

California Proposition 65 is a nightmare for manufacturers and as usual, manufacturer bad dreams are felt by retailers.



This Article Has Updated Information For Manufacturers!

This article is a repeat with a few updates. This law is going into effect in less than three (3) months and will affect EVERY manufacturer selling in California or ONLINE!

Proposition 65 was passed by the voters in California in the late 80's. The proposition required consumers to be notified if a product might contain a chemical that was carcinogenic or might cause harm to a fetus. The proposition required a simple warning label on any product that contained a chemical list maintained by the state.

The proposition was general ignored for the first 20 years as the state gradually added chemicals to the list. However, as the testing and research got better the list of chemicals started to grow exponentially. Now that list has 967 chemicals.

The list of chemicals on the list can be found here: [Chemicals or Listed under Proposition 65](#). You can download a list of the chemicals [here](#). There are currently 967 chemicals on the list and the list adds new chemicals yearly, sometimes more often.

The state recently determined that the consumer was not being adequately warned, and the warning did not provide enough information to the consumer. The regulations from Proposition 65 were changed, and the new regulations go into effect for all products sold after August 31, 2018. New warning label must be placed on products, in the catalog, on the website and maybe on an aisle of your store, for all products manufactured and for sale to the California consumer after August 31, 2018. That new warning is specific in what it must contain and must include the name of one of the chemicals on the list that can be found in the product.

Manufacturers can no longer place the general warning on everything, even if they did not know what the possible danger was.

The state also decided the enforcement of the warning needed to be kicked into a higher gear. With the new regulations, came a new way to enforce the law. Any consumer can act on behalf of the State of California and file a suit

against any manufacturer who has not met the new regulations. Damages can be up to \$2500 per day per product, court costs and attorney's fees. The consumer who files the lawsuit will receive one-third of the money recovered.

This has created a new rush for law firms with an associate in or based in California. Consumers are being *retained* to buy products, have them tested to prepare to sue manufacturers. One consumer already purchased sixty products in one day from Backcountry.com and sent them for testing.

Consequently, this has created a mad rush for manufacturers to determine what is in their products and what labels must be added to their products.

If a manufacturer has a product that contains a chemical on the list the label must be on the product, hangtag, packaging so the consumer can identify it before purchase. The first warning below is for chemicals that are carcinogenic.



WARNING

This product contains the following: Chemical 1

This product can expose you to chemicals including Chemical 1 which is [are] known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.

If the chemical is on the list because it may injure a fetus the warning must look like this.



WARNING

This product contains the following: Chemical 1

This product can expose you to chemicals including Chemical 1 which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to <http://www.P65Warnings.ca.gov>.

If your product contains chemicals that are on both lists, meaning the chemical can cause cancer or injury to a fetus, that warning must look like this.



WARNING: 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 birth defects or other reproductive harm. For more information go to <http://www.P65Warnings.ca.gov>

This is a different warning if you place the warning directly on the product. If the warning contains both a carcinogen and a toxicant, the safe harbor warning will look like this.



WARNING: Cancer and Reproductive Harm - www.P65Warnings.ca.gov

These warning have a minimum type size of 6pt or not smaller than the largest type size used for other consumer information on the product.

Current Manufacturer Issues

First, manufacturers are being contacted already about failing to meet the requirements of the current regulations. The law firms contacting the manufacturers are demanding large amounts of money.

No money is owed under the current regulations if a manufacturer fails to meet the requirements under the law, generally.

However, that has not stopped law firms from sending demand letters. Be aware of this issues and deals with them accordingly.

Supposedly, 60 products have been purchased at one non-California online retailer and based on testing; demand letters have been sent to manufacturers.

A **second issue** is California courts have said the standard language in commercial liability polices, the insurance policies you buy to protect against

lawsuits DO NOT apply to California 65 claims. There are two reasons for this.

First, most policies only protect against claims based on negligence. There is no negligence in this matter, there is a violation of the regulation, so your insurance company and the courts are going to say that they have no duty to defend you.

Second, most policies have a specific exclusion for fines, fees or regulatory penalties. Although this penalty is being collected by private individuals and law firms, it is being done under the auspices of the California Attorney General's office. As such, most policies are going to deny coverage for this reason also.

Finally, get your manufactures of the components or products you make on board now! Make sure they have supplied you with SDS (formerly MSDS) sheets that identify what is in the products you use to make your final product. If a component does not violate California Proposition, 65 regulations get that confirmed with the manufacturer and determine how claims are going to be dealt with if a demand comes in.

Monetary Claims are being made for products where the claimed components that violate the law have SDS sheets stating that the product does not violate California Proposition 65.

If your products are not made from US or UK manufactures who supply SDS sheets, then find out what is in your products immediately. If your manufacturer will not or cannot supply you with the information, you need you will probably have to hire a lab to test your products to determine what issues you face.

When working with an independent lab, determine in advance how any claims between you and third parties will be handled based upon the labs' results if possible.

Where a retailer has to pay attention.

The retailer headache comes in three different forms. The first is a retailer who sells their own branded products. If you name is on the product, you are probably the manufacturer under California law unless it is clear the product was manufactured by a third party. Your hangtags with your bar code and price are not creating liability because the manufacture's name is on everything else. However, a T-shirt with the name of your store name across the front probably makes you a manufacturer unless the packaging clearly identifies the true manufacturer of the shirt. Laying products out to be purchased without a warning label is possibly a thing of the past, unless you place a warning on the aisle or shelf where the product is displayed.

