund; sustainability and corporate social responsibility; CPSIA; REACH/chemical regulation/FIFRA; RCRA; enforcement, white-collar criminal and civil issues; wetlands; and the Endangered Species Act.



Contacts

Malcolm C. Weiss

Office: (213) 532-2130
Cell: (213) 422-5111
mweiss@hunton.com

Timothy J. Toohey

Office: (213) 532-2132
Cell: (213) 700-1009
ttoohey@hunton.com

Chris M. Amantea

Office: (213) 532-2102
Cell: (310) 295-7391
camantea@hunton.com

Ian M. Forrest

Office: (213) 532-2139
Cell: (213) 447-2252
iforrest@hunton.com

Diana Biason

Office: (213) 532-2151
dbiason@hunton.com

Hunton & Williams LLP
550 South Hope Street, Suite 2000
Los Angeles, CA 90071
Office: (213) 532-2000
Fax: (213) 532-2020

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WILLIAMS**
www.hunton.com

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