

# GUIDANCE on California Proposition 65 and Cannabis Products

Revised April 2018

Prepared by the American Herbal Products Association



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## **DISCLAIMER**

The information contained herein is not and should not be considered to be legal advice. This publication is not a substitute for the California Proposition 65 laws and regulations that apply to businesses in the State of California. Instead, it should be viewed as a supplementary guide to these laws and regulations. Information contained herein is not intended to replace or supersede instructions, guidelines or regulations issued by the State of California. In addition, no other issues related to the manufacture, marketing, or sale of products entering commerce in California are addressed herein.

While AHPA believes that all of the information contained here is accurate, any company that uses this information does so as its own choice; is wholly responsible for any policies established therefrom; and is advised to discuss all aspects related to compliance with Proposition 65 with a qualified attorney or consultant.



## Table of Contents

What is Proposition 65? .....	3
Who is responsible for all of this? Who is liable? .....	3
How is Proposition 65 enforced? .....	4
How can companies comply? .....	4
What warnings are required by Proposition 65? .....	5
Warning content in effect until August 30, 2018.....	5
Warning content in effect after August 30, 2018.....	6
How is this relevant to businesses selling <i>Cannabis</i> ? .....	8
What should a company do if it gets a 60-day Notice? .....	9



## What is Proposition 65?

Consumer goods sold in the State of California are, with certain exceptions, subject to that State's Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986. The regulations that have been implemented in the years since the Proposition was passed require that warnings be provided for products sold in the State of California if the products contain chemicals listed by the State as carcinogens or reproductive toxicants. Failure to provide such warnings can result in action by the California Attorney General, District or City Attorneys, or by "any person in the public interest."

Proposition 65 requires persons doing business to provide "clear and reasonable" warnings prior to exposing individuals to chemicals known to the State to cause cancer and/or reproductive toxicity. The State is required to publish a list of the chemicals it considers to cause cancer and/or reproductive toxicity.

Of particular interest to the cannabis industry is marijuana smoke, which was added to the Proposition 65 list in June 2009 as a chemical known to the State of California to cause cancer. The Hazard Identification Document<sup>1</sup> that outlines the basis for the classification of marijuana smoke as a carcinogen can be reviewed on the website of the California Office of Environmental Health Hazard Assessment (OEHHA). In addition to marijuana smoke, other chemicals on the Proposition 65 list that may be used in the cultivation and processing of cannabis, such as the pesticides myclobutanil and carbaryl, must be considered when cannabis businesses are determining compliance to this regulation.

This guidance document was prepared with a narrow focus; it is concerned only with the regulatory and liability implications for cannabis businesses or other entities in the State of California regarding exposure to marijuana smoke and potentially other chemicals listed under Proposition 65. It is not intended to address any other elements of Proposition 65 except as necessary for the present purpose, nor does it serve as a substitute for this law, its implementing regulations, or legal counsel.

AHPA has also produced the document *Guidance on California Proposition 65 and Herbal Products*,<sup>2</sup> which addresses the impact of this regulation to the broader herbal products industry and may also be of interest to the cannabis industry.

For more information on this law, see the website of the California Office of Environmental Health Hazard Assessment (OEHHA), which oversees Proposition 65 issues, at [www.oehha.org](http://www.oehha.org).

## Who is responsible for all of this? Who is liable?

The law states that "No person in the course of doing business shall knowingly and intentionally expose an individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual [with exceptions]." This "person" can be any

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<sup>1</sup> This document is available at <https://oehha.ca.gov/media/downloads/cnr/finalmjsmokehid.pdf>. Accessed April 4, 2018.

<sup>2</sup> This document is available through the AHPA website at <http://www.ahpa.org/Resources/Regulations/State.aspx>.



company or entity in the stream of commerce, e.g., a manufacturer, distributor or retailer, including medical marijuana collectives and cooperatives. Enforcement is most often against the manufacturer of a product, but cases have been brought against retailers as well.

Companies with fewer than ten employees are exempt from the requirements under Proposition 65 to provide warnings. However, both the California Attorney General and private enforcers have taken the position that Proposition 65 liability applies to any company with ten or more employees that is in the stream of commerce for the product. In this view, a manufacturer with fewer than ten employees would not be liable under Proposition 65, but its distributors and retailers, assuming they each have at least ten employees, would be liable. As a result of common indemnity practices and business customs, therefore, the small manufacturer may still be asked to take financial responsibility for compliance by or a lawsuit against the larger distributor or retailer.

## How is Proposition 65 enforced?

This law is enforced by civil suits against companies that are believed to be in violation of its requirements. The State Attorney General and local district and city attorneys have authority to take such actions, but, unlike most of the laws in the State of California, such a suit may also be brought by “any person in the public interest.” Private plaintiffs may be individuals or groups, and it is not a requirement to demonstrate harm or injury from alleged exposure to a Proposition 65 listed chemical.

