



# Food Industry

COUNSEL LLC

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



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# 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.**



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# 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](http://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

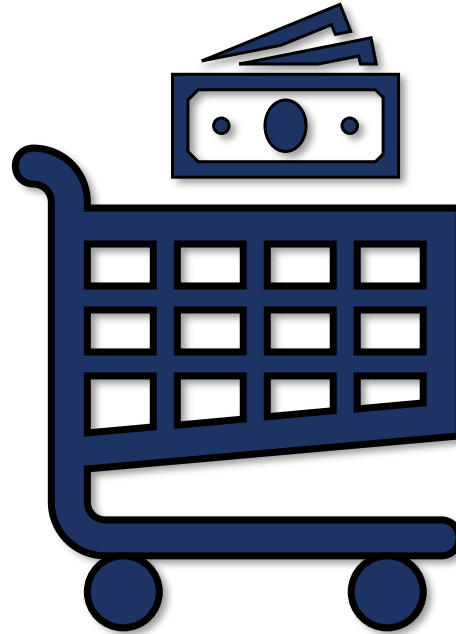
The air in and around this jet bridge sometimes contains jet engine exhaust, fumes from jet fuel, and exhaust from equipment used to service airplanes. Those substances contain chemicals known to the state to cause cancer, birth defects, and other reproductive harm.

Given pursuant to California Proposition 65



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# PROPOSITION 65 SHAKEDOWN



# **PROPOSITION 65 SHAKEDOWN**

**Onus is typically on manufacturers**

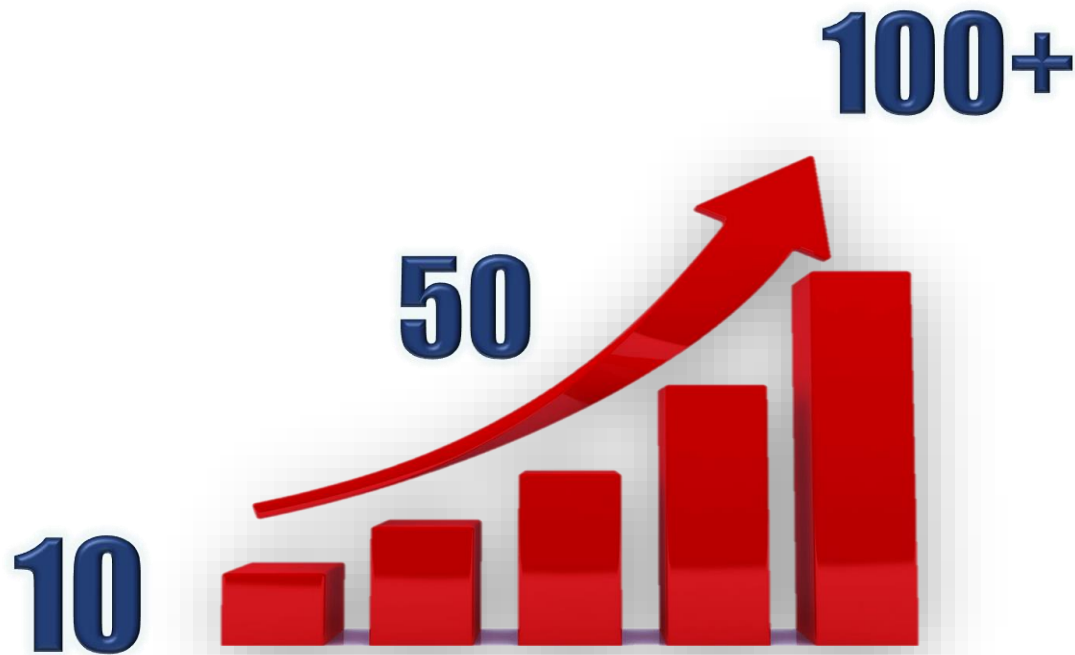
**Unless retailer has own private label**

**But ... plaintiff lawyers don't care**



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# HOW MANY FOOD PRODUCTS TARGETED SO FAR IN 2018?





# 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.**



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# 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**



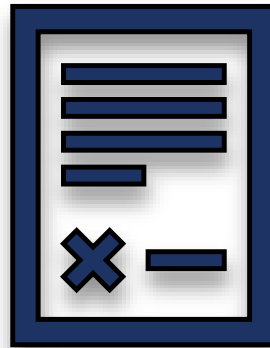
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# DEFENSE STRATEGIES



# 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](http://www.P65Warnings.ca.gov/food).



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# 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**

**Naturally Occurring**



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# DEFENSE STRATEGIES

**What happens when cases settle?**

**New exposure thresholds**

**NSRLs and MADLs**

**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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