

CHANGES TO PROPOSITION 65 NEW WARNING LANGUAGE MANDATORY AS OF AUGUST 31, 2018

California has made changes to its Proposition 65 warning language requirements. These changes are **mandatory as of August 31, 2018**; however, companies can voluntarily elect to follow them now. The changes modify the current Prop 65 warnings.

This document is intended to supplement The Vision Council's existing guidance document on Prop 65, which is found at https://www.thevisioncouncil.org/sites/default/files/VC_CA-Prop-65-Guide-2-2016.pdf. **You may continue to use the current warning language through August 30, but after that date you must use the new warnings.** Consumer products manufactured prior to then remain compliant so long as the products utilize the warning language in effect on or before August 30, 2018.

I. Changes to the Prop 65 Warning for Consumer Product Exposure

1. Warning Image. The first change will be the inclusion on the warning of a yellow equilateral triangle with a bold black outline, containing a black exclamation point.



- A. The symbol can be in black and white if the sign, label or hang tag it is placed on does not incorporate yellow already.
 - B. The symbol **must** be put to the left of the warning text, in a font size no smaller than the height of the word "WARNING", and then the rest of the warning language.
2. Must Identify the Chemicals in the Product. **You must identify by name one or more of the Prop 65 chemical substances found in your consumer product.**
 - A. The new language for product exposure where the Prop 65 substance is a **carcinogen** is as follows:
"**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. For more information go to www.P65Warnings.ca.gov."
 - B. The new language for product exposure where the Prop 65 substance is a **reproductive/birth defect toxicant** is as follows: "**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 birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov."
 - C. The Prop 65 list is broken out into two "pathways." One for substances that cause cancer, and other for substances that cause birth defects or reproductive harm. If the product contains **at least one**

substance that causes cancer, and at least one other substance that causes reproductive harm/ birth defects then the warning **must read**: “**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 [name of one or more chemicals], which is known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.”

- a. Vision Council members **must test their products comprehensively** and warn appropriately, as different pathways may be implicated.
- b. Historical substances of concern for TVC members include (*please test on your own for all potential concerns*):
 - i. Bisphenol A – found in polycarbonate; birth defect/reproductive harm pathway.
 - ii. Various phthalates – used as plastic softeners; birth defect/reproductive harm pathway. (*Although historically we have seen NOV's for DEHP, there are other phthalates on the Prop 65 list and you must label if your product contains any of them.*)
 - iii. Nickel found in metal components, like hinges and screws; cancer pathway.

D. If the product contains one substance that is identified on the Prop 65 list as **both a carcinogen and a reproductive toxicant** then the warning language must read: “**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 www.P65Warnings.ca.gov.”

E. You must proactively analyze your products, and its components, for Prop 65 substances, and be mindful of the different pathway warning requirements. Bisphenol A and phthalates have been substances of concern historically for TVC members. However, stainless steel hinges and hardware could be nickel coated or otherwise contain nickel as an alloying element; memory metals could contain nickel; other substances could be present.

- a. TVC has confirmed with the California Office of Environmental Health Hazard Assessment (“OEHHA”) that while nickel alloys are not listed, *per se*, on the Prop 65 list (certain nickel compounds are), nickel alloys contain metallic nickel. Metallic nickel is listed on the Prop 65 list and has no published safe harbor. Therefore, products containing nickel alloys trigger the metallic nickel warning requirement unless you possess toxicological testing establishing no significant risk of exposure.
- b. Remember, Prop 65 safe harbor levels are based on exposure testing. A parts-per-million (PPM) based test can confirm the presence or absence of a listed substance but does not establish compliance with a Prop 65 safe harbor level for that substance.