An action against a company by a private plaintiff is initiated by submittal of a “60-day Notice of Violation,” filed to the California Attorney General and also provided to District and City Attorneys. In this Notice the company is informed that the plaintiff claims violations of Proposition 65 and intends to bring enforcement action against the company within 60 days unless the Attorney General has first begun to prosecute the company for the alleged violations.

Furthermore, although the law specifies that exposure to a listed chemical be made “knowingly and intentionally,” these terms have not proven to be a practical impediment to enforcers in the past.

## How can companies comply?

Companies that provide cannabis products in California in full compliance with state and local laws and regulations should consider whether to provide Proposition 65 warnings. As previously stated there is an exemption for businesses that employ nine or fewer persons, though voluntary compliance by such small firms may be a good business decision.

With respect to marijuana smoke, OEHHA has not determined a threshold of exposure to marijuana smoke below which a Proposition 65 warning is not required, and expensive evaluation by scientific experts would be needed to assess if such a level can be defined. Companies can determine whether any “safe harbor” thresholds have been determined by OEHHA for other chemicals that may be present in the cannabis they provide or on their physical premises by consulting the agency’s website for the list



of No Significant Risk Levels (NSRLs) for carcinogens and Maximum Allowable Dose Levels (MADLs) for reproductive toxicants.

Businesses supplying marijuana itself as well as other marijuana-derived products that will be consumed in a manner that produces an exposure to marijuana smoke or other chemicals potentially present in marijuana may consider providing a warning for these exposures, both to comply with the warning provision of Proposition 65 and to reduce potential Proposition 65 liability.

It is important to understand that Proposition 65 does not forbid the sale of products that contain listed chemicals in amounts that might exceed the standards or even in amounts that might cause harm. Rather, the law places an obligation on companies to provide “clear and reasonable” warnings if they choose to sell such products in California.

## What warnings are required by Proposition 65?

Any company with ten or more employees that operates within the state or sells products in California must provide a “clear and reasonable” warning before knowingly and intentionally exposing anyone to a listed chemical in an amount exceeding established standards.

Cannabis businesses should consider whether Proposition 65 warnings are needed for other products or substances that may be used or stored at their facility and to which consumers, employees, or contractors may be exposed. Businesses that provide marijuana for vaping may consider providing a Proposition 65 warning for exposure to formaldehyde, another listed chemical, which is produced in some types of vaping pens when components of vaping liquid are heated. Products used for cleaning and building maintenance should also be checked to determine if they require appropriate environmental warnings.

The regulations specifying warning content that provides a safe harbor under Proposition 65 are currently in transition.

### Warning content in effect until August 30, 2018

- **On-Site Warnings:** Companies may consider posting one or more Proposition 65 warnings in prominent locations in their facilities. All such warnings are required to be “provided in a conspicuous manner and under such conditions as to make it likely to be read, seen or heard and understood by an ordinary individual in the course of normal daily activity, and reasonably associated with the location and source of the exposure.” Examples of warnings that could be posted by California businesses that sell marijuana and marijuana-derived products is provided as follows.

“WARNING: Smoking of marijuana and marijuana-derived products will expose you and those in your immediate vicinity to marijuana smoke. Marijuana smoke is known to the state of California to cause cancer.”

“WARNING: Chemicals known to the State of California to cause cancer and birth defects or other reproductive harm are present in certain marijuana products produced, stored, processed, packaged and dispensed from this facility.”



“WARNING: Chemicals known to the State of California to cause cancer and birth defects or other reproductive harm are stored and used during the operation of this facility.”

Companies or other entities that provide marijuana and marijuana-derived products and that allow smoking of these products on site<sup>3</sup> may consider such practice to constitute an “environmental exposure,” and may therefore consider posting one or more Proposition 65 warnings as extrapolated from current safe harbor warnings suggested for tobacco smoke.

“WARNING: This facility allows smoking of marijuana and marijuana-derived products in some areas. Marijuana smoke is known to the state of California to cause cancer.”

- **Product Warnings:** Warnings for marijuana products that are sold or otherwise distributed in a form that is expected to be or may be used in a manner that will result in exposure to marijuana smoke may be provided in the form of product labeling for prepackaged products or package inserts for products sold in loose or bulk form. An example warning for such products is provided as follows.

“WARNING: Smoking this product will expose you and those in your immediate vicinity to marijuana smoke, a chemical known to the State of California to cause cancer.”

- **Warnings in Written Policies:** For businesses and other entities that operate on a membership basis and that obtain members’ signatures on policy documents as a prerequisite to membership, warnings may be able to be provided in such policy documents.

### Warning content in effect after August 30, 2018

On August 30, 2016, OEHHA adopted new regulations for the provision of clear and reasonable warnings.<sup>4</sup> **The original warning regulations (as provided above) will sunset on August 30, 2018. In the interim, businesses may comply with the regulations currently in effect (as provided above), or the provisions of the new regulation.** This will allow for a reasonable transition period for businesses to begin providing warnings under the new provisions.

