

CLIENT ALERT

OEHHA Changes Safe Harbor Warnings for Pesticides

January 7, 2019

On December 6, 2018, California’s Office of Environmental Health Hazard Assessment (OEHHA) amended its safe harbor warning requirements for pesticides under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65).¹ This change took effect on January 1, 2019.²

Under Proposition 65, no business with ten or more employees may knowingly and intentionally expose any individual in California to a Proposition 65-listed chemical above a “safe harbor level,” where one exists, or at a level that otherwise poses a significant risk of cancer or reproductive toxicity without first giving a “clear and reasonable warning” to the individual.³

Prior to OEHHA’s amendment, the regulations for Proposition 65 provided a “safe harbor warning” that was presumptively “clear and reasonable” for any listed chemical contained in a “consumer product,” broadly defined. The safe harbor warning required, among other things, use of the signal word “WARNING:” in all capital letters and bold print, in conjunction with other warning language, in or on the sign, label, shelf tag, or other approved medium of transmission.⁴

A pesticide regulated by the U.S. Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), however, also must bear the signal word “DANGER,” “WARNING,” or “CAUTION” on its label, depending on the category of toxicity into which the pesticide’s most severe acute hazard falls.⁵ Accordingly, a pesticide bearing a signal word other than “WARNING” on its FIFRA label – i.e., “DANGER” or “CAUTION” – faced a likelihood that EPA would reject a Proposition 65 safe harbor warning containing the signal word “WARNING” as inconsistent with the FIFRA signal word.⁶

To address this potential problem, OEHHA has amended the safe harbor warning for exposures to listed chemicals in consumer products to allow use of the signal word “ATTENTION” or “NOTICE” in capital letters and bold type as an alternative to the signal word “WARNING” in pesticides (only), under the following two conditions.⁷

One, the person who otherwise needs to provide a warning for a consumer product exposure or an occupational exposure involving the use of a pesticide has elected to provide the required warning on the label of the pesticide. Two, the pesticide’s label must be regulated by EPA under FIFRA (40 C.F.R. pt. 156) and by the California Department of Pesticide Regulation under California’s Food and Agriculture Code ([section 14005](#)) and the California Code of Regulations ([title 3, section 6242](#)).

Commenters raised objections to OEHHA's proposed amendment during the public comment period. For example, commenters claimed that Proposition 65's safe harbor regulations conflict with FIFRA's labeling requirements and that the safe harbor warning for pesticides does not resolve the conflict but instead creates a new problem. Specifically, it makes the availability of the safe harbor warning contingent upon EPA's determination that the warning does not conflict with a pesticide's approved FIFRA label.⁸⁸

OEHHA rejected any direct conflict between Proposition 65 and FIFRA, identified EPA guidance to use the signal word "Attention" or "Notice" instead of "Warning" in a Proposition 65 warning on a pesticide's FIFRA label, and asserted that EPA has approved FIFRA labels that contain Proposition 65 warnings. Furthermore, OEHHA stated that other safe harbor warning methods are available if EPA rejects a safe harbor warning on a pesticide's FIFRA label, that safe harbor warnings are not mandatory under Proposition 65, and that a person may use any other warning method that is clear and reasonable.⁹⁹

In addition, because pesticides and prescription drugs are both subject to complex federal regulation and label approval prior to commercialization, commenters suggested that OEHHA treat pesticides like prescription drugs, for which OEHHA accepts the federally approved label as a clear and reasonable warning under Proposition 65. OEHHA found significant differences between pesticides and prescription drugs, chiefly, that medical professionals discuss possible drug-related risks with patients whereas consumers can buy pesticides over the counter without any professional advice or consultation. Accordingly, OEHHA disagreed that a warning that is clear and reasonable for a prescription drug under Proposition 65 is necessarily clear and reasonable for a pesticide product.¹⁰¹⁰

Lastly, commenters alleged that the triangle symbol used with the signal word "WARNING:" in the safe harbor warning is a Globally Harmonized System (GHS) pictogram that EPA prohibits on FIFRA pesticide labels. OEHHA denied that the triangle symbol is a GHS pictogram or any other pictogram prohibited by EPA and denied knowing of any conflict between using the triangle symbol on a pesticide label and any FIFRA requirement.¹¹¹¹

¹ Cal. Office of Env'tl. Health Hazard Assessment, Cal. Env'tl. Prot. Agency, Notice of Amendments to Article 6 Clear and Reasonable Warnings Pesticide Exposure Warnings, Final Adopted Regulatory Text (Dec. 6, 2018).

² 49-Z Cal. Regulatory Notice Reg. 2184 (Dec. 7, 2018).

³ Cal. Health & Safety Code § 25249.6 (2018).

⁴ Cal. Code Regs. tit. 27, § 25603(a)-(b) (2018).

⁵ 40 C.F.R. § 156.64(a)(2) (2018).

⁶ Cal. Office of Env'tl Health Hazard Assessment, Cal. Env'tl. Prot. Agency, Proposed Amendments to Clear and Reasonable Warnings for Listed Chemicals in Pesticides Regulated under the Federal Insecticide, Fungicide, and Rodenticide Act, Initial Statement of Reasons 4-5 (Apr. 23, 2018).

⁷ Cal. Code Regs. tit. 27, § 25603(d) (2018)

⁸ Cal. Office of Env'tl Health Hazard Assessment, Cal. Env'tl. Prot. Agency, Proposed Amendments to Clear and Reasonable Warnings for Listed Chemicals in Pesticides Regulated under the Federal Insecticide, Fungicide, and Rodenticide Act, Final Statement of Reasons 2, 5 (Dec. 6, 2018).

⁹ *Id.* at 2-3, 7.

¹⁰ *Id.* at 3-4, 11.

¹¹ *Id.* at 9.

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