



California's Prop. 65 – what the cannabis industry should know

BY SEDINA L. BANKS



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Your cannabis client calls. They have just received a 60-day Notice of Violation stating an intent to sue pursuant to California's Proposition 65 (Prop. 65) for failing to provide adequate Prop. 65 warnings on the cannabis products they sell. Steep penalties of \$2,500 per day for each violation can be imposed against your client for each non-compliant cannabis product sold in the past year. A court may also order your client to stop committing the violation. Because your client has sold a substantial number of cannabis products, the maximum potential penalty is significant. To

avoid having these types of enforcement actions brought against your client, it is important to be aware of the Prop. 65 warning requirements specific to the cannabis industry.

California's Prop. 65, officially referred to as the Safe Drinking Water and Toxic Enforcement Act of 1986 (codified at California Health and Safety Code Section 25249.5 et seq.), requires businesses with 10 or more employees to provide a "clear and reasonable" warning before "knowingly and intentionally" exposing individuals in California to any Prop. 65 listed chemical either through an environmental exposure, occupational exposure, or consumer product exposure. Although Prop. 65 does not define what is considered "clear and reasonable," the Prop. 65 regulations contain pre-approved "safe harbor" warning language that is deemed to be clear and reasonable.

Generally, the Prop. 65 warning includes a warning symbol (the yellow triangle with a black exclamation point inside), followed by the word "WARNING" in bold print, and warning language telling Californians about exposure to chemicals known to the State of California to cause cancer or reproductive harm. For some types of exposures and chemicals, the Prop. 65 regulations have specifically-tailored safe harbor warning language. Prop. 65 exempts from the warning requirements gov-

ernmental agencies and businesses with nine or fewer employees.

Whether a non-exempt business needs a Prop. 65 warning depends upon whether the product or business will expose Californians to a Prop. 65 listed chemical above "safe harbor" exposure levels, if applicable. A safe harbor exposure level identifies a level of exposure to a listed chemical that is so de minimis it does not require a Prop. 65 warning. Prop. 65 requires at least yearly updating of chemicals known to the State of California to cause cancer or reproductive harm, although chemicals can and have been added to the list more frequently. Currently, there are more than 900 Prop. 65 chemicals listed, including some chemicals specific to cannabis products.

For the cannabis industry, there has been an evolution of the type of cannabis product specific chemicals listed as a Prop. 65 chemical. On June 19, 2009, the State added cannabis smoke to the Prop. 65 chemicals known to cause cancer. On Jan. 3, 2020, the State added delta-9-THC and cannabis smoke to the Prop. 65 chemicals known to cause developmental harm. Significantly, there are no safe harbor exposure levels for cannabis smoke and delta-9-THC. This means products or exposures with any trace amounts of these chemicals require a Prop. 65 warning. The cannabis product may also

have other non-cannabis specific Prop. 65 chemicals.

Last year, the California Office of Health Hazard Assessment (OEHHA), which administers Prop. 65, proposed specific tailored safe harbor warning language for retail products that can expose consumers to cannabis smoke or delta-9-THC via inhalation, ingestion (edibles), or dermal application, and for environmental exposures to cannabis or vaping or dabbing of delta-9-THC. These proposed changes have undergone extensive public comment and further revision, with the last round of public comment ending on June 6, 2022. Once adopted, following a grace period for compliance, cannabis businesses will have to comply with these new specifically-tailored warning requirements to avail themselves of Prop. 65's safe harbor warning language. As of this writing, OEHHA has not adopted the proposed changes.

The proposed warning language departs significantly from the general Prop. 65 warning language that cannabis businesses are likely currently using. One of the biggest differences is OEHHA's elimination of the short-form warning for cannabis products. Businesses using the short-form warning language do not have to specifically list a Prop. 65 chemical in the warning. The short-form warn-

ing only requires the business to indicate whether use of the product exposes the consumer to a chemical causing cancer, reproductive harm, or both. For this reason, many businesses have preferred use of the short-form warning on its products when permissible.

OEHHA's proposed elimination of the short-form warning for cannabis products means the warning must specifically list cannabis smoke and delta-9-THC. For example, the proposed warning language for "Cannabis smoke from consumer products exposure" is:

"Smoking cannabis increases your cancer risk and during pregnancy exposes your child to delta-9-THC and other chemicals that can affect your child's birthweight, behavior, and learning ability. For more information go to www.P65Warnings.ca.gov/cannabis."

OEHHA stated that it wanted to eliminate the short-form warning to enable "consumers [to] receive the full safe harbor warning language so that they can be made aware of the specific effects the exposures can cause to unborn children." OEHHA also has a page on its Prop. 65 website dedicated to "Cannabis and THC Products," specifically discussing why OEHHA considers these prod-

ucts to be harmful to an individual's health or unborn children. In this respect, OEHHA's treatment of cannabis and THC products is consistent with the regulation of alcoholic beverages, which are also subject to specifically tailored warning language and factual information on the Prop. 65 website.

It is important for cannabis businesses to be aware of the evolving Prop. 65 warning requirements to ensure timely compliance with Prop. 65 and to avoid being the target of costly enforcement actions. Both the government and private parties can enforce Prop. 65. Private-party enforcement actions are common because of the monetary incentive in the form of attorneys' fees and a share in the recovered penalty. Cannabis businesses will be a target for these suits because of the lack of safe harbor exposure levels for cannabis smoke and delta-9-THC. As a result, enforcers will be able to easily ascertain whether a cannabis product has a compliant Prop. 65 warning. Knowledge of and compliance with Prop. 65's warning requirements before an enforcement action is taken is the best strategy for minimizing Prop. 65 liability.

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