



California
LEGISLATIVE INFORMATION

AB-227 Proposition 65: enforcement. (2013-2014)

AMENDED IN ASSEMBLY MAY 08, 2013

AMENDED IN ASSEMBLY APRIL 09, 2013

CALIFORNIA LEGISLATURE— 2013–2014 REGULAR SESSION

ASSEMBLY BILL

No. 227

Introduced by Assembly Member Gatto
(Coauthor(s): Assembly Member Muratsuchi)

February 04, 2013

An act to amend Section 25249.7 of the Health and Safety Code, relating to toxic ~~substances.~~ *substances, and declaring the urgency thereof, to take effect immediately.*

LEGISLATIVE COUNSEL'S DIGEST

AB 227, as amended, Gatto. Proposition 65: enforcement.

(1) The existing Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) prohibits any person, in the course of doing business, from knowingly and intentionally exposing any individual to a chemical known to the state to cause cancer or reproductive toxicity without giving a specified warning, or from knowingly discharging or releasing such a chemical into water or any source of drinking water, except as specified. The act imposes civil penalties *of not more than \$2,500 per day* upon persons who violate those prohibitions, and provides for the enforcement of those prohibitions by the Attorney General, a district attorney, or specified city attorneys or prosecutors, and by any person in the public interest. The act requires any person bringing an action in the public interest, or any private person filing an action in which a violation of the act is alleged, to notify the Attorney General, the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and the alleged violator that such an action has been filed.

This bill would ~~allow a person who receives a notice that alleges the person is in violation of the warning requirements of Proposition 65 to correct the violation within 14 days after receiving that notice and serve on the person that sent the notice a written statement, signed under penalty of perjury, that describes the corrective actions and to which is attached a copy of the posted warnings. The bill would~~ prohibit an enforcement action from being ~~commenced~~ *filed* by a person in the public interest, *and would prohibit the recovery of certain payments or reimbursements,* if the ~~person receiving the notice of alleged violation takes those actions~~ *notice to the alleged violator alleges a failure to provide a clear and reasonable warning for certain specified exposures and, within 14 days after receiving the notice, the alleged violator corrects the alleged violation, pays a civil penalty in the amount of \$500 per facility or premises, and serves on the person*

who sent the notice a specified written statement, signed under penalty of perjury. Since the commission of perjury is a crime, the bill would impose a state-mandated local program by creating a new crime.

The bill would require a person who brings an action in the public interest and serves a notice of an alleged violation for those exposures to include certain information in the notice and would provide, if there is a dispute over whether an action is prohibited under the provisions added by the bill, that the alleged violator bears the burden of proving the applicability of those provisions.

(2) Proposition 65 provides that it may be amended by a statute, passed in each house by 2/3 vote, to further its purposes.

This bill would find and declare that it furthers the purposes of Proposition 65 *and would make other findings regarding the purposes of the bill. The bill would declare that a specified provision of the bill is independent and severable from the other changes made by this bill.*

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

(4) This bill would declare that it is to take effect immediately as an urgency statute.

Vote: 2/3 Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 25249.7 of the Health and Safety Code is amended to read:

25249.7. (a) A person who violates or threatens to violate Section 25249.5 or 25249.6 may be enjoined in any court of competent jurisdiction.

(b) (1) A person who has violated Section 25249.5 or 25249.6 is liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) per day for each violation in addition to any other penalty established by law. That civil penalty may be assessed and recovered in a civil action brought in any court of competent jurisdiction.

(2) In assessing the amount of a civil penalty for a violation of this chapter, the court shall consider all of the following:

(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.

(c) Actions pursuant to this section may be brought by the Attorney General in the name of the people of the State of California, by a district attorney, by a city attorney of a city having a population in excess of 750,000, or, with the consent of the district attorney, by a city prosecutor in a city or city and county having a full-time city prosecutor, or as provided in subdivision (d).

