

# **California's Proposition 65: Background, Traps, and 2021 Updates**

Sherry E. Jackman and Sedina L. Banks

June 23, 2021



# Today's Presenters



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# Today's Agenda

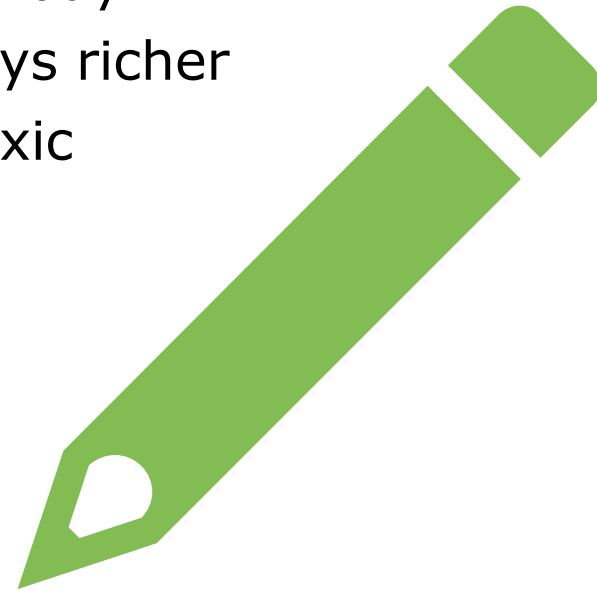
## 1. What is Prop 65?

2. Who is subject to Prop 65?
3. What are Prop 65-listed chemicals and safe harbors?
4. How do businesses comply with Prop 65?
5. Who has compliance responsibility under Prop 65?
6. Why do businesses need to comply with Prop 65?
7. What legal strategy minimizes Prop 65 liability?



## Q1: What is Prop 65?

- a. A fairly useless law resulting in overwarning
- b. A whole lotta stickers on things I buy
- c. A way to make plaintiffs' attorneys richer
- d. The "Safe Drinking Water and Toxic Enforcement Act of 1986"
- e. All of the above



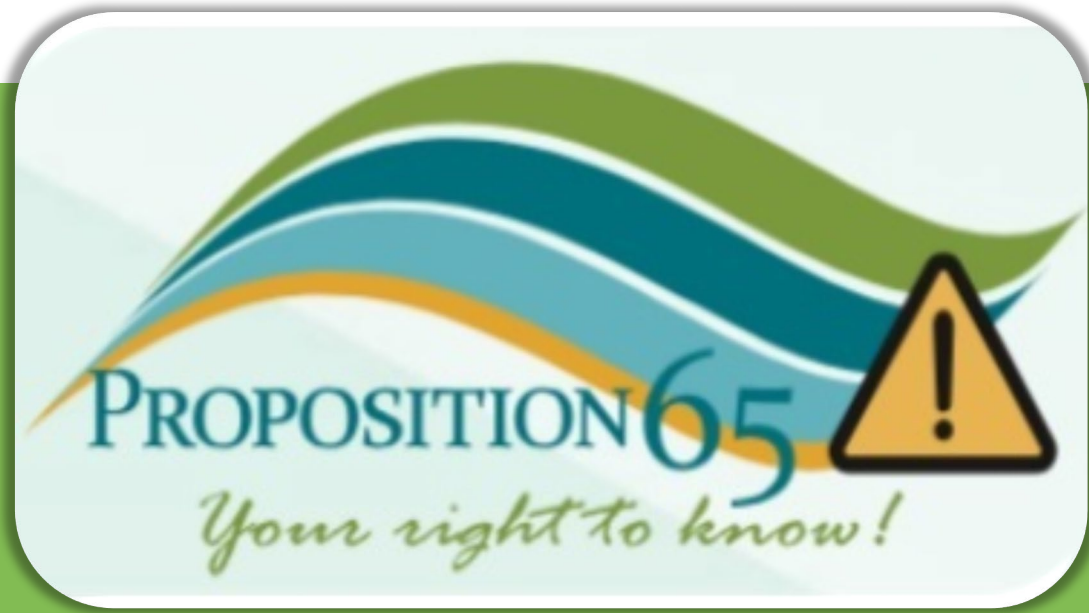


**Q2: My company has been sued under Prop 65 in the past.**

- a. True
- b. False







- Requires State to maintain and update list of chemicals known to CA to cause cancer or reproductive harm (called endpoints)
- Two principal provisions:
  - Protection of drinking water; and
  - “Clear and reasonable” warnings



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**Businesses with  
10 or more employees**





**Businesses selling  
products in California**





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**Governmental Agencies are  
not subject to Prop 65**



# Businesses that cannot demonstrate safe harbor exposure levels





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# What are the Prop 65 chemicals?

