

Facilities, Construction and Property Practice Group

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# AALRR Alert



## Prop 65 Warnings: More BPA Regulations, More Headaches

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Any entity that manufactures, produces, packages, imports, distributes or sells items containing bisphenol A (“BPA”) in California may have to provide a Proposition 65 warning. On May 11, 2015, the California Office of Environmental Health Hazard Assessment (“OEHHA”) added BPA to Proposition 65’s list of chemicals because of its potential reproductive toxicity. This BPA listing applies to all industrial and consumer products in California regardless of their manufacture date.

BPA is a chemical used in many hard plastics, polycarbonate, epoxies, electrical equipment, metal cans, and glass bottles. Canned and bottled products such as food and beverage containers often contain epoxy resins, which are typically used as a protective lining inside of some metal-based food and beverage cans and on the lids of glass jars and bottles. BPA is believed to migrate from these linings into food.

### Proposition 65 Background

The Safe Drinking Water and Toxic Enforcement Act of 1986 (California

Health and Safety Code §25249.5 et seq.) -- Proposition 65 -- requires the State of California to publish a list of chemicals “known to the state to cause cancer or reproductive toxicity,” and establishes two prohibitions regarding these chemicals. One prohibition is that no person may knowingly and intentionally expose any individual in California to a significant amount of a listed chemical without first providing a “clear and reasonable warning” to such individual (for consumer products, occupational and environmental exposures). The other prohibition is that no person may knowingly discharge or release a significant amount of a listed chemical into drinking water or into or onto land where it will pass into a source of drinking water. The OEHHA has listed more than 900 chemicals under Proposition 65.

Warnings are not required, and the discharge prohibition does not apply, when exposures are “insignificant.” For warnings, an exposure is insignificant if the person responsible can show that it poses no significant risk, assuming lifetime exposure at the level in

question for listed carcinogens (the “no significant risk level” or “NSRL”), or that it will have no observable effect assuming exposure at 1,000 times the level in question for listed reproductive toxicants (“maximum allowable dose level” or “MADL”). The exposure assessment must be based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis of the listing. California has established NSRLs and MADLs (“safe harbor levels”) for a number of listed carcinogens and reproductive toxicants. The use of OEHHA safe harbor levels is voluntary, and the regulations allow a business to calculate its own NSRL or MADL, but those levels may be challenged in an enforcement action.

Once a chemical is listed, companies have twelve months to

--> “Emergency regulation point of sale warnings are allowed for BPA contained in canned and bottled food and beverage industry products until November 13, 2016.”

comply with Proposition 65's warning requirements. Proposition 65 requires warnings either on a product's label or by point-of-sale signage. Violators are subject to a potential civil penalty of \$2,500 per day for each violation, as well as payment of attorney's fees if a party or agency commencing the lawsuit is successful.

Proposition 65 also contains a "bounty hunter" provision that permits private enforcers to bring a lawsuit if a public prosecutor does not act within 60 days after notification of an alleged violation. The majority of enforcement actions are brought by private enforcers, who are entitled to 25% of any civil penalty assessed by the courts; they can also seek attorneys' fees under California's Private Attorney General statute.

### **Current Listing of BPA**

On May 17, 2016, the OEHHA expressed fear over a potential mass recall of food and beverages and issued an emergency resolution that allows for temporary use of point-of-sale warnings regarding BPA exposure from canned and bottled food and beverages. This emergency resolution is effective for 180 days, until November 13, 2016, but OEHHA has indicated that it expects to adopt this regulation as an interim measure for at least one year. OEHHA recently stated:

This time period should be sufficient to ensure an orderly transition to providing warnings for BPA exposures, and for

manufacturers to reduce or eliminate exposures to BPA by switching to safer alternatives where feasible. It will also allow for additional time for OEHHA to evaluate the emerging science for potentially establishing a MADL [safe harbor level] for oral exposures to BPA, which would further clarify which products require a warning.

Additionally, on June 13, 2016, the Office of Administrative Law approved the amendment of Title 27 of the California Code of Regulations, section 25805, which sets the MADL to three micrograms per day for dermal exposure to solid materials containing BPA. This new regulation will be effective on October 1, 2016.

A Proposition 65 warning is not required if the product's BPA concentration is below the "safe harbor level." The OEHHA has not set a MADL for oral exposures and is awaiting the results of several federal studies investigating the results of BPA at low doses. These results are expected to be released as early as 2017; therefore, it is likely that additional regulations will be forthcoming.

### **What You Should Do with a BPA Product**

Due to the litigious nature of Proposition 65, we envision an uptick in civil enforcement. This is consistent with a significant increase in the growth of false labeling litigation in the federal courts, which

has developed in parallel with each expansion of Proposition 65 labeling and notice requirements.

If you are not a governmental entity and you manufacture, produce, package, import, distribute or sell products in California that contain BPA, be prepared to determine whether you need to provide an appropriate Proposition 65 warning. This warning should have been provided by May 11, 2016. For the canned and bottled food and beverage industry, the emergency regulation allows for the use of a point-of sale warning message on a card at least 5" by 5".

If you are a retailer selling canned or bottled food or beverage products within California containing BPA and an entity has provided an appropriate warning sign, you should post the warning sign.

Lastly, if you manufacture, produce, package, import, distribute or sell products in California containing BPA, it would be prudent to review the language of your contractual agreements regarding compliance with laws, regulations and indemnity.

In addition to our role as advice and defense counsel, AALRR team members have regularly represented concerned clients before OEHHA and remain actively involved in the ongoing hearings and public comment on the expanded notice postings OEHHA is promulgating.