



FACT SHEET

Office of Environmental Health Hazard Assessment

June 2000

SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 PROPOSITION 65

COMPARISON OF THE WARNING REQUIREMENT AND THE GOVERNMENT EMPLOYEE DISCLOSURE REQUIREMENT

Question: What is Proposition 65?

Answer: Proposition 65 is the Safe Drinking Water and Toxic Enforcement Act of 1986. It was passed by the people of California as a voter initiative. It may be found at Health and Safety Code Sections 25180, 25180.7, 25192 and 25249.5. through 25249.13

Question: What are the key provisions of Proposition 65?

Answer: Proposition 65 has two very distinct regulatory components. They are as follows:

- (1.) Chemicals known to the state to cause cancer or reproductive harm are placed on a list published by the Governor. This listing, in turn, triggers two specific requirements. These requirements are: (A) Clear and reasonable warning must be given by covered businesses before exposing individuals to listed chemicals above specified risk levels. (B) In addition, chemicals listed as known to the state to cause cancer or reproductive harm may not be discharged above specified risk levels into sources of drinking water. (The remainder of this document will focus on the warning requirement aspect of this component, as the provision that is of primary concern to the regulated community.)
- (2.) Designated government employees are required to disclose to the appropriate local Board of Supervisors and the local health officer actual or threatened illegal discharges of hazardous waste when such discharges are above a specified risk level.

These two principal parts of Proposition 65 may be better understood by breaking out separately the elements of each of these provisions. For ease, the first general requirement is referred to as the "Clear and Reasonable Warning" Requirement. The second general provision is called the "Government Employee Disclosure" Requirement. It is also worth noting that additional guidance regarding the application of Proposition 65 to given situations may be found in the implementing regulations. The regulations published in Title 22, California Code of Regulations, Section 12000 et seq.

CLEAR AND REASONABLE WARNING

Question: Where is the statutory authority for the clear and reasonable warning requirement?

Answer: Health and Safety Code Section 25249.6 is the citation for this requirement. The section states that:

“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 toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.”

Question: Who is subject to the clear and reasonable warning requirement?

Answer: The warning requirement applies only to businesses with ten or more employees.

Question: Are there any exemptions from the clear and reasonable warning requirement?

Answer: Yes. All government agencies at the local, state, and federal level, as well as operators of public water systems, are all expressly exempt from the warning provision of Proposition 65.

Question: What is the essence of the provision?

Answer: The essence of the provision is that persons be given clear and reasonable warning about risks from listed chemicals prior to being exposed to such chemicals.

Question: To what types of exposures does this warning requirement apply?

Answer: The warning requirement applies only to exposures to chemicals placed on a list of chemicals known to the state to cause cancer or reproductive harm.

Question: What level of exposure triggers the warning requirement?

Answer: Warnings must be provided for exposures that pose a “significant risk.” For chemicals that are listed as causing cancer, “significant risk” is defined in regulation to mean one excess cancer for every 100,000 people exposed (assuming exposures occur over a 70-year lifetime). For chemicals listed as causing birth defects or other reproductive harm, the significant risk level is defined as the level at which no observable (adverse) effects are seen divided by 1,000.

Question: Who can enforce violations of the warning requirement?

Answer: Violations of the warning requirement are enforceable by the Attorney General, any District Attorney, by any City Attorney of a city having a population in excess of 750,000, or any person acting in the public interest.

Question: What are the penalties for violation of the warning requirement?

Answer: Penalties for violating the warning requirement may be assessed in the amount of \$2,500 per day per violation. In addition, injunctions may be issued to enjoin any violation of the warning requirement.

Question: How long after a chemical is listed must a warning be given?

Answer: The warning requirement does not apply until twelve months after a chemical has been added to the list of chemicals known to the state to cause cancer or reproductive harm for exposures above the “no significant risk” level.

GOVERNMENT EMPLOYEE DISCLOSURE REQUIREMENT

Question: Where is the statutory authority for the government employee disclosure requirement?

Answer: Health and Safety Code Section 25180.7 is the citation for this requirement. Subdivision (b) of this section states that:

“Any designated government employee who obtains information in the course of his official duties revealing the illegal discharge or threatened illegal discharge of a hazardous waste within the geographical area of his jurisdiction and who knows that such discharge or threatened discharge is likely to cause substantial injury to the public health or safety must, within seventy-two hours, disclose such information to the local Board of Supervisors and to the local health officer. No disclosure of information is required under this subdivision when otherwise prohibited by law, or when law enforcement personnel have determined that such disclosure would adversely affect an ongoing criminal investigation, or when the information is already general public knowledge within the locality affected by the discharge or threatened discharge.”