Alcoholic  
beverages



One year to  
comply after  
listing



## STATE OF CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986

### CHEMICALS KNOWN TO THE STATE TO CAUSE CANCER OR REPRODUCTIVE TOXICITY March 19, 2021

The Safe Drinking Water and Toxic Enforcement Act of 1986 requires that the Governor revise and republish at least once per year the list of chemicals known to the State to cause cancer or reproductive toxicity. The identification number indicated in the following list is the Chemical Abstracts Service (CAS) Registry Number. No CAS number is given when several substances are presented as a single listing. The date refers to the initial appearance of the chemical on the list. For easy reference, chemicals which are shown underlined are newly added. Chemicals or endpoints shown in ~~strikeout~~ were placed on the Proposition 65 list on the date noted, and have subsequently been removed.

Chemical	Type of Toxicity	CAS No.	Date Listed
A-alpha-C (2-Amino-9H-pyrido [2,3-b]indole)	Cancer	26148-68-5	January 1, 1990
Abiraterone acetate	developmental, female, male	154229-18-2	April 8, 2016
Acetaldehyde	cancer	75-07-0	April 1, 1988
Acetamide	cancer	60-35-5	January 1, 1990
Acetazolamide	developmental	59-66-5	August 20, 1999
Acetochlor	cancer	34256-82-1	January 1, 1989
Acetohydroxamic acid	developmental	546-88-3	April 1, 1990
2-Acetylaminofluorene	cancer	53-96-3	July 1, 1987
Acifluorfen sodium	cancer	62476-59-9	January 1, 1990
Acrylamide	cancer	79-06-1	January 1, 1990
Acrylamide	developmental, male	79-06-1	February 25, 2011
Acrylonitrile	cancer	107-13-1	July 1, 1987
Actinomycin D	cancer	50-76-0	October 1, 1989
Actinomycin D	developmental	50-76-0	October 1, 1992
AF-2-[2-(2-furyl)-3-(5-nitro-2-furyl)] acrylamide	cancer	3688-53-7	July 1, 1987
Aflatoxins	cancer	---	January 1, 1988
Alachlor	cancer	15972-60-8	January 1, 1989
Alcoholic beverages	cancer	---	April 29, 2011
Alcoholic beverages, when associated with alcohol abuse	cancer	---	July 1, 1988
Aldrin	cancer	309-00-2	July 1, 1988
All-trans retinoic acid	developmental	302-79-4	January 1, 1989
<del>Allyl chloride, Delisted October 29, 1999</del>	<del>cancer</del>	<del>407-05-1</del>	<del>January 1, 1990</del>
Aloe vera, non-decolorized whole leaf extract	cancer	---	December 4, 2015
Alprazolam	developmental	28981-97-7	July 1, 1990
Altretamine	developmental, male	645-05-6	August 20, 1999
Amantadine hydrochloride	developmental	665-66-7	February 27, 2001
Amikacin sulfate	developmental	39831-55-5	July 1, 1990
2-Aminoanthraquinone	cancer	117-79-3	October 1, 1989
p-Aminoazobenzene	cancer	60-09-3	January 1, 1990
o-Aminoazotoluene	cancer	97-56-3	July 1, 1987

Aspirin

Marijuana smoke





# What are safe harbor levels?

## Safe Harbor Levels

Cancer

**No Significant Risk Level (NSRL):** 0.2 µg/day

Reproductive Toxicity

**Maximum Allowable Dose Level (MADL) :** 140 µg/day

**Last NSRL/MADL Revision:** 2010



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A grayscale photograph of a hallway with a row of white doors. The doors are set into a light-colored wall, and the floor is dark. A bright light source at the end of the hallway creates a strong lens flare effect. A solid green rectangular box is positioned in the lower right portion of the image, containing white text.

**Type of Warnings Required Depends  
on Type of Exposure**



# Environmental





# Occupational



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





# Consumer Product







# Method of Transmission of Warning



# Sign



A product-specific warning on a posted sign, shelf tag, or shelf sign at each point of display of the product



# Electronically



**Product-specific warning provided via any electronic device or process that automatically provides the warning to the purchaser prior to or during the purchase of the product, without requiring them to seek out the warning.**



# Label on a Product



A warning placed on the product itself



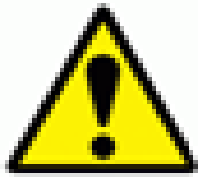


**Clear and Reasonable Warnings Required**



## Long Form Warning

### CALIFORNIA PROP. 65



**WARNING:** This product can expose you to chemicals including lead and lead compounds, which are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warning.ca.gov](http://www.P65Warning.ca.gov).





