

PUBLIC COMMENT PERIOD TO BEGIN ON CALIFORNIA'S PROPOSAL TO ALLOW FOR CONTINUED USE OF "POINT-OF-SALE" PROP 65 WARNINGS FOR BPA

Wed Sep 21st, 2016 | Categories: [Environmental Law](#) | By [Bick Law LLP](#)

On September 16, 2016, the California Office of Environmental Health Hazard Assessment (OEHHA) proposed the re-adoption of an emergency regulation that allows temporary use of a standard point-of-sale Proposition 65 "safe harbor" warning for bisphenol A (BPA) exposures to consumers from canned and bottled foods and beverages. The emergency regulation, which became effective April 18, 2016, is in effect for a limited time of 180 days and will expire on October 18, 2016.

OEHHA, the state entity responsible for implementation of Proposition 65, is proposing re-adoption of the emergency regulation for 90 days after the initial period expires because it says the emergency circumstances have not changed since the initial adoption.

The BPA Prop 65 Warning Emergency Regulation

Prop 65 requires companies doing business in California to provide a warning when they knowingly and intentionally cause an exposure to a listed chemical known to the state to cause cancer or reproductive harm. Effective May 11, 2016, companies that manufacture or sell products that expose consumers to BPA are required to provide Prop 65 warnings unless they can affirmatively show that their product does not pose a significant risk of reproductive harm to consumers.

Due to the large number of canned and bottled food and beverage products sold in California, OEHHA was concerned retailers would post warnings for each individual product, which likely simply would have confused customers.

According to OEHHA, the emergency regulation therefore serves to provide a reasonable transition period for businesses to decide whether their product requires a warning and, if so, how to provide it, thereby helping to avoid consumer confusion while ensuring that informative warnings are provided to consumers about exposures to BPA. Our California Proposition 65 lawyers provided a more thorough look at OEHHA's justifications for the emergency regulation in our previous blog, [Emergency Regulation Proposed to Address May 11, 2016 Prop 65 Warning Deadline for Oral Exposure to BPA in Consumer Products](#).

OEHHA actually has made efforts to adopt the provisions of the emergency regulation via the regular rulemaking process. On July 19, 2016, OEHHA submitted its file for the regular rulemaking process to the Office of Administrative Law (OAL). A public hearing on that proposed rulemaking was held on September 12, 2016, and public comments to OAL are due September 26, 2016. The regular rulemaking process will not be complete before October 18, however, when the emergency regulation expires.

OEHHA states that if the emergency regulation is allowed to expire before the regular rulemaking process is completed, California businesses would lose the ability to use the temporary warning process and would have to resort to providing a multitude of warnings in retail stores for canned foods and beverages that cause exposures to BPA.

The public may provide comments on the re-adoption of the emergency regulations directly to OAL within five calendar days of when OAL posts the proposed emergency regulations on its website. OEHHA must wait five working days from the date of its September 16 notice

before it can submit the proposed emergency action to OAL, so look for the emergency regulations to be posted on OAL's website on or about September 23, 2016.

Instructions for submitting comments, as well as additional information about this proposed emergency rulemaking, can be found at <http://oehha.ca.gov/proposition-65/crn/notice-readoption-emergency-action-amend-section-256033-title-27-california-code>.