

# **PROPOSITION 65 FRESHMAN ORIENTATION**

August 31, 2026

# Instructors

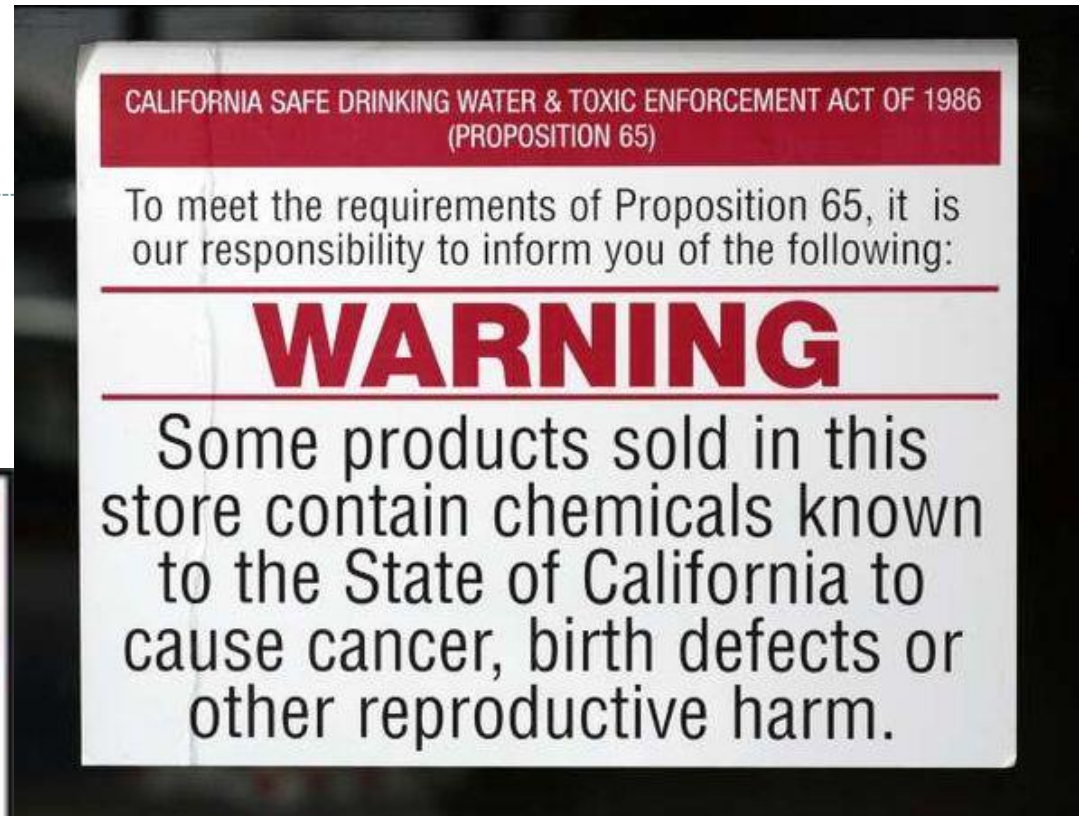
- ▶ JOE MANN, LEXINGTON LAW GROUP
  - ▶ RAFAEL HURTADO, DEPUTY ATTORNEY GENERAL
  - ▶ COLLIE JAMES, MORGAN, LEWIS & BOCKIUS LLP
- 



# Proposition 65: What's it all about?

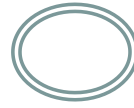


**Joe Mann**  
**Lexington Law Group**



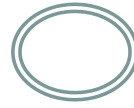
Disclaimer: Not clear & reasonable warnings