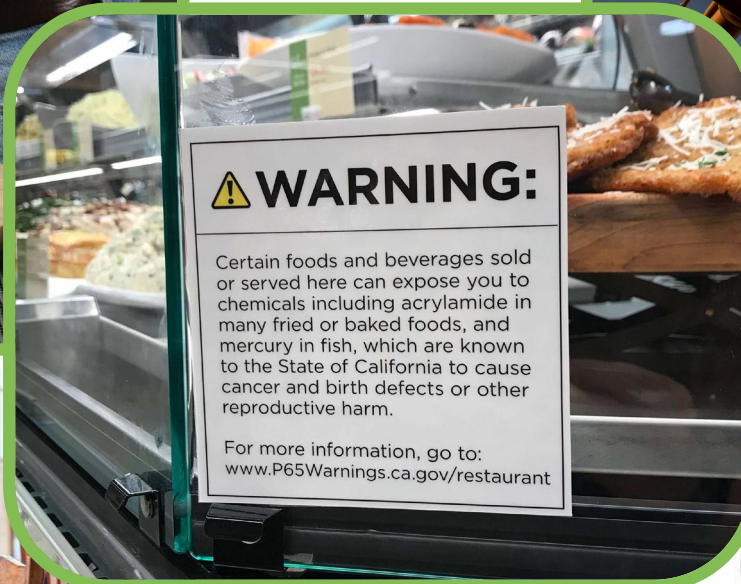
## Short Form Warning





## Short Form Warning





## Specific Warnings for Specific Products or Places





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**Typically, primary responsibility falls on manufacturers, producers, packagers, importers, suppliers and distributors of product as opposed to retailers**



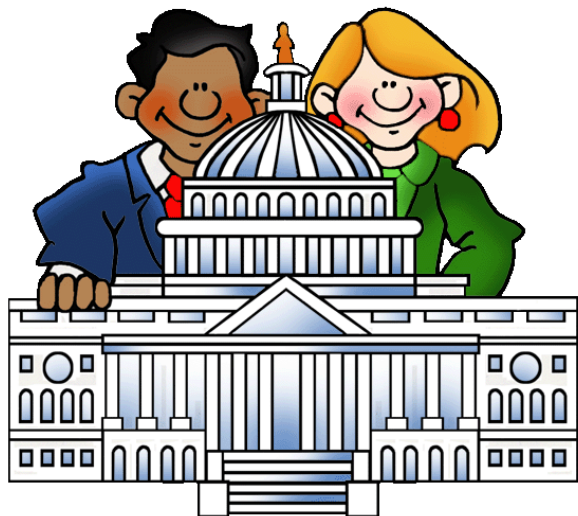
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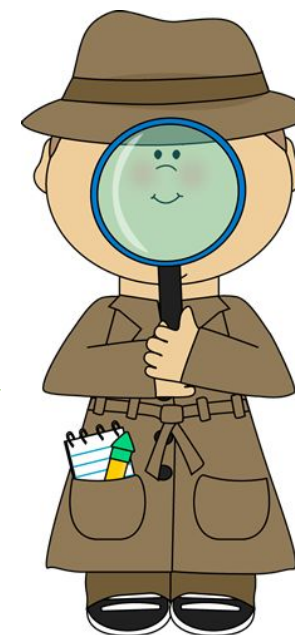
*Your right to know!*





**Government  
Enforcement**

**Private  
Enforcement**





# Private Enforcer:

## 60-day Notice

### 60-DAY NOTICE OF VIOLATION

SENT IN COMPLIANCE WITH  
*Cal. Health & Safety Code § 25249.5, et seq.*  
("Proposition 65")

**DATE:** March 4, 2020

**TO:** JUNICHIRO KAMIYAMA — KAIKO CO., LTD.  
SABUROMARU TSUJINO, President – JINON CORPORATION dba NIJIYA MARKET  
ALFRED STEPHEN BLANCKENSEE, CEO – JINON CORPORATION dba NIJIYA MARKET  
ITSUWA JANICE ITOH, Registered Agent – JINON CORPORATION dba NIJIYA MARKET  
California Attorney General's Office  
District Attorney's Office for All California Counties; and  
City Attorneys for San Francisco, San Diego, San Jose, Sacramento and Los Angeles

**FROM:** Public Health and Safety Advocates, LLC

#### I. INTRODUCTION

Public Health and Safety Advocates, LLC ("PHSA") is the noticing entity, acting in the interest of the general public. It seeks to reduce or eliminate the presence of hazardous substances in consumer products sold in California, and to ensure that California consumers are aware of the presence of such substances in consumer goods so that they can make an educated effort to limit their own exposure where deemed necessary.

