

AMENDED IN ASSEMBLY APRIL 9, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

**ASSEMBLY BILL**

**No. 227**

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**Introduced by Assembly Member Gatto**

February 4, 2013

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An act to amend Section 25249.7 of the Health and Safety Code, relating to toxic substances.

LEGISLATIVE COUNSEL'S DIGEST

AB 227, as amended, Gatto. Proposition 65: ~~enforcement: chemical listing.~~ *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 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 demonstrate to the Attorney General, the city attorney, or the district attorney in whose jurisdiction the notice is filed that the violation has been corrected *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 by a person in the public interest if the Attorney General, the city attorney, or the district attorney concurs that the violation has been corrected *person receiving the notice of alleged violation takes those actions.* ~~The~~ *Since the commission of perjury is a crime, the bill would impose a state-mandated local program by imposing new duties upon local agencies with regard to concurring in that correction of a violation creating a new crime.*

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

This bill would find and declare that it furthers the purposes of Proposition 65.

~~(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, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.~~

*(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.*

Vote:  $\frac{2}{3}$ . Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

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

1 25249.7. (a) A person who violates or threatens to violate  
2 Section 25249.5 or 25249.6 may be enjoined in any court of  
3 competent jurisdiction.

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

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

12 (A) The nature and extent of the violation.

13 (B) The number of, and severity of, the violations.

14 (C) The economic effect of the penalty on the violator.

15 (D) Whether the violator took good faith measures to comply  
16 with this chapter and the time these measures were taken.

17 (E) The willfulness of the violator's misconduct.

18 (F) The deterrent effect that the imposition of the penalty would  
19 have on both the violator and the regulated community as a whole.

20 (G) Any other factor that justice may require.

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

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

30 (1) The private action is commenced more than 60 days from  
31 the date that the person has given notice of an alleged violation of  
32 Section 25249.5 or 25249.6 that is the subject of the private action  
33 to the Attorney General and the district attorney, city attorney, or  
34 prosecutor in whose jurisdiction the violation is alleged to have  
35 occurred, and to the alleged violator. If the notice alleges a  
36 violation of Section 25249.6, the notice of the alleged violation  
37 shall include a certificate of merit executed by the attorney for the  
38 noticing party, or by the noticing party, if the noticing party is not  
39 represented by an attorney. The certificate of merit shall state that  
40 the person executing the certificate has consulted with one or more

1 persons with relevant and appropriate experience or expertise who  
2 has reviewed facts, studies, or other data regarding the exposure  
3 to the listed chemical that is the subject of the action, and that,  
4 based on that information, the person executing the certificate  
5 believes there is a reasonable and meritorious case for the private  
6 action. Factual information sufficient to establish the basis of the  
7 certificate of merit, including the information identified in  
8 paragraph (2) of subdivision (h), shall be attached to the certificate  
9 of merit that is served on the Attorney General.

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

13 (e) A person bringing an action in the public interest pursuant  
14 to subdivision (d) and a person filing an action in which a violation  
15 of this chapter is alleged shall notify the Attorney General that the  
16 action has been filed. Neither this subdivision nor the procedures  
17 provided in subdivisions (f) to (j), inclusive, affect the requirements  
18 imposed by statute or a court decision in existence on January 1,  
19 2002, concerning whether a person filing an action in which a  
20 violation of this chapter is alleged is required to comply with the  
21 requirements of subdivision (d).

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

36 (2) A person bringing an action in the public interest pursuant  
37 to subdivision (d), or a private person bringing an action in which  
38 a violation of this chapter is alleged, shall, after the action is either  
39 subject to a settlement, with or without court approval, or to a  
40 judgment, submit to the Attorney General a report that includes

1 information on any corrective action being taken as a part of the  
2 settlement or resolution of the action.

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

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

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

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

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

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

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

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

36 (h) (1) Except as provided in paragraph (2), the basis for the  
37 certificate of merit required by subdivision (d) is not discoverable.  
38 However, nothing in this subdivision precludes the discovery of  
39 information related to the certificate of merit if that information  
40 is relevant to the subject matter of the action and is otherwise

1 discoverable, solely on the ground that it was used in support of  
2 the certificate of merit.

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

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

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

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

1 (A) *Correct* the violation within 14 days after receiving that  
 2 ~~notice and demonstrate to the Attorney General, the city attorney,~~  
 3 ~~or the district attorney in whose jurisdiction the notice is filed that~~  
 4 ~~the violation has been corrected. An enforcement action shall not~~  
 5 ~~be commenced if the Attorney General, the city attorney, or the~~  
 6 ~~district attorney concurs that the violation has been corrected.~~  
 7 *notice.*

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

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

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

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

24 ~~SEC. 3.— If the Commission on State Mandates determines that~~  
 25 ~~this act contains costs mandated by the state, reimbursement to~~  
 26 ~~local agencies and school districts for those costs shall be made~~  
 27 ~~pursuant to Part 7 (commencing with Section 17500) of Division~~  
 28 ~~4 of Title 2 of the Government Code.~~

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