# Examples of Consumer Products Containing Toxic Chemicals Reformulated as a Result of Proposition 65



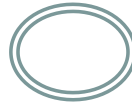
- Artificial turf (lead)
- Brass faucets (lead)
- Ceramic ware (lead)
- Calcium supplements (lead)
- Water filters (arsenic)
- Crystal decanters (lead)
- Exercise weights (lead)
- Jewelry (lead, cadmium)
- Baby rash powders and creams (lead)
- Hair dyes (lead)
- Hemorrhoidal medicines and nasal sprays (mercury)
- Spot remover (perchloroethylene)
- Bottled water and wooden playground structures (arsenic)
- Dandruff shampoos (coal tar)
- Nail care products (toluene and formaldehyde)
- Portable classrooms (formaldehyde)
- Potato Chips and Snack Foods (acrylamide)

# Safe Drinking Water and Toxic Enforcement Act of 1986



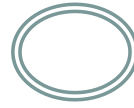
- Passed by 63% of voters in 1986
- Main features:
  - Discharge requirement
  - Warning requirement
  - Private enforcement

# List of Chemicals



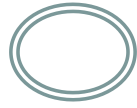
- Chemicals that cause cancer or reproductive toxicity
- Four listing mechanisms (Health & Saf. Code, § 25249.8)
  - Labor Code listings
  - State's Qualified Experts (appointed by Governor)
  - Authoritative Bodies
  - “Formally required” to carry warning by other gov't entity
- Roughly 900 chemicals
- 12 to 20 month safe harbor after listing

# Discharge Requirement



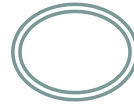
- Cannot put Listed Chemicals into drinking water (Health & Safety Code, § 25249.5)
  - Directly into water
  - Into or onto land where it passes to drinking water
- Qualified defense for authorized discharges
  - Defense does not apply to “significant amount” of chemical entering water
- Less frequently used in litigation than its “warning” counterpart

# Warning Requirement



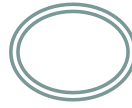
- “No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive harm without first giving a clear and reasonable warning.” (Health & Saf. Code, § 25249.6)
  - Consumer products
  - Air emissions
  - Premises
  - Workplace

# Warning Requirement



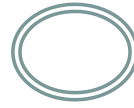
- Elements of prima facie case:
  - Person in the course of doing business
    - ✦ 10 or more employees
    - ✦ Does not include government entities
  - Exposure to Listed Chemical (not content or presence)
  - Knowing and intentional
  - No “clear and reasonable” warning
- Does not prohibit exposures; only requires warning

# Defenses to Warning Requirement



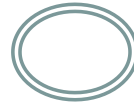
- No significant risk/no observable effect  
(Health & Saf. Code, § 25249.10(c))
  - Cal. Code Regs., tit. 27, §§ 25701-25821
  - Other competent scientific methods
- Safe harbor levels
  - Carcinogens: No Significant Risk Level (“NSRL”)
  - Reproductive toxins: Maximum Allowable Dose Level (“MADL”)
- Knowing and intentional: product testing and supply-chain data
- Exposure pathways: presence does not always mean exposure
- Reasonably anticipated use
- Burden of proof is on the defendant

# Defenses to Warning Requirement



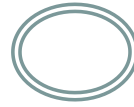
- “Naturally Occurring” chemical in food (CCR, tit. 27, § 25501)
  - Chemical is “naturally present in the environment”
  - Not avoidable by good agricultural or manufacturing practices
- Defense applies to naturally occurring chemical in food that is used in other product
- Amounts caused by or increased by human activity may fall outside of defense
- Burden of proof is on the defendant and is fact intensive

# Defenses to Warning Requirement (Not)



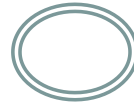
- Compliance with federal standards is NOT a defense to a Proposition 65 violation
- (But preemption is)
- (And so is the First Amendment)

# Remedies



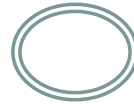
- **Civil Penalties** (Health & Saf. Code, § 25249.7(b))
  - Up to \$2,500 per day per violation
  - 6 specific factors, plus catch-all “any other factor that justice may require”
- **Injunction**
  - Warning vs. Reformulation vs. ?
- **Attorneys’ Fees** (Code Civ. Proc., § 1021.5)