This Notice is provided to the public agencies listed above pursuant to California Health & Safety Code § 25249.6, *et seq.* ("Proposition 65"). As noted above, notice is also being provided to the violators: KAIKO CO., LTD., JINON CORPORATION dba NIJIYA MARKET (the "Violators"). The violations covered by this Notice consists of a summary of Proposition 65, Statement of Violation, Number and Duration of Violation, Product Category/Type, Listed Chemical(s), Preservation of Evidence, Product Exposure, Routes of Exposure and type of harm resulting from exposure to the chemicals ("Listed Chemicals") as follows:

Product Exposure:	See Section VI. and VII. Exhibit A
Listed Chemical:	Lead and Cadmium
Routes of Exposure:	Ingestion and Dermal Absorption
Type of Harm:	Cancer, Birth Defect and other Reproductive Harm

#### II. PROPOSITION 65 INFORMATION – SUMMARY

A summary of Proposition 65 and its implementation regulations, prepared by the Office of Environmental Health Hazard Assessment, the lead agency designated under Proposition 65, is enclosed with the copy of the Notice served on the Notice Recipients. For more information concerning the provisions of Proposition 65, please feel free to contact the Office of Environmental Health Hazard Assessment's ("OEHA") Proposition 65 Implementation Office at (916) 445-6900.

on whether and how to eliminate (or reduce) the risk of exposure to the Listed Chemical from the reasonably foreseeable use of the Products.

tionally exposed, and continue to knowingly and intentionally use the Listed Chemical(s), a chemical known to the State of California to cause harm, without first giving clear and reasonable warning of this exposure, the Notice Recipients failed to provide a clear and reasonable warning to the Notice Recipients to Listed Chemical(s).

#### VIOLATIONS

a consumer in California without a clear and reasonable warning is a violation of Proposition 65. The violations have been occurring since at least February 20, 2019, as first introduced and sold in the State of California. These violations are provided prior to exposure of the Listed Chemicals.


through the act of using and consuming the Covered Product, are the Listed Chemical by eating the Covered Product, or when they use the Listed Chemical from the Covered Products onto their fingers and hands and to their mouths through hand-to-mouth activities that involve contact with the Covered Products.

exposures occur when California Citizens use as an ingredient, eat, or use the Listed Chemical from the Covered Products onto their fingers and hands or a portion of the product containing the Listed Chemical. People of all ages, including women of childbearing age.

Covered Products recently purchased and witnessed as being available for sale. Based on publicly available information, the retailers, the product is also provided.

Notice Recipients' benefit to assist in their investigation of the product is not meant to be an exhaustive or comprehensive investigation within the specific type or category of Covered Products at issue. Notice Recipients are obligated to conduct a good-faith investigation into the category of Covered Products that have been manufactured, imported, or sold within the Notice Recipients' custody or control, so as to ensure the California citizens prior to purchase.

#### VII. EXHIBIT A – LISTED CHEMICAL

Item	Toxicant(s)
	Lead and Cadmium

#### CLAIMS

If a desire to have these violations corrected, PHSA is interested in obtaining written agreement by the Violators to: (1) recall any products that do not have the requisite health hazard warnings to provide to those who have purchased the Product so as to eliminate further exposures to the Covered Product; and (2) pay an appropriate civil penalty. PHSA is interested in consumer exposure to the Covered chemical(s), as well as expensive litigation that counsel cannot (1) finalize any settlement until after the 60-day deadline. PHSA Attorney General or any District or City Attorney who has entered into an agreement with PHSA will resolve its claims; such an agreement may

to sue be given to the violators(s) sixty (60) days before the suit is filed. With this letter, PHSA gives notice of the alleged violations to the violators. In absence of any action by the appropriate governmental agency, PHSA may file suit. See *Cal. Code Civ. Proc.* § 382 and *Cal. Code Regs.* Tit. 27 § 25903(d)(1). Per *Cal. Code Regs.* § 25903(d)(1), on this 60 Day Notice is hereby requested to promptly provide the violator(s), producer(s), packager(s), importer(s), supplier(s), and/or

remains open and willing to discuss the possibilities of resolving its

#### E

Notice Recipients preserve and maintain all relevant evidence, including but not limited to, the resolution of this matter. Such relevant evidence includes but is not limited to the Listed Chemicals in the Covered Product; purchase and sales records and quantity sold; list of manufacturer(s), producer(s), importer(s) and quantity in each transaction, as well as current inventory records with Proposition 65 with respect to the Covered Products; presence or potential presence of the Listed Chemical in Covered Product; and the economic model falling within the Covered Products. This demand is made on the State of California, as far back as February 20, 2018, and this Notice.