(d) Actions pursuant to this section may be brought by a person in the public interest if both of the following requirements are met:

(1) The private action is commenced more than 60 days from the date that the person has given notice of an alleged violation of Section 25249.5 or 25249.6 that is the subject of the private action to the Attorney

General and the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and to the alleged violator. If the notice alleges a violation of Section 25249.6, the notice of the alleged violation shall include a certificate of merit executed by the attorney for the noticing party, or by the noticing party, if the noticing party is not represented by an attorney. The certificate of merit shall state that the person executing the certificate has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action, and that, based on that information, the person executing the certificate believes there is a reasonable and meritorious case for the private action. Factual information sufficient to establish the basis of the certificate of merit, including the information identified in paragraph (2) of subdivision (h), shall be attached to the certificate of merit that is served on the Attorney General.

(2) Neither the Attorney General, a district attorney, a city attorney, nor a prosecutor has commenced and is diligently prosecuting an action against the violation.

(e) A person bringing an action in the public interest pursuant to subdivision (d) and a person filing an action in which a violation of this chapter is alleged shall notify the Attorney General that the action has been filed. Neither this subdivision nor the procedures provided in subdivisions (f) to (j), inclusive, affect the requirements imposed by statute or a court decision in existence on January 1, 2002, concerning whether a person filing an action in which a violation of this chapter is alleged is required to comply with the requirements of subdivision (d).

(f) (1) A person filing an action in the public interest pursuant to subdivision (d), a private person filing an action in which a violation of this chapter is alleged, or a private person settling a violation of this chapter alleged in a notice given pursuant to paragraph (1) of subdivision (d), shall, after the action or violation is subject either to a settlement or to a judgment, submit to the Attorney General a reporting form that includes the results of that settlement or judgment and the final disposition of the case, even if dismissed. At the time of the filing of a judgment pursuant to an action brought in the public interest pursuant to subdivision (d), or an action brought by a private person in which a violation of this chapter is alleged, the plaintiff shall file an affidavit verifying that the report required by this subdivision has been accurately completed and submitted to the Attorney General.

(2) A person bringing an action in the public interest pursuant to subdivision (d), or a private person bringing an action in which a violation of this chapter is alleged, shall, after the action is either subject to a settlement, with or without court approval, or to a judgment, submit to the Attorney General a report that includes information on any corrective action being taken as a part of the settlement or resolution of the action.

(3) The Attorney General shall develop a reporting form that specifies the information that shall be reported, including, but not limited to, for purposes of subdivision (e), the date the action was filed, the nature of the relief sought, and for purposes of this subdivision, the amount of the settlement or civil penalty assessed, other financial terms of the settlement, and any other information the Attorney General deems appropriate.

(4) If there is a settlement of an action brought by a person in the public interest under subdivision (d), the plaintiff shall submit the settlement, other than a voluntary dismissal in which no consideration is received from the defendant, to the court for approval upon noticed motion, and the court may approve the settlement only if the court makes all of the following findings:

(A) The warning that is required by the settlement complies with this chapter.

(B) The award of attorney's fees is reasonable under California law.

(C) The penalty amount is reasonable based on the criteria set forth in paragraph (2) of subdivision (b).

(5) The plaintiff subject to paragraph (4) has the burden of producing evidence sufficient to sustain each required finding. The plaintiff shall serve the motion and all supporting papers on the Attorney General, who may appear and participate in a proceeding without intervening in the case.

(6) Neither this subdivision nor the procedures provided in subdivision (e) and subdivisions (g) to (j), inclusive, affect the requirements imposed by statute or a court decision in existence on January 1, 2002, concerning whether claims raised by a person or public prosecutor not a party to the action are precluded by a settlement approved by the court.

(g) The Attorney General shall maintain a record of the information submitted pursuant to subdivisions (e) and (f) and shall make this information available to the public.

(h) (1) Except as provided in paragraph (2), the basis for the certificate of merit required by subdivision (d) is not discoverable. However, nothing in this subdivision precludes the discovery of information related to the certificate of merit if that information is relevant to the subject matter of the action and is otherwise discoverable, solely on the ground that it was used in support of the certificate of merit.