# Enforcement



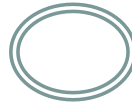
- **Public Enforcers**
  - Attorney General
  - District Attorneys
  - City Attorneys for big cities (pop. > 750,000)
- **Private Enforcers**
  - “Any person in the public interest”

# Prerequisites to Private Enforcement



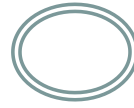
- **60-Day Notice of Violation**
  - Served on violator, Attorney General and District Attorney, City Attorney or prosecutor where violation occurred
  - Specific required content
- **Certificate of Merit**
  - Requirement added to statute in 2003
  - Certificate is form set forth in AG Regulations (11 Cal. Code Regs. §3101(b))
- **No public prosecutor has commenced and is diligently prosecuting an action against the violation**
- **60 days has elapsed since service of Notice**

# 60-Day Notices



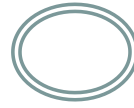
- Contents of a 60-Day Notice of Violation
  - Description of violation
    - ✦ Noticing entity information
    - ✦ Violator identity
    - ✦ Time period during which violation occurred
    - ✦ Listed chemical(s) at issue
  - Warning Notices must include route of exposure to listed chemical
    - ✦ Ingestion
    - ✦ Inhalation
    - ✦ Dermal
  - OEHHA Proposition 65 Summary must be included
  - Additional specific requirements for Notices vary by type
    - ✦ Discharge Notices
    - ✦ Consumer Product Exposure Warning Notices
    - ✦ Occupational Exposure Warning Notices
    - ✦ Environmental Exposure Warning Notices

# 60-Day Notices – Specific Requirements



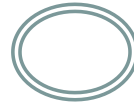
- **Discharge Notice**
  - General identification of discharge or release
  - Identification of source of drinking water where discharge took place
- **Consumer Product Exposure Notice**
  - Name of specific type of consumer product
  - Description must be specific enough to allow recipients to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged
- **Occupational Exposure Notice**
  - Geographic location where exposures occurred, or
  - Description of occupation or type of task performed by those exposed
- **Environmental Exposure Notice**
  - Identity, location and source of exposure

# 60-Day Notices – What's Not Required



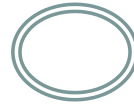
- UPC, SKU model or design number or stock number or other more specific identification of products.
- Specific retail outlet, time or date where product was purchased
- Level of exposure to listed chemical
- Evidence to prove violation
- Legal description of location of violation

# Issue Surrounding 60 Day Notices



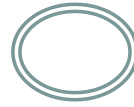
- Litigation surrounding specificity of product types
- Limitation of case to products specifically identified in 60-Day Notice
- Discovery of Certificate of Merit Materials
  - Tension between discovery rules and confidentiality of Certificate of Merit supporting materials

# Certificate of Merit



- What is a Certificate of Merit
  - Requirement added to statute in 2003
  - Certificate is form set forth in statute and regs and must be signed by counsel for noticing party
  - Certifier must state that he or she has
    - ✦ “consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action, and that, based on that information, the person executing the certificate believes there is a **reasonable and meritorious case for the private action.**”

# Certificate of Merit - Support



- Confidential factual support for certificate of merit served on the Attorney General
  - Must include identity of persons with relevant and appropriate experience that were consulted
  - Facts, studies or other data regarding exposure to listed chemical that is subject of Notice
  - Support that there is merit to each element of claim where Plaintiff has the burden of proof
- Confidential support is not discoverable
  - But otherwise discoverable information is not protected simply because it was included in Certificate of Merit, and
  - At conclusion of action, if Court determines that there was **no actual or threatened exposure to a listed chemical**, Court or violator may review confidential support for determination of “credible factual basis” for certification – subject to CCP §128.6 and §128.7 sanctions



C A L I F O R N I A

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DEPARTMENT OF JUSTICE

# Overview of Proposition 65 Settlements and the Attorney General's Guidelines

August 31, 2026

## Types of Settlements

### ❖ OUT-OF-COURT SETTLEMENTS

- Typically settled by private parties prior to filing a lawsuit.

