

WARNING:

PROP 65 BOUNTY HUNTERS ON THE LOOSE



California's Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65 (Prop 65), continues to evolve. Prop 65 requires businesses to provide "clear and reasonable" warnings before exposing individuals in California to chemicals known to cause cancer, birth defects or other reproductive harm. The list of chemicals is ever expanding and now includes over 900 substances.

The California Office of Environmental Health Hazard Assessment (the lead agency implementing compliance regulations for Prop 65 - "OEHHA") has recently amended its regulations concerning requirements for consumer product warnings. Because of this, businesses should be mindful of their labeling, online disclosure and contractual protections, or lack thereof.

Under the previous rule, generic short-form warning labels, such as "Warning: Cancer and Reproductive Harm. www.P65Warnings.ca.gov," were sufficient for all products. However, following the recent amendment, the most notable change is that more detail is now needed. Specifically, short-form warning labels now require identifying at least one specific chemical per risk endpoint. For example, "Warning: Exposes you to phthalates (DEHP), a chemical known to the State of California to cause cancer and reproductive harm. www.P65Warnings.ca.gov."

Although food and beverages are often the first things that come to mind when thinking about Prop 65, the law applies more broadly. Considering the several chemicals added to the Prop 65 list, including certain PFAS ("forever chemicals") and new reproductive toxins and carcinogens, the additions expand compliance obligations across multiple industries, from consumer goods to gyms. As it relates to gym facilities, equipment and cleaning

products can contain listed chemicals that trigger warning obligations – for example, phthalates in flooring, formaldehyde in adhesives or cleaning products, and lead in certain metal components. In addition, if a warning applies, such warnings must also appear in membership agreements prior to purchase by a California resident.

Prop 65 has a unique feature as far as statutes go in that it empowers private plaintiffs to act as private attorneys general – often referred to as Prop 65 bounty hunters – to bring lawsuits against businesses alleged to be in violation. While the intention behind Prop 65 was to address legitimate public health concerns, the rise of these bounty hunters means businesses must remain vigilant, even regarding minor technical violations. With civil penalties for violating Prop 65 as high as \$2,500 per violation per day, it is no surprise some have taken full advantage of the system and turned enforcement into a career, seeking out technical violations as a source of income.

What does this mean for your PF® business? First, franchisees should reassess labeling strategies in light of the new requirements, particularly the obligation to list at least one specific chemical per risk endpoint. Franchisees should conduct a compliance audit and update areas of the facility and online membership agreements to ensure full compliance.

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by Justin Klein



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Prop 65

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Second, supply chains should be evaluated to identify chemicals that may trigger warning requirements, taking into consideration the ever-growing list of chemicals listed on www.P65warnings.ca.gov/chemicals. Franchisees could even consider contacting a toxicologist familiar with Prop 65 to help conduct an exposure assessment.

Third, get familiar with your rights and obligations in vendor and supplier agreements to clarify which party bears responsibility for warnings, testing and indemnification, and negotiate contractual protections where appropriate. Finally, train your employees to ensure proper compliance and stay informed with any updates to chemical disclosure laws, such as Prop 65.

The good news is that the new amendments to Prop 65 warning regulations provide ample time for businesses to review their current warnings and develop a plan to implement the new warning requirements. Although effective as of Jan. 1, businesses have three years (until Jan. 1, 2028) to comply with the new short-form warning labels and other requirements.

Bear in mind that PF franchise agreements, like most franchise agreements, include a standard provision requiring franchisees to “operate your [business] in full compliance with all applicable laws, ordinances and regulations.” The franchise agreement further states that “[y]ou are responsible for ensuring that your membership agreement . . . compl[ies] with applicable law.” In other words, franchisees are ultimately responsible for ensuring that their operations meet legal and regulatory requirements, including labeling, signage and disclosure obligations under Prop 65.

PF franchise agreement insurance provisions also intersect with Prop 65 liability. Although general liability and umbrella coverages are designed to protect against a broad range of claims, many policies exclude statutory penalties – such as those arising from Prop 65 – and thus may not expressly cover Prop 65 enforcement actions. Franchisees should review their policies carefully and consult with insurance advisors to determine whether coverages extend to Prop 65 claims and consider whether additional coverage is advisable. It is important to keep in mind that even if coverage extends to Prop 65 claims, insurance coverage may be limited or even denied if the franchisee fails to show proactive and demonstrated compliance steps. In other words, always document compliance measures and keep signage and online warnings up to date, all the while being mindful of any new developments as Prop 65 continues to evolve.