3. Changes to the Warning if you put the Warning Directly on the Product

You will now have the option to use an abbreviated warning if the warning is affixed directly on the product. An on-product warning requires the following elements:

A. The warning symbol.



B. The word “**WARNING**” in all capital letters, in bold print.

C. And the appropriate warning based on the substance in the product:

- a. “Cancer - www.P65Warnings.ca.gov”

- b. "Reproductive Harm - www.P65Warnings.ca.gov"
- c. "Cancer and Reproductive Harm - www.P65Warnings.ca.gov"
- D. The font size can be no smaller than 6-point font but must be no smaller than the largest typeface used on the product for other consumer information.
- E. If you place the warning directly on the product you are excused from having to identify the actual chemical substance(s) found in the product.
- F. Affixed to product includes any label on, attached to or enclosing, the product.
 - a. Hangtags, pressure labels, packaging that encloses the product.

4. Other Requirements for Consumer Products

- A. The manufacturer, producer, packager, importer or distributor is the party responsible for Prop 65 warning compliance, except in certain circumstances discussed below.
- B. The warning label can be affixed to the product or to its immediate container or wrapper.
- C. Full chemical name must appear at first mention of chemical; acronyms ok for subsequent mentions.
- D. A product specific warning can also be on a posted sign, shelf tag or shelf sign.
 - a. But must be at each point of display of the product.
 - b. Cannot use the abbreviated warning language in these cases.
- E. For internet purchases, the warning language goes on the actual page where the consumer product is displayed or is accessed via a hyperlink on the product-display page, or on any other page "prominently displaying" the warning prior to completing the purchase.
 - a. The word "WARNING" must be associated with the hyperlink.
 - b. Shopping cart placement available.
- F. For catalog purchases, the warning must be clearly associated with the item being purchased.
- G. When a sign, label or shelf tag used with a consumer product to provide the warning includes consumer information in a language other than English, then the warning must also be provided in that additional language.

5. Shifting the Responsibility to the Retailer

A manufacturer, producer, packager, importer, supplier or distributor of a consumer product subject to Prop 65 can push the compliance responsibility to the retailer by doing the following:

- A. Provide written notice directly to a retail seller's authorized agent.
- B. State that the product may result in the exposure to one or more chemicals on the Prop 65 list.
- C. Provide the exact name or description of the product, or specific identifying information such as the UPC.
- D. Include all necessary warning materials, such as labels, shelf signs, or tags.
- E. Obtain confirmation either electronically or in writing of the retailer's receipt of the notice.
- F. You must renew this notice within 6 months of the first time it is served, and then annually thereafter.
- G. An additional notice is required within 90 days when a new chemical(s) or end point(s) is included in the warning.

If you do this, then the responsibility for placing and maintaining the warning materials, and the liability for failing to do so, is shifted to the retailer.

6. Other Areas of Retailer Responsibility for Warning Labels

- A. In addition to the above-described situation, the retailer is responsible for providing the warning in the following situations:
- a. It is selling the product under its brand or trademark.
 - b. It has knowingly introduced a listed chemical into the product.
 - c. It has covered, altered or obscured the warning label already affixed to the consumer product.
 - d. It has actual knowledge that the product requires a warning and the manufacturer, producer, packager, importer, supplier, distributor is not within the jurisdiction of California.

II. Changes to the Prop 65 Warning for Occupational Exposure

1. TVC members with facilities in California have the additional requirement of warning their employees if Prop 65 substances are in the workplace. Under the revised regulations, the Prop 65 warning is satisfied by any warning that complies with all the information, training and labeling requirements set out in the Federal Hazard Communication Standard, the California Hazard Communication Standard, or for pesticides, the Pesticides and Worker Safety Regulations.
2. Alternatively, you can achieve workplace compliance by posting specific Prop 65 warning signage that includes:
- A. The warning symbol.