Question: Who is subject to the disclosure requirement?

Answer: The disclosure requirement applies only to “designated government employees.”

Question: Who is included within the definition of “designated government employees?”

Answer: “Designated government employees” is a very broad term defined by cross reference to the conflict of interest provisions in the Government Code (Section 82019). In general, any local or state agency employee in a position that entails the making or participating in decisions which may foreseeably have a material effect on anyone’s financial interest is a designated government employee.

Question: Are there any exemptions from the government employee disclosure requirement?

Answer: Yes. The statute identifies three specific situations in which a disclosure is not required. The exceptional situations are as follows: (1) the disclosure is otherwise prohibited by law; (2) law enforcement personnel have determined that disclosure would adversely affect an ongoing criminal investigation; or (3) the information is already general public knowledge within the locality affected by the discharge or threatened discharge.

Question: What is the essence of this provision?

Answer: The essence of this provision is for government employees to disclose within seventy-two hours illegal discharges of hazardous waste to the local Board of Supervisors and the local health officer.

Question: To what types of discharges does this disclosure requirement apply?

Answer: The disclosure requirement applies only to the illegal discharge or threatened illegal discharge of a hazardous waste. (This is quite different from the list of chemicals known to the state to cause cancer or reproductive harm.) Proposition 65 does not contain a definition of the term “hazardous waste.” It, therefore, has the meaning set out elsewhere in the Hazardous Waste Control Law and its regulations administered by the Department of Toxic Substances Control. Basically, “hazardous waste” here refers to those wastes regulated by the Department of Toxic Substances Control as toxic, ignitable, corrosive, or reactive.

Question: What level of risk posed by the discharge triggers the disclosure requirement?

Answer: Disclosure must be made for discharges likely to cause substantial injury to the public health or safety. (This is quite different from the regulatory levels for the warning requirement set forth above.)

Question: Who can enforce violations of the government employee disclosure requirement?

Answer: Violations of the government employee disclosure requirement are enforceable as criminal offenses by district attorneys.

Question: What are the penalties for violation of the disclosure requirement?

Answer: Penalties for violation of the disclosure requirement may be assessed in the amount of not less than \$5,000 and not more than \$25,000. In addition, violations may be punished by imprisonment in the county jail for not more than one year or by imprisonment in state prison for not more than three years.

Question: Is there any lag time for enforcement of the designated government employee disclosure requirement?

Answer: No. In contrast with the warning requirement there is no lag time for this provision becoming operable.

**COMPARISON OF PROPOSITION 65
CLEAR AND REASONABLE WARNING
WITH
DESIGNATED GOVERNMENT EMPLOYEE DISCLOSURE**

Question	Clear And Reasonable Warning	Designated Government Employee Disclosure
What is the application to government?	Government is EXEMPT	ONLY applies to Government
What is the application to businesses?	Businesses employing 10 or more persons	Businesses are not subject to this requirement
What is the type of release?	Any <u>exposure</u> : water, air, consumer products	Discharges and threatened discharges only
What is the type of chemical?	“Listed” carcinogens and reproductive toxicants	Hazardous Waste
Who is informed?	Exposed persons (consumers, employees, neighbors, etc.)	Board of Supervisors and Local Health Officer
What is the risk standard?	1 in 100,000 for cancer: 1/1000 th No Observable Effect Level (NOEL) for reproductive toxicants	Likely to cause substantial injury to the public health or safety
Is it otherwise legal?	Exposure can be, and usually is, otherwise legal and still be subject to warning	Discharge must be ILLEGAL in order to trigger disclosure
What is the state of mind?	Only “knowing and intentional” exposures are subject to warning requirement	Must know of discharge and KNOW it is likely to cause substantial injury
Must there be an actual exposure?	Must have actual exposure to people	THREATENED discharge is sufficient
Is “public knowledge” relevant?	The fact that risk of harm from exposure is known (e.g., tobacco smoke) does <u>not</u> create exemption from warning	Exempt from disclosure if there is “already general public knowledge” about event
Who has enforcement authority?	Civil actions by Attorney General, District Attorneys, and private parties	Criminal prosecutions
What are penalties?	Civil penalties not to exceed \$2,500 per day per violation and orders	Imprisonment in county jail or State prison; civil penalties of not less than \$5,000 and not more than \$25,000