### ❖ IN-COURT SETTLEMENTS

- If a lawsuit is brought “in the public interest,” then a plaintiff must seek court approval of the settlement. (Health & Saf. Code, § 25249.7, subd. (f)(4).)
  - **Exception:** “[V]oluntary dismissal in which no consideration is received from defendant[.]”



## Governing Statutory Authority for Settlements

### ❖ **HEALTH & SAF. CODE, § 25249.7, subdivision (f).**

- Requires the court to make the following findings:
  1. Warnings comply with Proposition 65;
  2. Award of attorney's fees is reasonable under California law; and
  3. Penalty amount is reasonable based on the factors in Health and Safety Code section 25249.7, subdivision (b)(2).

### ❖ **BURDEN**

- The plaintiff has the burden to provide sufficient evidence. (Health & Saf. Code, § 25249.7, subd. (f)(5).)



# Notice to Attorney General – Out-of-Court Settlements

## ❖ STEPS

- **Serve the Attorney General with the settlement along with a Report of Settlement.**
  - Service must occur “within five days after any violation alleged in the notice is Subject to a Settlement.” (Cal. Code Regs., tit. 11, § 3003.)
  - The Report of Settlement template can be found in California Code of Regulations, title 11, Appendix B.



## Notice to Attorney General – In-Court Settlements

### ❖ STEPS

- **Serve the Attorney General with the proposed settlement with Report of Settlement.**
  - **Deadline:**
    - within 5 days “after the action is Subject to a Settlement” *or*
    - at the time of service of the motion for judicial approval of the settlement, *whichever is sooner.*
- **Serve the Attorney General with the motion for judicial approval and all supporting documents.**
  - **Deadline:** 45-days prior to the hearing.
  - Submit motions and supporting documents to [Prop65.Motions@doj.ca.gov](mailto:Prop65.Motions@doj.ca.gov).

❖ **NOTE:** Motion for judicial approval of a settlement must advise the court that “the fact that the Attorney General does not object or otherwise respond to a settlement shall not be construed as endorsement of or concurrence in any settlement.” (Cal. Code Regs., tit. 11, § 3003.)



## Elements of a Settlement

### ❖ INJUNCTIVE RELIEF

- May include reformulation.

### ❖ WARNINGS

- Requirement to provide a clear and reasonable warning.

### ❖ PENALTIES

- Must consider the factors in Health and Safety Code section 25249.7, subdivision (b)(2).
- 75 % to the Safe Drinking Water and Toxic Enforcement Fund/25% to private enforcer. (Health & Saf. Code, § 25249.12, subds. (c) and (d).)

### ❖ ALTERNATIVE PAYMENTS

### ❖ ATTORNEY'S FEES

- May be awarded pursuant to Code of Civil Procedure section 1021.5.



## When Warnings Are Required

### ❖ CHEMICALS ON THE PROPOSITION 65 LIST OF CARCINOGENS

- Exposure to the chemical exceeds the no significant risk level (“NSRL”).

### ❖ CHEMICALS ON THE PROPOSITION 65 LIST OF REPRODUCTIVE TOXICANTS

- Exposure to the chemical exceeds the maximum allowable dose level (“MADL”).



## Standards

### ❖ SAFE HARBOR LEVELS

- See Cal. Code Regs., tit. 27, § 25705.

### ❖ PRIOR SETTLEMENTS/CONSENT JUDGMENTS

- Attorney General 60-Day Notice database at <https://oag.ca.gov/prop65/60-day-notice-search>.