If you sell or probably give away anything advertising your store that based on the way, the product is identified, would lead a consumer to believe that you are the manufacturer you need to have the new warning labels on those products. However, the giveaways are a gray area because the regulations use the terms *for sale to the public*....

If you advertise the products, you sell on your own website, any product on your website that needs a label must have that warning on the website. So even though you are just the retailer, the consumer must be able to see the warning on your site (or if you still use one, your catalog). The warning must be visible to the consumer before purchase.

Retailers selling consumer products over the Internet must pay special attention to their new obligations under the updated rules. A compliant product label will no longer be sufficient to qualify the Internet seller for the safe harbor protection even if the label complies with the updated warning content requirements of the new regulation. For Internet sales, retailers must provide a Prop 65 warning for the product on the retailer's website to fall within the safe harbor. Such website warnings must either:

- 1) Be placed on the product's display page,*
- 2) Be given via a hyperlink using the word "WARNING" placed on the product display page, or*
- 3) Be displayed, with a tie to the product for which the warning is being given, to the consumer before their purchase is completed (such as having the warning appear in the virtual shopping cart or on the last page before the consumer authorizes the use of their credit card during the checkout process).*

The new rules will therefore, likely require many retailers to alter the coding of their websites and may force website redesigns.

<https://www.mofo.com/resources/publications/170801-new-proposition-65-warning-regulations.html>

The biggest burden that could be placed on a retailer is a manufacturer may opt to place signs in the aisles where their products are being sold. Then the burden shifts to the retailer to make sure the signs are up and visible to the consumer.

The actual requirements that create liability for retailers have a few additional ways to create liability; however, for the ski and snowboard retailer, those are unlikely.

The new regulations will relieve retailers from the responsibility of providing a Prop 65 warning if certain criteria are met. Retailers have often been caught up in the broad scope of Prop 65, which, until now,

said little about who exactly needs to provide the warning. Retailers will no longer have to provide the warning unless:

- 1) **The retailer is selling the product under a brand or trademark that is owned or licensed by the retailer or an affiliated entity;**
- 2) **the retailer has knowingly introduced a listed chemical into the product, or knowingly caused a listed chemical to be created in the product;**
- 3) **The retailer has covered, obscured or altered a warning label that has been affixed to the product;**
- 4) **The retailer has received a notice and warning materials from the manufacturer, producer, packager, importer, supplier, or distributor and the retailer has sold the product without conspicuously posting or displaying the warning; or**
- 5) **The retail seller has actual knowledge of a potential consumer product exposure requiring a warning and there is no manufacturer, producer, packager, importer, supplier or distributor who:**
 - a) Meets the definition of a "person in the course of doing business," and,
 - b) Has a designated agent for service of process in California or has a place of business in California.

<https://www.troutman.com/are-you-ready-for-the-new-california-prop-65-warning-requirements-05-22-2017/>

Retailers are not totally exempted even if they do not have any of the above challenges. Manufacturer's may attempt to pass the liability onto Retailers, which I would strongly advise against. Retailers are responsible for posting signs if required by the manufacturer and notifying the manufacturer that they have received the material to post.

The new system clarifies that manufacturers have the primary responsibility for providing Proposition 65 warnings. Manufacturers can choose whether to put warning labels on their products or to provide notices to their distributors, importers or retail outlets that a product may cause an exposure to a listed chemical that requires a warning and provides warning signs or other warning materials to the Retailer. Manufacturers can also enter written agreements with retailers to modify this allocation of responsibility as long as the consumer receives a clear and reasonable warning before he or she is exposed to a Proposition 65 chemicals.

Retailers must confirm that they received the notice and must use the warning signs or other materials provided by the manufacturer.

<https://www.p65warnings.ca.gov/new-proposition-65-warnings>

You are not out of the woods yet. Again, though, other than chemicals that might be on the list for waxing or repairing skis and snowboards, these probably might not apply.

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.*

<https://www.bryancave.com/en/thought-leadership/california-adopts-new-prop-65-warning-regulations.html>

The last one, knowing of a problem is where the ski and snowboard retailer may be in trouble.

What if you suspect a manufacturer of product in your store has not properly labeled their products. Several apparel manufacturers are taking the position that the odds of them getting caught are so slim that they can take the risk. As a retailer, you will quickly know based upon the products you carry if they are labeled properly; that waterproof jackets or certain greases should carry a label. Supplier XYZ is not labeling their products are you liable.

The law is unclear and untested, except for one area. A California Court has already determined that the language of standard general liability insurance policies that protect against claims of negligence, do not apply to these types of lawsuits because they are based on violating a government regulation. So, any battle you might fight, you may be doing out of your own pocket.

What should you do?

Request a letter from your vendors stating that the products sold in your store have been reviewed, and the manufacturer has properly labeled the products that require labeling.

Ask vendors you work with to indemnify you for California Proposition 65 violations. The larger retailers you compete with are already requiring that.

Contact your insurance agent and see if your policy covers proposition 65 suits and if so, get that in writing.

James H. Moss

720 334 8529

jim@rec-law.us

PO Box 16743, Golden, CO 80402

www.recreation-law.com