

AMENDED IN SENATE JUNE 19, 2013

AMENDED IN ASSEMBLY MAY 8, 2013

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**  
**(~~Coauthor: Assembly Member~~ *Coauthors: Assembly Members Alejo,***  
***Hagman, Logue, and Muratsuchi*)**

February 4, 2013

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An act to amend Section 25249.7 of the Health and Safety Code, relating to toxic 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 prohibit an enforcement action from being filed by a person in the public interest, and would prohibit the recovery of certain payments or reimbursements, if the notice to the alleged violator alleges a failure to provide a clear and reasonable warning for certain specified exposures, *including a notification that an alleged violator may not be liable if the business has fewer than 10 employees*, 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, *subject to the limitation that the alleged violator may correct the violation, pay the civil penalty, and serve a correction notice on the person who served notice of the violation only one time for a violation arising from the same exposure in the same facility or on the same premises*. 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  $\frac{2}{3}$  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:  $\frac{2}{3}$ . 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:

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

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

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

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

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

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

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

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

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

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

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

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

32 (1) The private action is commenced more than 60 days from  
33 the date that the person has given notice of an alleged violation of  
34 Section 25249.5 or 25249.6 that is the subject of the private action  
35 to the Attorney General and the district attorney, city attorney, or  
36 prosecutor in whose jurisdiction the violation is alleged to have  
37 occurred, and to the alleged violator. If the notice alleges a  
38 violation of Section 25249.6, the notice of the alleged violation

1 shall include a certificate of merit executed by the attorney for the  
2 noticing party, or by the noticing party, if the noticing party is not  
3 represented by an attorney. The certificate of merit shall state that  
4 the person executing the certificate has consulted with one or more  
5 persons with relevant and appropriate experience or expertise who  
6 has reviewed facts, studies, or other data regarding the exposure  
7 to the listed chemical that is the subject of the action, and that,  
8 based on that information, the person executing the certificate  
9 believes there is a reasonable and meritorious case for the private  
10 action. Factual information sufficient to establish the basis of the  
11 certificate of merit, including the information identified in  
12 paragraph (2) of subdivision (h), shall be attached to the certificate  
13 of merit that is served on the Attorney General.

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

17 (e) A person bringing an action in the public interest pursuant  
18 to subdivision (d) and a person filing an action in which a violation  
19 of this chapter is alleged shall notify the Attorney General that the  
20 action has been filed. Neither this subdivision nor the procedures  
21 provided in subdivisions (f) to (j), inclusive, affect the requirements  
22 imposed by statute or a court decision in existence on January 1,  
23 2002, concerning whether a person filing an action in which a  
24 violation of this chapter is alleged is required to comply with the  
25 requirements of subdivision (d).

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

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

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

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

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

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

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

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

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

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

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

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

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

36 (j) In an action brought by the Attorney General, a district  
37 attorney, a city attorney, or a prosecutor pursuant to this chapter,  
38 the Attorney General, district attorney, city attorney, or prosecutor  
39 may seek and recover costs and attorney's fees on behalf of a party

1 who provides a notice pursuant to subdivision (d) and who renders  
2 assistance in that action.

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

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

15 (A) An exposure to alcoholic ~~beverages, or to~~ *beverages that*  
16 *are consumed on the alleged violator's premises to the extent*  
17 *on-site consumption is permitted by law.*

18 (B) *An exposure to a chemical known to the state to cause cancer*  
19 *or reproductive toxicity to the extent the chemical is formed on*  
20 *the alleged violator's premises by necessary preparation of food*  
21 *or beverages which are sold on the alleged violator's premises for*  
22 *immediate consumption on or off the premises.*

23 ~~(B)~~  
24 (C) An exposure to environmental tobacco smoke caused by  
25 entry of persons (other than employees) on premises owned or  
26 operated by the alleged violator where smoking is permitted at any  
27 location on the premises.

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

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

36 (A) Corrected the alleged violation.