6 and Title 11, California Code of Regulations, section 3100, a copy of the entire notice and Certificate of Merit is served on the violator(s) as required by section 3102 attached hereto.



**Q3: How many Prop 65 notices were issued in 2019?**

5,924

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# Private Enforcer:

## Certificate of Merit

**CERTIFICATE OF MERIT**  
Health & Safety Code Section 25249.7(d)

I, Evan J. Smith, hereby declare:

- (1) This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the parties identified in the notice have violated Health & Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.
- (2) I am the attorney for the noticing party Ema Bell.
- (3) I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies or other data regarding the alleged exposure to the listed chemicals that are the subject of the action.
- (4) Based on the information obtained through these consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for private action" means that the information provides a credible basis that all elements of the plaintiffs' case can be established and the information did not prove that the alleged violator(s) will be able to establish any of the affirmative defenses set forth in the statute.
- (5) The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including information identified in Health & Safety Code Section 25249.7(h)(2), i.e., (1) the identity of the





# Penalties, Attorneys' Fees, and PILPs





## Penalty Assessment: Relevant Factors

- (A) The nature and extent of the violation.
- (B) The number of, and severity of, the violations.
- (C) The economic effect of the penalty on the violator.
- (D) Whether the violator took good faith measures to comply with this chapter and the time these measures were taken.
- (E) The willfulness of the violator's misconduct.
- (F) The deterrent effect that the imposition of the penalty would have on both the violator and the regulated community as a whole.
- (G) Any other factor that justice may require.







**Penalties: Up to \$2,500 Per Day for Each Violation**



**OEHHA**  
California Office of Environmental  
Health Hazard Assessment

**75%**

**25%**

**Plaintiff**







# Attorneys' Fees





# Private Enforcer Example: Anthony Ferreiro, 2019

## Represented by Brodsky & Smith

Plaintiff Anthony Ferreiro (Year 2019)	
No. of Prop 65 Notices	241
No. of Prop 65 Settlements	91
Total Settlement Pmts.	\$1,387,750
Amt. to Plaintiff	\$31,850
Amt. to CalEPA	\$95,550
Amt. to Brodsky & Smith	\$1,260,350



## Proposition 65 Executive Summary 2019 Private Settlements

Plaintiff	No. of Settlements	Total Settlement Payments	Non-Contingent Civil Penalty*	% of Total	Attorney's Fee and Costs	% of Total	Payment In-Lieu of Penalty (PILP)	% of Total	% of PILP to (Civil Penalty + PILP)
APS&EE, LLC	22	\$1,422,482	\$973,000	68%	\$449,482	32%	\$0	0%	0%
As You Sow	1	\$350,000	\$15,000	4%	\$325,000	93%	\$10,000	3%	40%

No. of Settlements	Total Settlement Payments	Non-Contingent Civil Penalty*	Attorney's Fee and Costs	Payment In-Lieu of Penalty (PILP)
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<b>GRAND TOTAL</b>	<b>898</b>	<b>\$29,810,351</b>	<b>\$5,441,508</b>	<b>\$22,676,093</b>	<b>\$1,692,750</b>
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Macias, Danny	1	\$15,000.00	\$1,000.00	7%	\$14,000	93%	\$0	0%	0%
CA Citizen Protection Group, LLC	17	\$337,000.00	\$15,000.00	4%	\$322,000.00	96%	\$0.00	0%	
Center for Environmental Health (CEH)	46	\$4,122,000	\$635,311	15%	\$2,999,311	73%	\$487,378	12%	43%
Chanler Group, The (combined)									

<b>GRAND TOTAL</b>	<b>898</b>	<b>\$29,810,351</b>	<b>\$5,441,508</b>	<b>18%</b>	<b>\$22,676,093</b>	<b>76%</b>	<b>\$1,692,750</b>	<b>6%</b>	<b>24%</b>
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A background image of Roman soldiers in battle, wearing helmets with red plumes and carrying spears and shields. The scene is dimly lit, suggesting a battlefield at dusk or dawn.

# Defenses to Prop 65 Notice

- Federal preemption
- Naturally occurring
- Defective notice
- Warning sufficient
- Warning not needed
- Exposure assessment
- Res judicata
- Statute of limitations



# Strategy re: Prop 65 Notice

- Respond to notice?
- Settle or litigate?
- How much to settle for?
- In/out of court settlement?
- Reformulate/warn?





# Questions?



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