- B. The word **“WARNING”** in all capital letters, in bold print.
- C. And the appropriate warning based on the substance in the product:
- a. For single carcinogens: “Entering this area can expose you to [name of the chemical] from [name of one or more sources of exposure]. [Name of chemical] is known to the State of California to cause cancer. For more information, go to www.P65Warnings.ca.gov.
 - b. For multiple carcinogens: “Entering this area can expose you to chemicals known to the State of California to cause cancer, including [name of the chemicals], from [name of one or more sources of exposure]. For more information, go to www.P65Warnings.ca.gov.
 - c. For single reproductive toxicants: “Entering this area can expose you to [name of chemical] from [name of one or more sources of exposure]. [Name of chemical] is known to the State of California to cause birth defects or other reproductive harm. For more information, go to www.P65Warnings.ca.gov.
 - d. For multiple reproductive toxicants: “Entering this area can expose you to chemicals known to the State of California to cause birth defects or other reproductive harm, including [name of one or more chemicals], from [name of one or more sources of exposure]. For more information, go to www.P65Warnings.ca.gov.

- e. For exposure to both listed carcinogens and reproductive toxicants: “Entering this area can expose you to chemicals known to the State of California to cause cancer and birth defects or other reproductive harm, including [name of one or more chemicals known to cause cancer and name of one or more chemicals known to cause birth defects or other reproductive harm, from [name of one or more sources of exposure]. For more information, go to www.P65Warnings.ca.gov.
 - f. For exposure to a single chemical that is listed both as a carcinogen and as a reproductive toxicant: “Entering this area can expose you to [name of chemical] from [name of one or more sources of exposure]. [Name of chemical] is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information, go to www.P65Warnings.ca.gov.
3. The warning sign must be posted at all public entrances to the affected area
 - A. Must use at least 72-point font.
 - B. Sign must be in English, unless other languages are used on other signage in the affected area, in which case it must be in that language too.
 - C. Must be conspicuous, likely to be read, and call out the source of exposure.

NEW - Following a recent conference call several interesting Proposition 65 related questions were discussed. Listed below are the details on these various topics.

1. Internet or Catalog Sales Are Not Immune from Prop 65 Warnings. In previous TVC’s updates on the upcoming Prop 65 changes, members were informed on how to comply with e-commerce going into California. Specifically, businesses need to provide a warning or a clearly marked hyperlink using the word “WARNING” on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the internet purchase, say by putting the warning or hyperlink in the cart area. A warning provided in a catalog must be “clearly associated” with the item being purchased

IN ADDITION TO the on-line or catalog warning, affected business must also include a warning on or with the product(s) that is ordered on-line or via catalog, using one of the methods for providing consumer products warnings. In other words, any product shipped into California and that contains a Prop 65 listed substance requiring warning, must include that warning at the time of delivery, notwithstanding the fact that the consumer received the warning on-line, or in a catalog, at the time of purchase.

2. Foreign Language. If a consumer product label or packaging sets out consumer information in a language other than English, then the warning must be in that language **in addition to** English. Likewise, if signage at a business or facility is in a language other than English, then any warning signs provided by that business or facility must be in that other language in addition to English.
3. Font Size. The “long” form consumer product warning can be any font size, so long as it is overtly visible. The warning needs to be conspicuous, placed proximate to the product for which the warning is associated (if not on its label) so that a typical consumer would read it and understand it under ordinary conditions of purchase or use. You cannot make the font so small that it cannot be easily identified from other words on a label or sign.

Alternatively, if you use the “short” form on product warning for consumer products, then a font size requirement exists. The short form warning requires that it be, in its entirety, a type size no smaller than the largest type size for any other “consumer information” on the product, or six-point font, whichever is larger. Consumer information does not include things like the brand or product name, or product advertising. It is information such as use instructions, other warnings, ingredient list, etc.

If you use signs to warn of occupational or environmental exposure, then a 72-point minimum font is required.

For more information, please contact Rick Van Arnam, The Vision Council regulatory counsel, at rvanarnam@barnesrichardson.com, or Michael Vitale, Senior Technical Director, at mvitale@thevisioncouncil.org.