37 (B) ~~Paid~~ *Agreed to pay* a civil penalty for the alleged violation  
38 of Section 25496.6 in the amount of five hundred dollars (\$500),  
39 to be adjusted ~~annually~~ *every 5 years* to reflect any increases in  
40 the cost of living in California, as indicated by the annual average

1 of the California Consumer Price Index, per facility or premises  
2 where the alleged violation occurred, of which 75 percent shall be  
3 deposited in the Safe Drinking Water and Toxic Enforcement  
4 Fund, and 25 percent shall be paid to the person that served the  
5 notice as provided in Section 25249.12.

6 ~~(C) Served or Notified, in writing, the person that served the~~  
7 ~~notice a written statement, signed under penalty of perjury, that~~  
8 ~~fully describes the actions taken to correct the alleged violation~~  
9 ~~and attaches a true and correct copy of any warning provided as~~  
10 ~~part of such actions of the alleged violation, that the violation has~~  
11 ~~been corrected. The written notice shall include the notice of~~  
12 ~~compliance approved by the Judicial Council pursuant to~~  
13 ~~paragraph (2) of subdivision (l) and a photograph or photocopy~~  
14 ~~of the true and correct warning.~~

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

21 ~~(3) The alleged violator shall deliver the civil penalty to the~~  
22 ~~person that served the notice of the alleged violation within 30~~  
23 ~~days of receipt of that notice, and the person that served the notice~~  
24 ~~of violation shall remit the portion of the penalty due to the Safe~~  
25 ~~Drinking Water and Toxic Enforcement Fund within 30 days of~~  
26 ~~receipt of the funds from the alleged violator.~~

27 ~~(l) Any notice subject to subdivision (k) shall prominently~~  
28 ~~include a clear and reasonable description of the terms of~~  
29 ~~subdivision (k). The lead agency may prescribe specific language~~  
30 ~~for inclusion in the notice that meets this requirement. both of the~~  
31 ~~following:~~

32 ~~(1) A clear and reasonable description of the terms of~~  
33 ~~subdivision (k), including a notification that an alleged violator~~  
34 ~~may not be liable if the business has fewer than 10 employees. The~~  
35 ~~lead agency may prescribe specific language for inclusion in the~~  
36 ~~notice that meets this requirement.~~

37 ~~(2) A notice of compliance, approved by the Judicial Council,~~  
38 ~~that includes the following statement: "I hereby swear, under~~  
39 ~~penalty of perjury, that I have received a notice of violation of~~

1 *Section 25249.6 and have taken the following steps to comply with*  
2 *Section 25249.7.”*

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

20 *(m) An alleged violator may satisfy the conditions set forth in*  
21 *subdivision (k) only one time for a violation arising from the same*  
22 *exposure in the same facility or on the same premises.*

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

31 SEC. 2. The Legislature finds and declares that this enactment  
32 furthers the purposes of the Safe Drinking Water and Toxic  
33 Enforcement Act of 1986 (Chapter 6.6 (commencing with Section  
34 25249.5) of Division 20 of the Health and Safety Code).

35 SEC. 3. Specifically, the Legislature finds and declares that  
36 subdivision (k) of Section 25249.7 is necessary to further the  
37 purposes of Section 25249.6 of the Health and Safety Code, in  
38 terms of speed of compliance and reasonableness as contemplated  
39 by that section. To ensure prompt compliance with the Safe  
40 Drinking Water and Toxic Enforcement Act of 1986 (Chapter 6.6

1 (commencing with Section 25249.5) of Division 20 of the Health  
2 and Safety Code), paragraph (2) of subdivision (k) of Section  
3 25249.7 of the Health and Safety Code shall be independent and  
4 severable from the rest of this enactment.

5 SEC. 4. The Legislature further finds and declares that  
6 subdivisions (k) to (m), inclusive, of Section 25249.7 of the Health  
7 and Safety Code are necessary to further the purposes of the intent  
8 of fairness contemplated by the Safe Drinking Water and Toxic  
9 Enforcement Act of 1986 (Chapter 6.6 (commencing with Section  
10 25249.5) of Division 20 of the Health and Safety Code), as evinced  
11 by the fairness factors outlined in Section 25249.10 of the Health  
12 and Safety Code.

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

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

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