(2) Upon the conclusion of an action brought pursuant to subdivision (d) with respect to a defendant, if the trial court determines that there was no actual or threatened exposure to a listed chemical, the court may, upon the motion of that alleged violator or upon the court's own motion, review the basis for the belief of the person executing the certificate of merit, expressed in the certificate of merit, that an exposure to a listed chemical had occurred or was threatened. The information in the certificate of merit, including the identity of the persons consulted with and relied on by the certifier, and the facts, studies, or other data reviewed by those persons, shall be disclosed to the court in an in-camera proceeding at which the moving party shall not be present. If the court finds that there was no credible factual basis for the certifier's belief that an exposure to a listed chemical had occurred or was threatened, then the action shall be deemed frivolous within the meaning of Section 128.7 of the Code of Civil Procedure. The court shall not find a factual basis credible on the basis of a legal theory of liability that is frivolous within the meaning of Section 128.7 of the Code of Civil Procedure.

(i) The Attorney General may provide the factual information submitted to establish the basis of the certificate of merit on request to a district attorney, city attorney, or prosecutor within whose jurisdiction the violation is alleged to have occurred, or to any other state or federal government agency, but in all other respects the Attorney General shall maintain, and ensure that all recipients maintain, the submitted information as confidential official information to the full extent authorized in Section 1040 of the Evidence Code.

(j) In an action brought by the Attorney General, a district attorney, a city attorney, or a prosecutor pursuant to this chapter, the Attorney General, district attorney, city attorney, or prosecutor may seek and recover costs and attorney's fees on behalf of a party who provides a notice pursuant to subdivision (d) and who renders assistance in that action.

~~(k)(1) A person who receives a notice pursuant to paragraph (1) of subdivision (d) that alleges the person is in violation of Section 25249.6 may, prior to the commencement of an enforcement action, do both of the following:~~

~~(A) Correct the violation within 14 days after receiving that notice.~~

~~(B) Serve on the person that sent the notice a written statement, signed under penalty of perjury, that fully describes the corrective actions taken and to which is attached a true and correct copy of any posted warnings.~~

~~(2) An enforcement action shall not be commenced by a person in the public interest pursuant to subdivision (d) if the person receiving the notice alleging the violation complies with subparagraphs (A) and (B) of paragraph (1).~~

~~(3) This subdivision shall not prevent the Attorney General, a district attorney, a city attorney, or a prosecutor in whose jurisdiction the violation is alleged to have occurred from filing an action pursuant to subdivision (c) against an alleged violator.~~

(k) Any person who serves a notice of alleged violation pursuant to paragraph (1) of subdivision (d) for an exposure identified in subparagraph (A), (B), or (C) of paragraph (1) of this subdivision shall not file an action for that exposure against the alleged violator, or recover from the alleged violator in a settlement any payment in lieu of penalties or any reimbursement for costs and attorney's fees, if all of the following conditions have been met:

(1) The notice given pursuant to paragraph (1) of subdivision (d) was served on or after the effective date of the statute adding this paragraph and alleges that the alleged violator failed to provide clear and reasonable warning as required under Section 25249.6 regarding one or more of the following, and no other violation:

(A) An exposure to alcoholic beverages, or to a chemical known to the state to cause cancer or reproductive toxicity to the extent the chemical is formed on the alleged violator's premises by necessary preparation of food or beverages which are sold on the alleged violator's premises for immediate consumption.

(B) An exposure to environmental tobacco smoke caused by entry of persons (other than employees) on

premises owned or operated by the alleged violator where smoking is permitted at any location on the premises.

(C) An exposure to chemicals known to the state to cause cancer or reproductive toxicity in engine exhaust, to the extent the exposure occurs inside a facility owned or operated by the alleged violator and primarily intended for parking noncommercial vehicles.

(2) Within 14 days after service of the notice, the alleged violator has done all of the following:

(A) Corrected the alleged violation.

