

AMENDED IN SENATE JULY 2, 2013
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

Introduced by Assembly Member Gatto
(Coauthors: Assembly Members Alejo, Hagman, Logue, and
Muratsuchi)
(Coauthor: Senator Anderson)

February 4, 2013

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 the Judicial Council, on January 1, 2019, and at each 5-year interval thereafter, to adjust that civil penalty, as specified.*

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.

(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

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

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

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

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

1 that the report required by this subdivision has been accurately
2 completed and submitted to the Attorney General.

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

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

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

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

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

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

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

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

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

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

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

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

39 (j) In an action brought by the Attorney General, a district
40 attorney, a city attorney, or a prosecutor pursuant to this chapter,

1 the Attorney General, district attorney, city attorney, or prosecutor
2 may seek and recover costs and attorney’s fees on behalf of a party
3 who provides a notice pursuant to subdivision (d) and who renders
4 assistance in that action.

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

13 (1) The notice given pursuant to paragraph (1) of subdivision
14 (d) was served on or after the effective date of the ~~statute adding~~
15 ~~this paragraph~~ *act amending this section during the 2013–14*
16 *Regular Session* and alleges that the alleged violator failed to
17 provide clear and reasonable warning as required under Section
18 25249.6 regarding one or more of the following, and no other
19 violation:

20 (A) An exposure to alcoholic beverages that are consumed on
21 the alleged violator’s premises to the extent onsite consumption
22 is permitted by law.

23 (B) An exposure to a chemical known to the state to cause cancer
24 or reproductive toxicity to the extent the chemical is formed by
25 necessary preparation of food or beverages which are sold on the
26 alleged violator’s premises for immediate consumption on or off
27 the premises.

28 (C) An exposure to environmental tobacco smoke caused by
29 entry of persons (other than employees) on premises owned or
30 operated by the alleged violator where smoking is permitted at any
31 location on the premises.

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

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

39 (A) Corrected the alleged violation.

1 (B) (i) Agreed to pay a civil penalty for the alleged violation
2 of Section 25496.6 in the amount of five hundred dollars (\$500),
3 to be adjusted every 5 years to reflect any increases in the cost of
4 living in California, as indicated by the annual average of the
5 California Consumer Price Index *quinquennially pursuant to clause*
6 (ii), per facility or premises where the alleged violation occurred,
7 of which 75 percent shall be deposited in the Safe Drinking Water
8 and Toxic Enforcement Fund, and 25 percent shall be paid to the
9 person that served the notice as provided in Section 25249.12.

10 (ii) *On January 1, 2019, and at each five-year interval*
11 *thereafter, the dollar amount of the civil penalty provided pursuant*
12 *to this subparagraph shall be adjusted by the Judicial Council*
13 *based on the change in the annual California Consumer Price*
14 *Index for All Urban Consumers, published by the Department of*
15 *Industrial Relations, Division of Labor Statistics, for the most*
16 *recent five-year period ending on December 31 of the year*
17 *preceding the year in which the adjustment is made, rounded to*
18 *the nearest five dollars (\$5). The Judicial Council shall*
19 *quinquennially publish the dollar amount of the adjusted civil*
20 *penalty provided pursuant to this subparagraph, together with the*
21 *date of the next scheduled adjustment.*

22 (C) Notified, in writing, the person that served the notice of the
23 alleged violation, that the violation has been corrected. The written
24 notice shall include the notice of compliance approved by the
25 Judicial Council pursuant to paragraph (2) of subdivision (l) and
26 a photograph or photocopy of the true and correct warning.

27 (3) The alleged violator shall deliver the civil penalty to the
28 person that served the notice of the alleged violation within 30
29 days of receipt ~~service~~ of that notice, and the person that served
30 the notice of violation shall remit the portion of the penalty due to
31 the Safe Drinking Water and Toxic Enforcement Fund within 30
32 days of receipt of the funds from the alleged violator.

33 (l) Any notice subject to subdivision (k) shall prominently
34 include both of the following:

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

1 (2) A notice of compliance, approved by the Judicial Council,
2 that includes the following statement: “I hereby swear, under
3 penalty of perjury, that I have received a notice of violation of
4 Section 25249.6 and have taken the following steps to comply
5 with Section 25249.7.”

6 (m) An alleged violator ~~my~~ *may* satisfy the conditions set forth
7 in subdivision (k) only one time for a violation arising from the
8 same exposure in the same facility or on the same premises.

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

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

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

32 SEC. 4. The Legislature further finds and declares that
33 subdivisions (k) to (m), inclusive, of Section 25249.7 of the Health
34 and Safety Code are necessary to further the purposes of the intent
35 of fairness contemplated by the Safe Drinking Water and Toxic
36 Enforcement Act of 1986 (Chapter 6.6 (commencing with Section
37 25249.5) of Division 20 of the Health and Safety Code), as evinced
38 by the fairness factors outlined in Section 25249.10 of the Health
39 and Safety Code.

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

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

8 *SEC. 5. The Legislature further finds and declares that Sections*
9 *2, 3, and 4 of this act are intended to articulate how this act*
10 *furtheres the purposes of the Safe Drinking Water and Toxic*
11 *Enforcement Act of 1986 (Chapter 6.6 (commencing with Section*
12 *25249.5) of Division 20 of the Health and Safety Code) and shall*
13 *not be construed to affect any litigation other than litigation*
14 *concerning whether this act furtheres the purposes of the Safe*
15 *Drinking Water and Toxic Enforcement Act of 1986 (Chapter 6.6*
16 *(commencing with Section 25249.5) of Division 20 of the Health*
17 *and Safety Code).*

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

27 *SEC. 7. This act is an urgency statute necessary for the*
28 *immediate preservation of the public peace, health, or safety within*
29 *the meaning of Article IV of the Constitution and shall go into*
30 *immediate effect. The facts constituting the necessity are:*

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