

WHISTLEBLOWER ALERT – CONSUMER PRODUCT COMPANIES

The newly enacted Consumer Product Safety Improvement Act of 2008 for the first time extends Federal “whistleblower” protections against termination or disciplinary action to millions of employees of manufacturers, distributors and retailers of consumer products, a broad category that includes (but is not limited to) appliances, power tools, electronics, furniture, home furnishings, toys, recreational and sports equipment, apparel, household chemicals and lawn and garden equipment.

The Act prohibits termination or other adverse action against an employee because he or she has provided or is about to provide to the employer, the Federal government, or a State Attorney General information regarding an act or omission that the employee “reasonably believes” to be a violation of Federal consumer product safety statutes or regulations. In addition, the Act prohibits such action against an employee for objecting to, or refusing to participate in, any activity, policy or assigned task that the employee likewise “reasonably believes” to be in violation of any such statute or regulation.

More specifically, employees could potentially seek to invoke these protections based on assertions of providing information concerning, or refusing to participate in, the following actions or activities:

- Manufacture, distribution or sale of a product that does not conform to an applicable product safety standard or a product that is subject to a safety recall;
- Issuance of a false certificate of compliance with a product safety standard;
- Misrepresentation of the scope of products subject to a safety recall;
- Making a material misrepresentation to a Federal employee in the course of a product safety investigation; or
- Attempting to exercise undue influence on a third party laboratory with respect to testing, or the reporting of the results of testing, any product for conformity with product safety standards.

Significantly, an employee could claim the whistleblower protections based on an assertion of being “about to” inform government officials that the employer has committed a statutory violation by failing to immediately report to Federal officials that it has obtained information that reasonably supports the conclusion that a product either fails to comply with an applicable safety standard or contains a defect that creates a substantial risk of injury. The



timing of defect determinations and reporting often depends on collection and assessment of incident reports as well as engineering analysis. Federal regulations specifically allow companies to conduct a “reasonably expeditious investigation” generally not exceeding 10 days. However, the judgment of when sufficient information has been obtained to warrant a defect determination is inherently subject to interpretation or second-guessing by an employee or government officials.

An employee who has allegedly been retaliated against has 180 days to file a complaint with the Department of Labor, which will then conduct an investigation, including seeking the employer’s response to the allegation, within 60 days. If the Department finds reasonable cause to believe retaliation has occurred, it will issue a preliminary order reinstating the employee with back pay and awarding compensatory damages. Alternatively, the Department will dismiss the complaint if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the behavior regarding the alleged safety violation.

Either party may file objections within 30 days and request a hearing. The Department is to issue a final order within 120 days after the hearing is concluded. In addition to reinstatement, back pay and compensatory damages, a prevailing employee can request and receive an award of all costs and expenses, including attorneys’ and expert witness fees. There is no provision for the award of punitive damages. A prevailing employer may be awarded attorneys’ fees only if the Department finds the complaint was frivolous or brought in bad faith, and even then is limited to no more than \$1,000. Either party may petition for review of the final order in the appropriate U.S. Court of Appeals.

If the Department fails to issue a final order within 210 days after the complaint is filed, the employee may bring an action for de novo review in Federal district court and request a jury trial. The suit is governed by the same burdens of proof, and the court is authorized to grant the same relief, that apply and are available in the Department of Labor proceeding. Given that the 210-day trigger is based on the deadlines for the three enumerated phases of the Departmental proceeding, but does not account for the time necessary to schedule and hold the hearing, this right to de novo review with a jury trial may be used in many cases to short-circuit the administrative process before it can be completed.

Manufacturers, distributors and retailers of consumer products may wish to revise their personnel policies to include specific prohibitions against the retaliatory actions that are now proscribed by the newly enacted Federal whistleblower protections. Employers who have not already done so may also wish to consider establishing written protocols, as well as related personnel training, regarding the internal handling and assessment of information concerning potential product safety problems and the external reporting of such information to government officials. Adherence to specific established procedures may serve as an important basis for



defending against unwarranted whistleblower claims, as well as responding to government investigations of potential statutory violations.

If you have any questions about this new Act or require any assistance in connection with the prophylactic measures described above, please call the member of the Eckert Seamans' Labor and Employment Department with whom you normally deal or call **Ed Noonan** (202-659-6616 or **Ryan Siciliano** (412-566-2839).