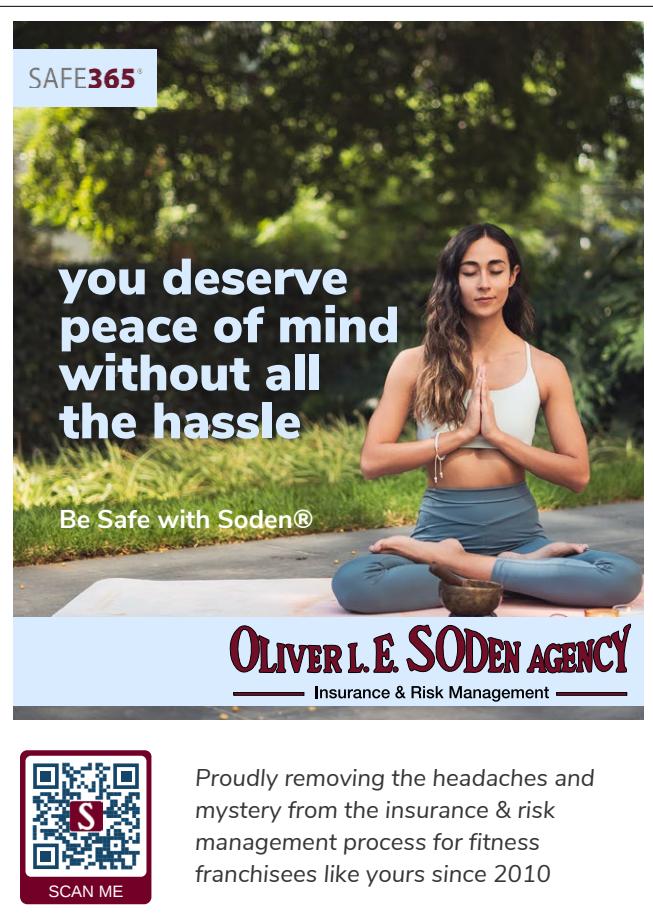
Similarly, franchisees should be aware of their indemnity obligations. Franchise agreements typically require franchisees to indemnify the franchisor for any claims related to the operation of the franchised business, especially if the claim is for any omission, act or error on behalf of the franchisee. Prop 65 claims fall squarely within these parameters. For example, if a franchisee fails to display proper warning labels and a Prop 65 bounty hunter comes knocking on your door with a lawsuit in hand, the franchisee will likely be on the hook for any liability the franchisor is faced with as a result thereof. Similarly, if it is the case that a Prop 65 claim is driven by a franchisor-mandated finish or product, such as flooring specifications or cleaning products, franchisees may nonetheless be on the hook unless there are specific carve outs in place that the franchisee has negotiated prior to entering into a franchise agreement.

Although it can be said that California is the driving force behind such “right-to-know” laws, particularly chemical disclosure laws, keep in mind that many other states are following the trend and adopting statutes with similar disclosure obligations. For example, Vermont and Connecticut have implemented their own form of chemical disclosure requirements. Massachusetts has enacted its Toxic Use Reduction Act aimed at implementing reduction plans for toxic chemicals. New York’s Child Safe Products Act and Washington’s Children’s Safe Products Act focus on protecting against toxic chemicals in children’s products. While these laws are not as robust as California’s Prop 65, they illustrate a growing nationwide trend in emphasizing chemical transparency. Therefore, it would be wise for businesses operating across multiple states to consider a broader compliance strategy that extends beyond the requirements of Prop 65.

As Prop 65 continues to evolve, it is clear that generic warnings will no longer cut it. Franchisees must identify specific chemicals, post clear signage and update membership agreements. Franchisees should stay proactive and minimize risk by aligning compliance programs, insurance coverage and indemnity obligations now, and not just within California but across all jurisdictions where they operate. By treating Prop 65 as a baseline, PF franchisees will be better prepared to tackle the nationwide trend in chemical disclosure laws. 

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