Key changes in the new safe harbor warning regulations include the following:

- Warnings must be provided prior to a consumer’s purchase of the product rather than prior to exposure;
- For warnings that are not given on the product or its immediate packaging, warnings must include the name of at least one chemical for which the warning is being provided;
- For products that provide consumer information in a language other than English, warnings must also be provided in that language in addition to English;
- The OEHHA Proposition 65 website url must be provided ([www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)).

Examples of the new warnings as applicable to cannabis and cannabis-derived products are as follows:

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<sup>3</sup> California counties and local jurisdictions may prohibit businesses from allowing the smoking of marijuana on-site. Businesses should ensure that they comply with any local restrictions.

<sup>4</sup> More information regarding Proposition 65 warnings is available at the following link: <https://oehha.ca.gov/proposition-65/cnr/notice-adoption-article-6-clear-and-reasonable-warnings>. Accessed April 4, 2018.



- For any chemical listed as a carcinogen:

**WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

- For any chemical listed as a reproductive toxicant:

**WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

- For a chemical listed as a carcinogen and a different chemical listed as a reproductive toxicant:




**WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer, and [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

- For any chemical listed as both a carcinogen and as a reproductive toxicant:

**WARNING:** This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

Where a warning is being provided for an exposure to a single chemical, the words “chemicals including” may be deleted from the warning above, but in that circumstance the warning will only cover the identified chemical.

Companies can also comply with the warning regulation using the short-form warning option. This warning option contains a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline<sup>5</sup> placed to the left of the warning text, as well as the following:

- For consumer products that cause exposures to a listed carcinogen:  
 **WARNING:** Cancer - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).
- For consumer products that cause exposures to a listed reproductive toxicant:  
 **WARNING:** Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).
- For consumer products that cause exposures to both a listed carcinogen and a reproductive toxicant:  
 **WARNING:** Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

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<sup>5</sup> If the sign, label, or shelf tag for the product is not printed using the color yellow, the symbol may be provided in black and white. The warning symbol can be downloaded from the OEHHA website.





For short-form warnings, the warning language must be no smaller than the largest type size used for other consumer information<sup>6</sup> on the product, and in no case shall the warning appear in a type size smaller than 6-point type.

Short-form warnings are not required to include the name or names of a listed chemical within the text of the warning.

Examples of on-site exposure warnings that may be utilized by cannabis businesses are as follows:

- For any chemical listed as a carcinogen:

**⚠ WARNING:** Entering this area can expose you to chemicals known to the State of California to cause cancer, including [name of one or more chemicals], from [name of one or more sources of exposure]. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

- For any chemical listed as a reproductive toxicant:

**⚠ WARNING:** Entering this area can expose you to chemicals known to the State of California to cause birth defects or other reproductive harm, including [name of one or more chemicals], from [name of one or more sources of exposure]. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

## How is this relevant to businesses selling *Cannabis*?

Since 2014, numerous businesses have received 60-day Notices regarding exposure to marijuana smoke due to the presence of cannabis and paraphernalia used in the smoking of cannabis. Each 60-day Notice describes the alleged violation as failure to provide a clear and reasonable warning as required by Proposition 65 regarding potential consumer exposure to marijuana smoke. These 60-day Notice documents are publicly available through the California Attorney General’s website<sup>7</sup> by searching “marijuana” in the Source/Product field. In addition, in AHPA’s experience, initiation by a private plaintiff of actions against a new product class is followed promptly by many more such actions. To date, civil penalties up to \$31,000 and attorney’s fees up to \$64,500 have been incurred by some of the businesses who have received these notices.

Some of the 60-Day Notices inaccurately describe the allegedly affected products as including “all marijuana products not in an edible form,” since this language implies that topical products, which do not produce marijuana smoke, are subject to the law’s warning provisions regarding this substance.

In addition, 2017, a private plaintiff initiated numerous 60-day Notices against businesses selling cannabis products alleging that the products contain one or more pesticides listed under Proposition 65.

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<sup>6</sup> “Consumer information” includes warnings, directions for use, ingredient lists, and nutritional information. “Consumer information” does not include the brand name, product name, company name, location of manufacture, or product advertising.

<sup>7</sup> The Attorney General’s website can be searched for 60-day Notices at <http://oag.ca.gov/prop65/60-day-notice-search>.



Examples of such pesticides are myclobutanil and carbaryl. No settlement information is yet available for any of these actions.

## What should a company do if it gets a 60-day Notice?

The defense of a lawsuit brought under California Proposition 65 is a complex process requiring special expertise. It is strongly advised that any cannabis business in receipt of a 60-day Notice promptly contact an attorney who is knowledgeable about this law. AHPA maintains communications with several legal firms who specialize in environmental and consumer law and can sometimes provide an introduction.

Any business providing cannabis – whether it is smoked or consumed on the premises of the business or elsewhere – and other businesses that may allow smoking or other consumption of cannabis on their premises should be prepared to answer any charges that are brought against them in this matter promptly, as the burden of proof is generally placed on the defendant.

Providing the required warnings following the receipt of a 60-day Notice does not relieve a business of the potential liability for failure to warn for exposures that may have occurred prior to provision of the warning.

