

# Buchalter

## CLIENT ALERT

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### **Proposition 65 Updates: A Sampling Of Notices Of Violation Filed in 2019, A Cautionary Tale For Environmental Warnings, and Meeting The February 28th Deadline**

I hope your 2019 is off to a good start! I have been tracking Prop. 65 filings this year, and it is evident that many of the usual products (general consumer products), chemicals (lead and phthalates), noticing parties and law firms are at play. However, it is apparent that there are a new crop of “noticing parties” and lawyers entering this arena, signaling that it is an area of rapid growth and profit for the plaintiff’s bar.

After researching the recently filed notices, I compiled a representative list of the most common products as set forth below. I still contend that noticing parties are reaching for the “lowest hanging fruit”- targeting low price point products that are easily bought in discount and big-box stores. If you sell consumer products that meet these criteria, you should insure compliance with Prop. 65 immediately. Aside from consumer products, there have been developments in the environmental exposure warnings that I will discuss below.

#### **Representative Products and Noticing Parties**

<b>Product</b>	<b>Chemical</b>	<b>Noticing Party</b>
Acrylic Paint Set	DEHP	Anthony Ferreiro
Alcohol		John Devlin
Artificial plant	DINP	Shefa LMV
Blending makeup sponge	DEHP	CAPA (Center for Advanced Public Awareness) AND Kawahito Law Group
Boxing gloves	DEHP	Ecological Alliance
Clam meat	Lead	Chemical Toxin Working Group
Clear Cross Body Bags with plastic components	DEHP	CAG (Consumer Advocacy Group)
Darice metal wire	Lead	APS&EE
Faux leather and vinyl fabric	DEHP	APS&EE
Foldable chair with polymer components	DEHP	CAG
Frying pans	DEHP	Ecological Alliance
Manicure and brush sets	DEHP/DINP	Ecological Alliance
Non-slip placemats	DEHP	CAPA

Product	Chemical	Noticing Party
Over-the-door organizer	DEHP	Center for Advanced Public Awareness
Raw cacao	Cadmium and cadmium components	CAG
Reflective Sticker Packs	DEHP	Ecological Alliance
Seasoned laver	Cadmium and cadmium components	CAG
Shoe cleaning kit	DEHP	Ecological Alliance
Sink Mat	DEHP	CAPA
Tire gauges	DEHP	Ecological Alliance
Travel pouch with vinyl components	DEHP	CAG
Umbrella Cover	DEHP	Anthony Ferreiro
Women's decorated plastic sandals	DBP	CAG

### **"Test Case" in Environmental Exposure Warnings**

I have uncovered a recently filed notice of violation that should serve as a cautionary tale to businesses with respect to environmental and occupational exposure warnings. An environmental exposure notice was filed on February 1, 2019 against a manufacturing company in Huntington Beach, alleging styrene exposures from plastics processing. The notice alleges that the violations have been occurring since April 2017 and the location of the exposure is the neighborhood surrounding a 0.1 mile radius of the facility. The noticing party claims that the facility's operations release styrene into the air, exposing residents living and working within these limits to styrene, and that there is no clear and reasonable warning provided regarding the carcinogenic hazards of styrene. This notice is unique because it seeks to enforce a draconian warning requirement as it encompasses persons outside of the manufacturing company.

According to Title 27 Cal. Code of Regs. Article 6, § 25604 (the section applying to environmental exposures), businesses must warn at indoor and outdoor spaces with clearly defined entrances, with a sign in 72-font type or larger bearing the following language:



**WARNING:** Entering this area can expose you to chemicals known to the State of California to cause birth defects or other reproductive harm, including [name of one or more chemicals], from [name of one or more sources of exposure]. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

The regulations state that the warning must be provided in a conspicuous manner and in a manner that is likely to be seen, read and understood by an ordinary individual in the course of normal daily activity. Crucially, the warning must also be provided in a notice that is mailed, sent electronically, or delivered to each occupant in the affected area. The notice must identify one or more sources of exposure, include a map that clearly identifies the affected area, be provided every 3 months, and can be published in the largest newspaper that is circulated in the area for which the warning is given. This is a significant burden for business, and one that has not regularly been tested by the typical notices of violation. If you own or operate

physical locations within California, you should take this opportunity to consider whether such warnings are required, and to whom the warnings should be provided.

## **Upcoming Deadline – February 28, 2019**

As a reminder, there is an upcoming deadline with which you must comply if applicable. If you are providing warnings to downstream retailers (in lieu of warning on the package or product), pursuant to Title 27 Cal. Code of Regs. Article 6, § 25600.2, the notice to the retailer must be renewed and receipt of the notice must be confirmed electronically or in writing by the retail seller's authorized agent no later than February 28, 2019. Thereafter, the notice must be provided annually during the period in which the product is sold in California by the retail seller. If you add a different or additional chemical name or endpoint, an additional notice is required within 90 days of such change in the composition of the product. This section does not apply if you are placing a warning on the product and the retailer is simply selling the product with the label.



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