(B) Paid a civil penalty for the alleged violation of Section 25496.6 in the amount of five hundred dollars (\$500), to be adjusted annually to reflect any increases in the cost of living in California, as indicated by the annual average of the California Consumer Price Index, per facility or premises where the alleged violation occurred, of which 75 percent shall be deposited in the Safe Drinking Water and Toxic Enforcement Fund, and 25 percent shall be paid to the person that served the notice as provided in Section 25249.12.

(C) Served on the person that served the notice a written statement, signed under penalty of perjury, that fully describes the actions taken to correct the alleged violation and attaches a true and correct copy of any warning provided as part of such actions.

(3) The alleged violator has not been served with a notice under paragraph (1) of subdivision (d) for an exposure identified in subparagraph (A), (B), or (C) of paragraph (1) of this subdivision within the previous five years for failure to provide clear and reasonable warning about the same exposure in the same facility or on the same premises.

(l) Any notice subject to subdivision (k) shall prominently include a clear and reasonable description of the terms of subdivision (k). The lead agency may prescribe specific language for inclusion in the notice that meets this requirement.

(m) In the event of a dispute over whether an action brought pursuant to subdivision (d) is barred by subdivision (k), the alleged violator shall bear the burden of proving the applicability of subdivision (k) and its compliance with all requirements of paragraph (2) of subdivision (k). Upon the conclusion of an action brought pursuant to subdivision (d), if the trial court determines that the alleged violator has prevailed on the affirmative defense under subdivision (k), the court may, upon motion of that alleged violator or upon the court's own motion, review the basis for the belief of the plaintiff that the action was not precluded by subdivision (k). If the court finds that there was no credible factual basis for the plaintiff's belief that the action was not precluded by subdivision (k), then the action shall be deemed a violation of subdivision (b) of Section 128.7 of the Code of Civil Procedure. The court shall not find a factual basis credible if it is based on a legal theory of liability that is frivolous within the meaning of Section 128.5 of the Code of Civil Procedure.

(n) Nothing in subdivision (k) shall prevent the Attorney General, a district attorney, a city attorney, or a prosecutor in whose jurisdiction the violation is alleged to have occurred from filing an action pursuant to subdivision (c) against an alleged violator. In any such action, the amount of any civil penalty for a violation shall be reduced to reflect any payment made by the alleged violator for the same alleged violation pursuant to subparagraph (B) of paragraph (2) of subdivision (k).

~~**SEC. 2.** The Legislature finds and declares that this act furthers the purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Chapter 6.6 (commencing with Section 25249.5) of Division 20 of the Health and Safety Code):~~

SEC. 2. *The Legislature finds and declares that this enactment furthers the purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Chapter 6.6 (commencing with Section 25249.5) of Division 20 of the Health and Safety Code).*

SEC. 3. *Specifically, the Legislature finds and declares that subdivision (k) of Section 25249.7 is necessary to further the purposes of Section 25249.6 of the Health and Safety Code, in terms of speed of compliance and reasonableness as contemplated by that section. To ensure prompt compliance with the Safe Drinking Water and Toxic Enforcement Act of 1986 (Chapter 6.6 (commencing with Section 25249.5) of Division 20 of the Health and Safety Code), paragraph (2) of subdivision (k) of Section 25249.7 of the Health and Safety Code shall be independent and severable from the rest of this enactment.*

SEC. 4. *The Legislature further finds and declares that subdivisions (k) to (m), inclusive, of Section 25249.7 of the Health and Safety Code are necessary to further the purposes of the intent of fairness contemplated by the Safe Drinking Water and Toxic Enforcement Act of 1986 (Chapter 6.6 (commencing with Section 25249.5) of Division 20 of the Health and Safety Code), as evinced by the fairness factors outlined in Section 25249.10 of the Health and Safety Code.*

SEC. 5. *This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:*

In order to avoid unnecessary litigation and to facilitate compliance with the Safe Drinking Water and Toxic Enforcement Act of 1986, it is necessary that this act take effect immediately.

~~SEC. 3.~~ SEC. 6. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.