## Clear and Reasonable Warnings

### ❖ SAFE HARBOR WARNINGS

- Deemed “clear and reasonable.”  
(Cal. Code Regs., tit 27, § 25600 et seq.)
- Examples of safe harbor warnings for specific types of exposures:
  - Consumer products
  - Environmental
  - Occupational
  - Food
  - Alcohol
  - Food and beverage
  - Prescription drug
  - Furniture
  - Hotels
  - Amusement parks



## Attorney General's Review

### ❖ OUT-OF-COURT SETTLEMENTS

- Factors listed in Health and Safety Code section 25249.7, subdivision (f).
- Attorney General Settlement Guidelines. (Cal. Code Regs., tit. 11, § 3200 et seq.)
  - Not binding.
  - Provide the Attorney General's view of various types of settlement provisions.
  - Not exhaustive.
    - For example, releases in out-of-court settlements must always be limited to the named parties, not on behalf of the public.
- Attorney General's Office may request a modification to objectionable terms.
  - If the parties refuse to modify, the Attorney General may issue a letter identifying the objectionable terms and/or stating that the settlement is void.



## Attorney General Review

### ❖ IN-COURT SETTLEMENTS

- **Factors in Health and Safety Code section 25249.7, subdivision (f).**
- **Attorney General Guidelines and other appropriate criteria.**
  - Meant to “assist the parties in fashioning settlements to which the Attorney General is unlikely to object, and assist the courts in determining whether to approve settlements.”
- **Objection by Attorney General**
  - Not required to intervene in order to object.



# Effect of the Attorney General's Objection or Non-Objection

## ❖ EFFECT OF NON-OBJECTION

- “[S]hall not be construed as endorsement of or concurrence in any settlement.” (Cal. Code Regs., tit. 11, § 3003, subd. (a).)

## ❖ OBJECTION OR REQUEST OF MODIFICATION

- Objection to or request for modification of a certain term or section does not mean endorsement of the settlement as a whole.

## ❖ COURT’S RESPONSIBILITY

- The court is tasked with making the findings for approval of settlement. (Health & Saf. Code, § 25249.7, subd. (f)(4).)



## Examples of Common Problems in Settlements

- ❖ **Warnings that are inconsistent with the safe harbor warnings.**
- ❖ **Agreed upon exposure levels that may be the same or higher than what currently exists in the noticed products.**
  - No public benefit.
- ❖ **Attorney's fees awards that do not meet the Code Civ. Proc. § 1021.5 criteria.**
  - Record insufficient to determine reasonableness of fees.
  - Fees are unreasonable based on record provided.



## Examples of Common Problems in Settlements

- ❖ **Averaging exposures to reproductive toxicants and comparing to MADL.**
- ❖ **Agreements that set naturally occurring level with no support.**
- ❖ **Sloppy/careless mistakes.**



## Assembly Bill 2577

### ❖ Fourth factor added to Health and Safety Code section 25249.7, subdivision (f)(4).

- Court must find that settlement is in the **public interest** and provides a **public benefit**.
- Settlement presumed to be in the public interest and provide a public benefit if:
  - Settlement reduces exposure to the listed chemical; *or*
  - Requires a warning if one was not previously provided.

### ❖ AB 2577 codifies existing authority regarding public benefit.

- Code of Civil Procedure section 1021.5 applies to an enforcement action that “affects the public interest” and provide a “significant benefit” to the general public.
- California Code of Regulations, title 11, section 3201, subdivision (b) discusses the presumption of public benefit if the settlement requires a warning or reformulation.



## Assembly Bill 2577

### ❖ Court approval of settlement without approval of attorney's fees award. (Health & Saf. Code, § 25249.7, subd. (f)(7).)

- Upon the Attorney General's objection.
- The court must find that the evidence in support of fees is insufficient.
- Plaintiff may provide additional information to support fees.
- Defendant and Attorney General may respond or object to additional information.
- Court may not award fees in excess of agreed-upon amount.

