

## Employment Alert: Consumer Product Safety Improvement Act Creates New Whistleblower Rights Affecting Manufacturers, Distributors, Private Labelers, and Retailers

2/9/2009

On August 14, 2008, Congress enacted the Consumer Product Safety Improvement Act of 2008 ("CPSIA" or the "Act"), 15 U.S.C. § 2051 *et seq.*, which significantly increased regulation of the consumer product industry.

Companies covered by the Act must comply with a host of new product safety standards, some of which became effective immediately. The Consumer Product Safety Commission (the "Commission") has pledged to implement other new standards over time. The Act also grants the Commission a powerful array of enforcement powers, including the ability to impose enhanced monetary and nonmonetary penalties against companies that fail to comply.

Crucially, in addition to the regulatory implications of the Act and the regulations promulgated by the Commission, affected employers also must be very mindful of the whistleblower provisions and protections found in the Act.

### Who Is Covered by the Act?

Any company that manufactures or imports a consumer product, owns a brand or trademark on the label of a consumer product that bears a private label, distributes a consumer product, or sells a consumer product to customers is subject to the Act. Any company that meets these criteria and employs individuals is also subject to the whistleblower protections of the Act.

In addition to affecting the rights of individuals employed directly by companies governed by the Act, importantly, the Act may also impact how a company treats workers engaged through an outsourcing arrangement.

### Which Employees and What Behaviors Are Protected Pursuant to the Whistleblower Provisions of the Act?

Section 219 of the Act states that a "manufacturer, private labeler, distributor or retailer" cannot discharge, discriminate, or take an adverse action against an employee because the employee engages in a protected activity under the Act.

Most commonly, protected activity will consist of an employee providing the federal government, a state attorney general's office, or an internal corporate reporting mechanism, whether formal or informal—such as a manager, human resource personnel, or a corporate hotline—with information about a violation or a suspected violation of the Act. Additionally, Section 219 also protects any employee who testifies, or is about to testify, in any proceeding involving alleged violations of the CPSIA, as well as employees who have helped or are about to assist the government in preparing for a proceeding. Finally, Section 219 protects any employee who has objected to, or refused to participate in, any activity that the employee (or another individual) reasonably believes is a violation of the Act or *any other statute enforced by the Commission*.

These whistleblower protections apply regardless of whether the protected activity is on the employee's own initiative or undertaken as a part of the employee's ordinary work duties.

### Litigation Options and Remedies Available under the Act

The Department of Labor (DOL) has initial jurisdiction over whistleblower complaints. A claimant must file an administrative proceeding before the Occupational Safety and Health Administration (OSHA) of the DOL within 180 days after the violation occurs. If the DOL does not issue a decision within 210 days after the claimant files, or if the claimant receives an adverse decision from the DOL, the claimant may remove the claim to federal court.

If a claimant prevails, the Act permits him or her to seek reinstatement, back pay with interest, and compensation for "special" damages, including litigation costs, expert witness fees, and reasonable attorney fees. Crucially, employers should understand that certain states grant employees more comprehensive remedies. Therefore, in addition to understanding how the Act affects your business, employers should also be aware of the state laws that are implicated by the business—employees may opt to sue in state court and bypass the administrative exhaustion requirement of the Act.

### Mitigating CPSIA Whistleblower Risks—Action Items for Affected Employers

Employers who are covered by the Act should:

- design and publish policies that inform employees of their whistleblower and anti-retaliation rights under the Act and other similar statutes;
- review their employee handbooks, posters, and policies to ensure that they comply with the Act's whistleblower provisions;
- periodically review the product safety standards required by CPSIA with its officers and personnel managers. This periodic review should include a primer on the company's lawful procedure for managing whistleblowers' allegations, regardless of whether those allegations are made internally or externally;
- ensure that supervisors and managers are trained to deal with an employee's allegation(s) of potential violations of the CPSIA; and
- train managers not to retaliate against any employee for reporting a potential violation of the Act.

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*For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.*

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