

Proposition 65 Representation

For clients affected by California's far-reaching warning statute, Pillsbury provides focused compliance audits and counseling, and regularly defends businesses facing Proposition 65 litigation using strategies designed to achieve optimal and economic business solutions.

Passed by California voters in 1986, Proposition 65 impacts businesses around the world. Primarily, the law requires a warning for exposure to one or more of the approximately 900 listed chemicals that the state, through the Office of Environmental Health Hazard Assessment, has determined may cause cancer, birth defects or reproductive harm at or above certain threshold levels. Placing a "clear and reasonable" warning should invoke the safe harbor provisions of the law and shield a business from potential Proposition 65 liability; however, for many businesses, compliance with Proposition 65 is not always straightforward.

Proposition 65 applies to products ranging from animal crackers and baby bibs to clarinets and motor fuel, to products sold in the state or simply shipped to California consumers. Moreover, product *packaging* also falls within the ambit of Proposition 65. The law also requires specific warnings be placed on commercial property—at designated smoking areas, enclosed parking lots and other common areas.

A business typically first learns of Proposition 65 through a notice of violation received in the mail. That mailing triggers a 60-day waiting period where no lawsuit can be filed against the business. After that waiting period expires, the business can be sued in California for a violation of the law.

The law applies to any company with ten or more employees that conducts business in California, even companies that may not intend to conduct business in the state. With the ubiquity of internet sales, however, businesses may find their products shipped to California, and therefore subject to Proposition 65 warning requirements, even though California is not an intended market. Any manufacturer, supplier, packager, retailer or other party in the chain of product distribution should be aware of the obligations and liabilities imposed by Proposition 65. Under Proposition 65, penalties amount to \$2,500 per day per violation, and injunctive relief is the prescribed remedy—either can have significant impacts. Injunctive relief can take the form of affixing warning labels,

reformulating the product in order to eliminate or satisfactorily reduce the offending chemical's concentration, or simply withdrawing the product from the marketplace.

While the Attorney General has the opportunity to become involved in enforcement litigation, Proposition 65 is most often enforced by the public, represented by a cottage industry of plaintiff's law firms. The sheer volume of Notices of Violation and associated litigation is significant, and it's growing.

Pillsbury lawyers have successfully defended some of the most expansive Proposition 65 claims ever pursued, in and out of court—diesel exhaust at the Ports of Los Angeles and Long Beach, acrylamide in baked goods, and cadmium in rice, to name only a few. Decades of experience resolving many hundreds of Proposition 65 claims make Pillsbury an asset to rely on.

Current Warning Regulations

Generally, California's "clear and reasonable" warning requirements include a triangular yellow and black exclamation symbol, a link to California's Proposition 65 website, the identification of the specific chemical or chemicals triggering the warning, and the specific potential harm (cancer, birth defects or other reproductive harm) caused by exposure.

For consumer exposures, the regulations require product-specific warnings to be provided using one or more of the following methods:

- On a "posted sign, shelf tag, or shelf sign" at the point of display, 27 C.C.R. § 25602(a)(1);
- via "any electronic device or process that automatically provides the warning to the purchaser prior to or during the purchase of the consumer product, without requiring the purchaser to seek out the warning," 27 C.C.R. § 25602(a)(2); or
- on the label, 27 C.C.R. § 25602(a)(3)-(4).

The regulations also place a heavier burden on specific custodians, such as real estate developers, transportation services, ports, medical facilities, restaurant owners, hoteliers, and amusement park operators, to provide industry-specific warning language.

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Representative Chemicals

- Acrylamide
- Alcohol
- Beta-myrcene
- Bisphenol-A (BPA)
- Carbon Monoxide
- Crystalline Silica
- Diesel Exhaust
- Formaldehyde
- Heavy Metals (Lead, Cadmium, Arsenic, Mercury)
- Hexavalent Chromium
- Phthalates (DEHP, DINP, DIDP, DnHP, and BBP)
- Polychlorinated Biphenyls (PCBs)
- Polyvinyl Chloride (PVC)
- Propylene Glycol
- Soluble Nickel
- Styrene
- Toluene
- Tris Phosphate (TD-CCP, TCEP)

Representative Experience

Pillsbury's Proposition 65 experience ranges from representing "mom-and-pop" retailers to Fortune 500 corporations. A sampling of Pillsbury's compliance and defense experience includes:

Product Manufacturers, Suppliers, Distributors and Retailers

- **Bath Tissue:** Defense of manufacturer in litigation (alleged presence of polychlorinated biphenyls)
- **Electronic Cigarettes:** Compliance advice to manufacturer regarding warnings and warranties
- **BBQ Grill:** Defense of retailer against noticed violations, conduct compliance audit, assess compliance, and to draft proper warning signs and labels

Food and Drug

- **Rice:** Defense of manufacturer in litigation (alleged presence of lead and cadmium)
- **Baby Formula:** Defense of retailer in litigation (alleged presence of lead)
- **Coffee:** Defense of retailer in litigation (alleged presence of acrylamide)
- **Antacids:** Defense of manufacturer and supplier in litigation (alleged presence of lead and cadmium)
- **Dietary Supplements:** Defense of manufacturer and supplier (alleged presence of lead)

Transportation Compliance and Defense

- **Ports:** Litigation defense of 35+ vessel and terminal operators at the Ports of Los Angeles and Long Beach against claims of diesel particulate matter and volatile organic compound exposure and related tort causes of action
- **Railroads:** Compliance advice regarding exposures and warnings at California facilities
- **Aerospace:** Defense of parts manufacturer against alleged hexavalent chromium emission exposure

Commercial Real Estate Compliance

- **Commercial Properties:** Compliance advice for commercial property management companies regarding representations and warranties and indemnification provisions for tenant lease agreements; conduct compliance audits for property/building management companies

Industries

- Aerospace
- Agriculture
- Alcohol
- Amusement Parks & Recreation
- Automotive
- Bars & Restaurants
- Building Materials & Equipment
- Commercial Real Estate
- Chemical & Related Manufacturing
- Clothing
- Construction
- Cruise Lines
- Dentistry
- Electronics Manufacturing
- Energy & Natural Resources
- Food & Beverage
- Health Professionals & Services
- Hotels & Lodging
- Marine Transportation
- Medical Supplies
- Musical Instruments
- Pharmaceutical Manufacturing & Supply
- Railroad Transportation
- Retail
- Telecom Services & Equipment
- Textiles
- Timber, Logging & Paper Mills
- Trucking
- Waste Management
- Wood Manufacturing & Processing

Pillsbury advises all companies that conduct business in California, directly or indirectly, to identify their potential Proposition 65 liabilities and obligations. Businesses should identify whether their current compliance strategies have been updated to conform to the revised warning regulations. In particular, consideration should be given to: (i) internet warnings; (ii) consumer exposures that may occur because of business operations or product use; (iii) whether agreements allocating Proposition 65 obligations exist between actors in the chain of commerce (i.e., manufacturers, suppliers, distributors and retailers) to ensure proper warnings have been provided; and (iv) whether language in tenant agreements allocates Proposition 65 obligations.

About Pillsbury

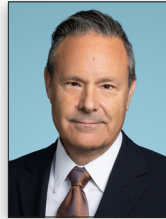
Pillsbury Winthrop Shaw Pittman LLP is an international law firm with a particular focus on the technology & media, energy, financial services, and real estate & construction sectors. Recognized as one of the most innovative law firms by *Financial Times* and one of the top firms for client service by BTI Consulting, Pillsbury and its lawyers are highly regarded for their forward-thinking approach, their enthusiasm for collaborating across disciplines and their authoritative commercial awareness.

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