

COMMENTS OF THE OFFICE OF THE ATTORNEY GENERAL TO FOOD WARNING WORK GROUP

Proposition 65 requires that no person in the course of business shall knowingly and intentionally expose an individual to a listed chemical without “first giving clear and reasonable warning to such individual, except as provided in Section 25249.10. (Health & Saf. Code § 25249.6.) The statute further states that a warning need not be provided separately to each exposed individual “and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided that the warning accomplished is clear and reasonable.” (Health & Saf. Code § 25249.10, subd. (f).) Thus, while the statute is flexible concerning warning methods, it does require that businesses “provide” a warning, not simply that it be available to those who request it.

The regulations further implement the warning requirement and state that the method employed to transmit the warning “must be reasonably calculated, considering the alternative methods available under the circumstances, to make the warning message available to the individual prior to exposure.” (Cal. Code Regs., tit. 25, section 25601, subd. (a).)

In *Ingredient Communication Council, Inc. v. Lungren* (1992) 2 Cal.App.4th 1480, the court ruled that the warning system must effectively convey the warning to the consumer so that it is available prior to purchase or use of a product. Effective conveyance is measured by whether consumers are likely to see or hear the warning prior to purchase or use of the product. Effective conveyance is not achieved if the only way the consumer would obtain the message is through considerable effort. Thus, “an invitation to inquire about possible warnings” is not equivalent to providing the warning about a specific product. Further, while a warning system need not be the best possible system, a company cannot refuse to employ features that would significantly improve the warning system without significantly increasing cost. (*Id.* at p. 1494.) Finally, the warning system must take into account that most consumers make impulse purchases in the store and few consumers are willing to spend time researching relatively inexpensive products they buy in the grocery store. (*Id.* at p.1495.)

Given the above requirements, it appears that any warning system that does not rely on either a label or a shelf sign at the point of sale, should adequately do all of the following:

1. Identify the products or type of products that require a warning, in a manner that draws the consumer’s attention to the fact that the product has a warning;
2. Notify the consumer where the warning is provided;
3. Make the warning easily available in the store so that the consumer receives it without considerable effort; and
4. Provide warning language that is clear and reasonable given the type of product at issue. While the safe harbor warning language is adequate for certain products, in some situations additional information may help consumers understand the nature

of the exposure and the risks and the benefits of the product.