



FoodIndustry

COUNSEL LLC

“GOING ALL-IN FOR FOOD AND ALL-OUT FOR THOSE WHO PRODUCE IT”



Shawn Stevens

Food Industry Consultant and Lawyer

stevens@foodindustrycounsel.com

920.698.2561

PROPOSITION 65

**What You Need to Know
and Do NOW to Ensure Compliance**



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PROPOSITION 65

Enacted by referendum in 1986

Requires warnings for any exposure to a chemical known to the State of California to cause cancer, birth defects or other reproductive harm.

PROPOSITION 65

WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.

WARNING: Consuming 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/or (as appropriate) [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/food.

\$2,500 per day



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PROPOSITION 65 SHAKEDOWN

CA PROP 65 WARNING:
THIS PRODUCT CONTAINS
CHEMICALS KNOWN TO
THE STATE OF CALIFORNIA
TO CAUSE CANCER, OR
BIRTH DEFECTS, OR OTHER
REPRODUCTIVE HARM.



WARNING:

The Disneyland Resort
contains chemicals
known to the state of
California to cause
cancer and birth
defects or other
reproductive harm.

Proposition 65,
California Health &
Safety Code Section
25249.6 et seq.

WARNING

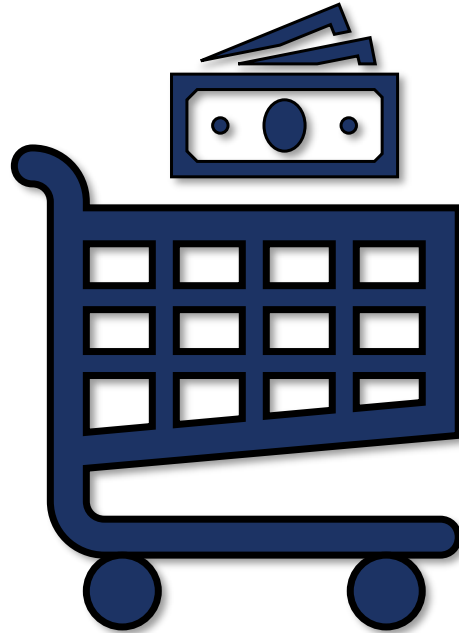
The air in and around this jet
bridge sometimes contains jet
engine exhaust, fumes from
jet fuel, and exhaust from
equipment used to service
airplanes. Those substances
contain chemicals known to
the state to cause cancer,
birth defects, and other
reproductive harm.

Given pursuant to California Proposition 65



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PROPOSITION 65 SHAKEDOWN



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PROPOSITION 65 SHAKEDOWN

Onus is typically on manufacturers

Unless retailer has own private label

But ... plaintiff lawyers don't care



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HOW MANY FOOD PRODUCTS TARGETED SO FAR IN 2018?



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WHAT TYPES OF FOOD PRODUCTS TARGETED?

**coffee, potato chips, black olives,
baby food, cookies, prune juice, cinnamon,
oregano, shrimp, oysters, popcorn, clams,
noodle soups, nutrition bars, almonds,
and many, many others.**



WHAT IS THE SHAKEDOWN PROCESS?

60-Day Notice Settlement Demand Lawsuit



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WHAT IS THE SHAKEDOWN PROCESS?

Revised Proposition 65 Requirements are going into effect, beginning August 30, 2018

Required language of the warnings has been changed from “contains” to “may expose”

Category Shelf-Tags to Point-of-Sale Shelf-Tags

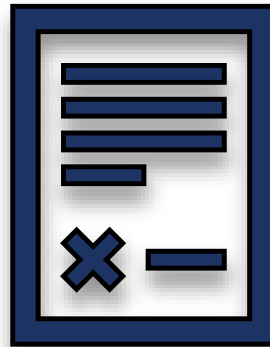
DEFENSE STRATEGIES



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DEFENSE STRATEGIES

**Amend contracts to require indemnification
for Proposition 65 claims.**



DEFENSE STRATEGIES



Determine which products require warnings



Send information pamphlets to suppliers

**Send letters to all suppliers asking them to identify whether their product will expose consumers to chemicals known to the State of California ...
(+ indemnity)**



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DEFENSE STRATEGIES



Provide adequate warnings where needed



Product Warnings

Typically the easiest, because the supplier is managing the labelling and ensuring compliance.

However, may create some logistics problems

WARNING: Consuming 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/or (as appropriate) [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/food.




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DEFENSE STRATEGIES

 **Provide adequate warnings where needed** 

Point-of-Sale Shelf-Tags

must be prominently displayed with such conspicuousness, with other words, statements, or designs as to render the warning likely to be seen, read, and understood by an ordinary individual under customary conditions of purchase.



DEFENSE STRATEGIES

Provide adequate warnings where needed

Internet Sales

The word WARNING must be hyperlinked on the product display page, or by prominently displaying the warning to the purchaser prior to purchasing.



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DEFENSE STRATEGIES

Statute of Limitations

Defective Notices

Federal Preemption

Adequate Warnings

Safe Harbor Levels

INSRLs and MADLs

Naturally Occurring



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DEFENSE STRATEGIES

What happens when cases settle?

New exposure thresholds

Compliance with these may or may not protect you

CAN YOU “OPT IN?”



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CLOSING THOUGHTS

What is the future of Proposition 65?



QUESTIONS?



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