

Sent Via Electronic Mail

MEMORANDUM

TO: Cindy Miglino
FROM: Diane Kindermann
DATE: August 24, 2018
RE: Prop 65 Warning Labels, Compliance with Revised Statutory Requirements*

I. SUMMARY

You have asked us, Abbott & Kindermann, Inc., to clarify the warning label requirements under the revised California's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Prop 65") as relevant to the Precast community. We conclude that a conservative approach is appropriate and requires the placement of proper warning labels in a consistent and conservative fashion on all sections or pieces of precast concrete to meet the requirements under Prop 65. While the language listed in the statute is ambiguous as to what constitutes "clear and reasonable" warning labels, we advise that a conservative inclusion of warning labels on all precast products would unequivocally prove that manufacturers meet the compliance requirements under the revised statute. The new label requirements under Prop 65 provide several options for a manufacturer to warn consumers of the dangers of Prop 65 listed chemicals. Among those options, our suggestive approach is the most conservative. The analysis provided will give you a roadmap to properly meet the Prop 65 requirements.

II. FACTUAL BACKGROUND

On August 1, 2018, a member producer of the California Precast Concrete Association ("CPCA") received an email from a customer inquiring as to whether its precast concrete products were in compliance with the August 2016 Prop 65 regulatory update. The client stated several of their customers had concerns over whether their sub-vendors were in compliance with Prop 65. The member forwarded an inquiry to you, Cindy Miglino at CPCA to determine whether the August 2016 update significantly changed precast concrete manufacturer's duty to warn of the Prop 65 chemicals found in precast materials.

* The information presented in this memorandum should not be construed to be formal legal advice by Abbott & Kindermann, Inc., or the formation of a lawyer/client relationship. Because of the importance of individual facts and the nature of this area of the law and, members are encouraged to seek individual counsel for advice regarding their individual legal issues.

You contacted us to determine what the obligations and liabilities are for precast manufacturers under the new regulatory framework. Upon receiving your inquiry our office 1) reviewed the regulations prior to the August 2016 update, 2) reviewed the new regulations to be implemented on August 31, 2018, and 3) called a few attorneys we knew at the Office of Environmental Health Hazard Assessment (“OEHHA”) to broadly and hypothetically inquire as to what warning strategies would be compliant.

Upon speaking with OEHHA, they informed us that they have been deluged with calls from various manufacturers across all affected industries for further clarification on the warning provisions of Prop 65. They also informed us they are sympathetic to manufacturers making adjustments to their labeling protocols beginning on August 31, 2018. As such, the enforcement division is primarily looking for whether manufacturers are meeting a reasonable due diligence standard when warning the public about potentially dangerous materials. The attorney we spoke with advised us that enforcement actions likely will ramp up if it is apparent that certain industries are not adequately warning consumers of the dangers of their product.

III. HISTORY/REGULATORY FRAMEWORK PROP 65

California voters approved Prop 65 in 1986 in an effort to provide transparency to the public on which specific chemicals are known to cause cancer or reproductive toxicity¹. OEHHA is the agency responsible for overseeing the Prop 65 program for the State of California and the Attorney General for the State of California acts as the principle enforcement agency under the Prop 65 program. OEHHA maintains and updates the list of chemicals known to cause cancer or birth defects once a year. The list now contains more than 800 chemicals since its 1987 enactment.²

Businesses selling products in the state are required to provide a “clear and reasonable” warning label prior to exposing anyone to a listed chemical. 27 CCR § 25600. The warning is sufficient in a variety of ways under the statute: 1) labeling of consumer products, 2) posting signs at a workplace, 3) distributing notices at a rental house, or 4) by publication in a newspaper. Id. Upon listing a chemical as toxic under Prop 65, manufactures carry the burden of properly complying with warning label requirements within 12 months. 27 CCR §25600.2. Businesses with 10 employees or less or those exposing chemicals in such low quantities as to have no significant risk of cancer or birth defects or other reproductive harm do not need to post warnings.

IV. 2018 REGULATION UPDATES AND COMPLIANCE OBLIGATIONS

In August 2016, the legislature passed a regulatory update further clarifying the requirements to meet compliance. 27 CCR §25600-25607 (August 30, 2016). The 2016 update to the regulations include 1) updates to the safe-harbor warning label language, 2) new

¹ See Prop 65 in Plain Language: <https://oehha.ca.gov/proposition-65/general-info/proposition-65-plain-language>

² See Chemical Database: <https://oehha.ca.gov/proposition-65/chemicals>

regulations for internet warnings, 3) limited warning requirements for retailers, 4) the grace period for implementing the new regulations, and 5) whether warnings need to be provided on all products. The important changes to the regulations for precast manufacturers lie in points 4 and 5 regarding the grace period and whether warning need to be provided on all products.

