

OEHHA Suggests Alternative Proposition 65 Warning Language for Acrylamide in Food

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April 18, 2024

The Office of Environmental Health Hazard Assessment (OEHHA) has [proposed an alternative warning option for companies labeling their food products](#) with Proposition 65 cancer warnings related to acrylamide.

The move comes amid ongoing litigation between OEHHA and businesses over the constitutionality of providing Prop. 65 warnings for acrylamide in food, as well as a similar case over warnings for the herbicide glyphosate. In both cases, the plaintiffs have sued OEHHA arguing that there is no scientific consensus on the carcinogenicity of these chemicals, and therefore requiring businesses to place a Prop. 65 warning on products violates the First Amendment's limits on compelled speech.

In 2021, a district court judge imposed a preliminary injunction in [California Chamber of Commerce v. Becerra and CERT](#), blocking new Prop. 65 notices of violation for acrylamide in food from being filed while the litigation proceeded. The 9th U.S. Circuit Court of Appeals upheld the preliminary injunction and the case is now pending in the district court for the Eastern District of California.

In response, OEHHA amended its regulation setting the safe harbor warning language for acrylamide. The safe harbor warning language is deemed to provide "a clear and reasonable warning" as required by Prop. 65 and is meant to help businesses comply with the law [see [OEHHA Proposes Prop. 65 Safe Harbor for Acrylamide in Cooked Foods](#), October 8, 2021].

While typical Prop. 65 cancer warnings include wording that a listed chemical "is known to the state of California to cause cancer," OEHHA provided the following alternative wording for food products containing acrylamide: "CALIFORNIA WARNING: Consuming this product can expose you to acrylamide, a probable human carcinogen formed in some foods during cooking or processing at high temperatures. Many factors affect your cancer risk, including the frequency and amount of the chemical consumed. For more information including ways to reduce your exposure, see www.P65Warnings.ca.gov/acrylamide."

The constitutionality of that new safe harbor warning language has not been decided by the courts. But, now OEHHA has offered a second optional safe harbor warning language for acrylamide. The proposal would allow companies to continue to use the above warning language or use this second version.

The wording of the second version is: "WARNING:" or "CA WARNING" or "CALIFORNIA WARNING" followed by the choice of two sentences:

- "Consuming this product can expose you to acrylamide;" or
- "Consuming this product can expose you to acrylamide, a chemical formed in some foods during cooking or processing at high temperatures."

Following that, the warning would have to include one of the following three sentences:

- "The International Agency for Research on Cancer has found that acrylamide is probably carcinogenic to humans;"
- "The United States Environmental Protection Agency has found that acrylamide is likely to be carcinogenic to humans;" or
- "The United States National Toxicology Program has found that acrylamide is reasonably anticipated to cause cancer in humans."

The warning may end there, or businesses can add on one of the three following sentences:

- "Acrylamide has been found to cause cancer in laboratory animals;"

- "Many factors affect your cancer risk, including the frequency and amount of the chemical consumed;" or
- "For more information including ways to reduce your exposure, see www.P65Warnings.ca.gov/acrylamide."

In proposing this new alternative safe harbor warning language, OEHHA pointed to a subsequent ruling from the 9th U.S. Circuit Court of Appeals in the First Amendment litigation involving Prop. 65 cancer warnings for glyphosate. In *National Association of Wheat Growers v. Zeise* case, the 9th Circuit concluded that there was an active scientific debate over the carcinogenicity of glyphosate, and therefore the Prop. 65 warning requirement was unconstitutional. The court also rejected alternative safe harbor warning language that OEHHA had approved that had attempted to address the scientific disagreement [see [Prop. 65's Glyphosate Warning Violates First Amendment, 9th Circuit Rules](#), November 15, 2023].

OEHHA pointed to the First Amendment standards analyzed by the courts in its decision to propose an alternative safe harbor warning for acrylamide.

"Although OEHHA believes that the existing safe harbor warning for acrylamide in food complies with the First Amendment, OEHHA has determined that providing an additional safe harbor warning will further the right-to-know provisions of the act while ensuring that the warning remains '(1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome,'" according to its [Initial Statement of Reasons for the acrylamide warning regulation](#). "The proposal also provides businesses with increased flexibility."

OEHHA is accepting public comment on the draft regulation until Monday, May 20, 2024.