
Restaurants and Food Retailers Are Now Required to Post Proposition 65 Warning Signs about BPA in All California Locations

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As of May 11, 2016, all businesses that distribute or sell food and beverage products in California that potentially contain bisphenol A (BPA) are required to provide a warning under California's Proposition 65 to consumers. BPA is a chemical commonly used in the protective lining of many food cans, bottle lids, and other food-packaging materials. Failure to provide the required warning for products sold or distributed into California that potentially contain BPA could expose restaurants and their vendors to considerable liability under Proposition 65.

Proposition 65 Background

Proposition 65 (Health and Safety Code § 25249.6 *et seq.*) requires businesses to provide warnings for products that contain chemicals that have been determined by the state of California to cause cancer or reproductive toxicity. The Office of Environmental Health Hazard Assessment (OEHHA) maintains the list of chemicals which are known to the state to cause cancer or reproductive toxicity for the purposes of Proposition 65. Bisphenol A was added to the list of hazardous chemicals on May 11, 2015, and the warning requirements for BPA went into effect on May 11, 2016. Proposition 65 does not prohibit a business from exposing people to listed chemicals, but rather requires that the business provide a warning prior to potential exposure.¹ Neither lack of knowledge, nor lack of intent to cause exposure to a listed chemical, is a defense to a claim of noncompliance under Proposition 65.

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¹ There is currently no safe harbor level for BPA. Accordingly, any potential exposure to BPA requires a consumer warning.

Emergency Regulations Issued by OEHHA

Because BPA is so widely used in packaged food and beverage products sold throughout California, on April 19, 2016, OEHHA issued emergency regulations regarding BPA to provide guidance to manufacturers, producers, packagers, importers and distributors of canned and bottled food and beverage products in an attempt to avoid public confusion from inconsistent warning messages about these products. Although these emergency regulations do not directly address sales of these products by restaurants, prudent restaurant operators should post Proposition 65 warnings concerning BPA given the likely, and potentially very costly, enforcement of Proposition 65 by private individuals.

Currently there is no statutory or regulatory requirement for Proposition 65 warnings to name the chemical of concern or the health effect associated with it. However, OEHHA has repeatedly made clear its intent to expand its requirements for chemical and product specific warnings under Proposition 65. The emergency regulations issued by OEHHA for BPA reflect this move towards additional specificity in consumer warnings.

The emergency regulations require the following warning for products potentially containing BPA:

WARNING: Many food and beverage cans have linings containing bisphenol A (BPA), a chemical known to the State of California to cause harm to the female reproductive system. Jar lids and bottle caps may also contain BPA. You can be exposed to BPA when you consume foods or beverages packaged in these containers. For more information go to: www.P65Warnings.ca.gov/BPA

It is appropriate for restaurants that serve bottled or canned beverages or other products to post this warning. The same is true whether the restaurant sells the product in the bottle or can, or pours it from the bottle or can into a glass, which is then served to the guest. It is also judicious for restaurants that do not serve bottled or canned products, but that use bottled or canned products as ingredients in menu items, to post the warning.

Further complicating matters, restaurants that sell other products potentially containing Proposition 65-listed chemicals (for example, mercury and acrylamide), including common foodstuffs such as coffee, baked goods, potatoes and fish, are required to provide an additional Proposition 65 warning for those products. The current required warning language for restaurants is found in Section 25603.3(a) of the California Code of Regulations and reads as follows:

WARNING: Chemicals known to the State of California to cause cancer, or birth defects or other reproductive harm may be present in foods or beverages sold or served here.

Although there is possibly an argument that this generic restaurant warning may be sufficient if a restaurant operator has not received a notice from any suppliers or distributors which informs the operator of the information listed in Section 25603.3(f)(1)(A)(2) of the California Code of Regulations, the more prudent course of action is to post the BPA-specific sign.

Restaurants that serve alcoholic beverages are also required to post the well-known Proposition 65 warning concerning those products.

Recommendations Regarding Compliance

Specific guidance regarding the location, size, font and type of Proposition 65 warnings requires an evaluation of a restaurant's specific business practices and is dependent on many factors, such as

whether a restaurant provides full service, counter service, drive-through sales, online ordering, or a combination of service methods; whether the restaurant sells bottled or canned beverages in their original packaging or otherwise; and whether the restaurant sells other products that contain chemicals listed by OEHHA under Proposition 65. Businesses may exercise their discretion and business judgment in determining the best method of providing the Proposition 65 warnings to their customers; however, the regulations require the method used to transmit the warning be reasonably calculated, considering the available alternative methods, to make the warning message available to the consumer prior to exposure. Appropriate warning methods may include warnings on signs, shelf labels, point-of-sale warnings (including online orders), table tents, menus and product labels.

Restaurants should also evaluate their vendor agreements to confirm there are adequate product indemnity provisions that cover Proposition 65. In addition, restaurant companies should consider providing written notice to each supplier stating the restaurant's expectation that suppliers reduce or eliminate the use of BPA in food packaging in the future, so the need for warnings for these products will decrease over time. However, although a restaurant may contractually shift the burden to its suppliers to eliminate BPA and/or to place warnings directly on bottles, cans and other products, this does not preclude a finding of liability against the restaurant for non-compliance with Proposition 65 if BPA is found in a product served by the restaurant and the restaurant has failed to provide the required warnings. Violations of Proposition 65 can cost restaurant operators up to \$2,500 per day for each violation (i.e., for each restaurant at which a warning is missing) and thus it is a wise business decision to post or otherwise display the recommended warnings in a conspicuous manner which meets the requirements of the statute.

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If you have any questions about the content of this Alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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