a. Grace Period for Implementing New Regulations

The grace period refers to the time frame between the enactment of the August 2016 regulatory update and the deadline for manufacturers to comply with the new regulations under the code. Per the regulation, manufacturers are expected to comply with the 2016 regulation with the new warning labels by August 31, 2018. You had mentioned in your earlier email correspondence that you were aware of the August 31, 2018 compliance deadline. The OEHHA attorneys we spoke with indicated that the agency is sympathetic to affected parties needing additional direction and guidance to properly comply with the updated regulations. As such, the agency expects to be more lenient on affected manufacturers in the months prior to the August 31 deadline.

b. Sufficiency of Warning Labels

OEHHA stated that under the new system, producers/manufacturers (“producer” and “manufacturer” are used interchangeably herein) have the primary responsibility for providing Prop 65 warnings. 27 CCR §25600.2(b). Manufacturers can choose the form of compliance for the warnings so long as consumers receive “clear and reasonable warnings” prior to exposure of Prop 65 listed chemicals. Id. The manufacturer first needs to determine how their product is reaching a consumer and then must look to the applicable regulatory section to determine whether their operations comply with the OEHHA’s guidance for “clear and reasonable warnings.” 27 CCR §25601. Manufacturers providing consumer products with a Prop 65 listed chemical needs to follow the guidance provided under 27 CCR §25602-25603. Manufacturers with products containing Prop 65 chemicals that reach consumers through environmental exposure or occupational exposure must look to 27 CCR §25604-25606.

The key takeaways from the regulations on consumer products label are as follows:

- 1) manufacturers may also elect to provide notice to distributors and agree that the distributors carry the burden of proper labeling through written agreements,
- 2) provide a product specific warning label for each consumer product at the point of display on the product,
- 3) provide a product specific display via the internet,
- 4) provide a catalog warning clearly indicating the dangers of the product, and
- 5) a consumer product sign to be displayed at a construction site or to be used in a manner consistent with an on-product warning label. 27 CCR §25602.

For all forms of notice, the warning labels should use language consistent with the regulations outlined in 27 CCR § 25603. Retailers must confirm they received notice and must use the warnings provided by manufacturers when transferring products to consumers. 27 CCR §25601(b). As applied to the questions you posed to us, if precast producers are transferring materials to a third party distributor, labels must be consistently displayed on each section to comply with the regulations. However, the manufacturer may also elect to provide notice either through an agreement with the distributor, through internet warnings, inclusion of signs to be placed at construction sites, or clear warnings in distributor's sales catalogs. OEHHA informed us over the phone that they are primarily looking for consistency and transparency to the reasonable consumer. If manufacturers can prove their actions were consistent and reasonable, then their duty to warn consumers has been met under the regulations.

The key takeaways from regulations on environmental exposure and occupational exposure are as follows:

- 1) clearly define and place warning signs at all public entrances and affected areas,
- 2) provide notice to occupant in affected area via mail,
- 3) provide notice at least once every three months in a local news paper, and
- 4) for employee exposure warn in a manner consistent with OSHA requirements. 27 CCR §25604-25606.

Similar to consumer products, the signs provided in each context need to be consistent with language of § 25605 of the regulation. OEHHA attorneys made clear that manufacturers do not have a duty to warn every possible consumer about chemical exposure. They do however need to ensure that notice was proper, consistent, and unambiguous. Further, the attorneys stated occupational exposure depends almost entirely on compliance with OSHA since they would be the lead enforcement agency.

V. RECOMMENDATIONS FOR APPLYING THE UPDATED REGULATIONS TO PRECAST PRODUCERS

Precast manufacturers can consider a conservative approach by applying the new warning system to each of their products prior to distribution or use. As stated previously, the producer/manufacturer carries the primary liability to warn consumers as to the dangers of their product. In order to avoid costly litigation, it would be within the producers' best interest to provide more warning labels rather than less. There is no case law on concrete manufacturing failing to comply with the regulations. However, after a cursory scan of the Attorney General's enforcement recovery for Prop 65 violations we noted that settlements between manufacturers in violation of Prop 65 and the DTSC averaged in the millions of dollars. Further OEHHA attorneys informed us that they had seen instances of industry manufacturers failing to meet the minimum standard for warnings in abundance prior to the enactment of the 2016 regulatory

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update. Therefore, a conservative approach that is consistent and unambiguous is best, although that may vary depending upon the product and who the final consumer is.

Producers/Manufacturers may come to an individual agreement with their retailers or third party suppliers on a proper warning system. However, since precast equipment often ends up in infrastructure development, the end consumers would be members of the public. In this instance, producers should provide clear and concise labels on all precast materials and sufficient signs at construction sites so there is no question as to whether manufacturers remain in compliance.

Should individual members have further questions regarding their particular circumstances, we are happy to provide further assistance and an action plan to meet the obligations under Prop 65.

End of memorandum.