

NY Should Learn From Prop 65 Chemical-Labeling Regs

By **Kevin Mayer and Michelle Chipetine** (April 10, 2019, 12:13 PM EDT)

Early this year, New York Gov. Andrew Cuomo announced new legislation^[1] aimed at “protecting” state residents from unknowing “exposure” to allegedly hazardous chemicals. The “Consumer Right to Know Act” mimics California’s Proposition 65,^[2] authorizing the New York State Department of Environmental Conservation, or DEC, in conjunction with the state’s Department of Health and Department of State, to promulgate product labeling requirements to “increase transparency” and alert consumers of the presence of certain chemicals.

In addition to imposing extensive reporting requirements on product manufacturers, the act requires these agencies to assess the feasibility of on-package labeling, specify the types of consumer products subject to the warning requirements, and provide a list of more than 1,000 carcinogens and other chemicals subject to labeling. The disclosure requirements extend to all cleaning products sold in New York, as well as personal care products such as toothpaste, deodorant and shampoo. Manufacturers would also be required to list the ingredients for certain products on their websites.

Specifically, the act expands the DEC’s previously established Household Cleansing Product Information Disclosure Program requirements “to cover all cleaning products sold in New York State,” and provides the Department of Health with “the authority to require similar disclosure for the manufacturers of personal care products.”^[3]

Is this a new Prop 65?

Not exactly. The New York law will likely contain several significant differences from the California regulatory scheme. For example, the New York legislation proposes that state agencies will be responsible for determining which products will require a warning, rather than delegating this duty to individual businesses as occurs under Prop 65.

Moreover, unlike Prop 65, the New York legislation provides no private right of action, thus leaving potential enforcement up to the agencies. Nonetheless, it remains unclear how this law will be enforced, by whom and what penalties may be faced by alleged violators.



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The absence of a private right to enforce the act, coupled with shifting the burden of justifying whether a warning is required from businesses to government agencies, will notionally prevent a similar flood of hypertechnical violation claims and, in the words of former California Gov. Jerry Brown, the sort of “frivolous shakedown lawsuits” that currently plague the California courts.

While this is a step in the right direction, and suggests that New York may have learned a thing or two from multiple industries’ unfortunate experiences under Prop 65, it will be interesting to see how closely the act will hew to Prop 65 in other respects.

For example, it is unclear whether the New York DEC will adopt the list of carcinogens and reproductive toxins utilized by the California Office of Environmental Health Hazard Assessment, or OEHHA as well as the content of required Prop 65 “exposure” warnings. It is also unclear whether the act will target substances other than carcinogens and reproductive toxins. The press release for the act broadly discusses warnings for “potentially hazardous chemicals,” which, as a matter of science (indeed, the first principle of toxicology is “the dose makes the poison”), is virtually limitless.

What can we learn from Prop 65?

Prop 65 requires businesses to provide “clear and reasonable warnings” to consumers before “knowingly and intentionally” exposing them to any chemical on OEHHA’s list, at levels which are orders of magnitude beneath any even remotely contemplated — much less shown — to pose a potential risk of harm.

As stated by the American Cancer Society,[4] “the law defines ‘no significant risk’ [for a carcinogen] as a level of exposure that would cause no more than 1 extra case of cancer in 100,000 people over a 70-year lifetime. So a compound can be unlabeled if a person exposed to the substance at the expected level for 70 years is estimated to have a 1 in 100,000 chance or less of getting cancer due to that exposure. The law also has similar strict cutoff levels for birth defects and reproductive harm.”

What does this mean in practical terms? Not much. Prop 65 simply requires warnings about “exposure” to listed chemicals. Exposure is not the same thing as dose. Exposure is merely the opportunity to receive a dose. Dose is the amount actually taken into, retained and metabolized within the body. It is for this reason that “the dose makes the poison”.

Prop 65 warnings address only exposure and do not communicate other critical information such as (1) the basis for the determination of carcinogenicity or reproductive toxicity; (2) the concentration of the listed chemical in the product; or (3) the duration, frequency or intensity of exposure the consumer may encounter through use or consumption of the product. In the absence of such information, one cannot meaningfully determine the presence or absence of actual “risk,” thus rendering the warning essentially meaningless. After all, literally any substance can be “toxic” at the right dose.

What’s the harm?

The public health goals accompanying New York’s act and California’s Prop 65 are well-intended, albeit misguided. As Cuomo stated somewhat hyperbolically during his announcement of the proposed legislation, “[t]he more we know about our exposure to chemicals, the more frightening the situation is ... Consumers have the right to know what is in the products they use, and requiring labeling on designated products will provide consumers with the information they deserve.”

Compelling as this sentiment may be, and while a legitimate warning will alert consumers to a real potential hazard, over-warning can have the opposite effect. Where warnings become commonplace, as they are in California under Prop 65, they simply fade into the background. Seeing a cancer warning label on beef jerky with an expiration date of 2093 might give one pause. However, if one sees the same label on 20 other products on the grocery store shelves, including coffee beans, bread and protein bars, one tends to ignore them.

Indeed, the coffee example is illustrative. A California trial court held that coffee companies failed to show they should not be required to place a Prop 65 warning on their products due to the presence of a specific chemical — acrylamide — that is formed during the roasting of coffee beans.[5]

Acrylamide is found in almost all foods that are cooked at a high temperature, from French fries to baked goods, and appears on the Prop 65 list of carcinogens. While acrylamide may pose a risk of cancer at extraordinarily high doses, the amount contained in coffee and other food products is harmless. No human studies have found that humans are at any risk from acrylamide under the circumstances of exposure and dose actually experienced. And yet, the act and Prop 65 are concerned solely with the notion of “exposure,” not risk or causation.

It is for this reason that, in light of the public outcry arising from the California trial court’s decision in the coffee litigation, OEHHA is now adopting a new rule[6] stating that the mixture of chemicals in coffee does not pose an increased risk of cancer to humans — a wholly accurate statement in light of worldwide studies showing that coffee is actually protective of humans from various forms of cancer.[7]

Indisputably, many substances are capable of causing cancer. Coffee and bread are likely not among them. The problem with over-warning is that the public becomes overwhelmed by and ultimately desensitized to the warnings. New York has a real opportunity to educate consumers of legitimate risks to help them make informed decisions about the products they chose to purchase and consume. If the state follows in California’s footsteps too closely, however, warning labels under the Consumer Right to Know Act will become as ubiquitous (and as ignored) as a “Don’t Walk” street sign in Manhattan.

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[1] <https://www.governor.ny.gov/news/governor-cuomo-announces-proposal-executive-budget-protect-new-yorkers-unknown-exposure-toxic>

[2] <https://oehha.ca.gov/proposition-65/general-info/proposition-65-plain-language>

[3] <https://www.jdsupra.com/legalnews/new-york-governor-announces-proposed-84205/>

[4] <https://www.cancer.org/cancer/cancer-causes/general-info/cancer-warning-labels-based-on-californias-proposition-65.html>

[5] <https://www.npr.org/sections/thetwo-way/2018/03/30/598348764/fact-check-calif-judge-rules-coffee-must-come-with-a-cancer-warning-but-should-i>

[6] <https://www.law.com/therecorder/2018/07/05/new-prop-65-warning-requirements-are-coming-on-aug-30-are-you-ready/>

[7] <https://www.latimes.com/opinion/editorials/la-ed-proposition-65-warning-coffee-20170930-story.html>