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EXPANDING WHISTLEBLOWER PROTECTIONS TO EMPLOYEES IN CONSUMER PRODUCTS INDUSTRIES

With little publicity or flourish, the Consumer Product Safety Improvement Act of 2008, H.R. 4040 ("CPSIA") was signed into law on August 14, 2008. The Act's relatively quiet advent, however, belies its potential to subject employers across many industries and sectors to a new and substantial source of litigation brought against them by their employees and former employees seeking damages and attorney fees.

Created in response to a growing number of consumer product recalls ranging from toys to toothpaste, the CPSIA is the most extensive consumer product safety law enacted in the United States in over 30 years. The Act is designed primarily to enhance the safety of consumer products by requiring independent third-party testing of toys and infant products before they are sold, and by banning lead and toxic chemicals from children's products. The Act also mandates the creation of a publicly accessible and searchable consumer product safety complaint database and gives the Consumer Product Safety Commission (CPSC) greater financial resources to better protect the public. Most of this monetary infusion will come from a significant increase in the Commission's funding and an increase in the limit on civil penalties that the CPSC can assess against violators from $1.8 to $15 million per safety violation.

What may ultimately pose a bigger issue for consumer product companies though is the expansion of the CPSIA's reach beyond ensuring consumer product safety and into regulating employer-employee relations. Buried in Section 219 of the Act, the CPSIA creates and confers new whistleblower protections upon a broad range of employees. This provision, which will be administered by the United States Department of Labor, creates new rights and protections for the countless numbers of employees who are employed in positions that are, in *any way*, related to consumer products, *anywhere* in the broad areas of manufacturing, private labeling, distribution or private retail. Under the Act, employees in these industry sectors will be protected from adverse or unfavorable personnel actions, with respect to compensation terms, conditions or privileges of employment, taken by employers in retaliation for "blowing the whistle" about unsafe consumer products.

The CPSIA covers a broad range of employee activities under the umbrella of whistle-blowing. The Act protects not only reporting or providing information to an employer or to government entities that have oversight or enforcement authority, but it also protects an employee's communications with the "federal government" in general, as well as to the attorney general of any state. Like other whistleblower laws, the CPSIA protects as well employee participation in proceedings brought under the Act, including, but not limited to, giving testimony.

Alarmingly, the CPSIA does not require an employee to have actual proof of a consumer safety violation, nor to be correct in reporting such a violation, to be entitled to the Act's whistleblower protections. Rather, the Act specifies that any employee who has a "reasonable belief" that a wrong under the CPSIA has or is being committed by an employer will receive the protection of the law. The Act further provides that the whistleblower protections extend

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to those employees who blow the whistle "in the ordinary course of their job duties," in addition to those employees who take their own independent initiative to make a report.

The whistleblower protections of the CPSIA will generate serious concerns for many employers that previously were outside the reach of narrowly cast state or federal whistleblower laws. The extension of broad whistleblower protections to so expansive a group of employees in companies that manufacture or work with consumer products will permit employees to bring claims based on employment decisions that, until now, could not be challenged in court. Moreover, experience teaches that employee lawsuits based upon charges of retaliation, as are whistleblower claims, are the most difficult kind of employee claim to defend under other federal anti-discrimination legislation.

Employers can take steps to minimize their potential liability under the CSPIA whistleblower provision. Managers and supervisors must continue to consistently maintain clear documentation of the reasons for the adverse personnel actions that they take regarding their employees, and they should be periodically trained and reminded to do so. Furthermore, human resources personnel can and should serve as both a clearinghouse and a buffer against possible whistleblower claims. Human Resources should be advised routinely of any whistle-blowing activity in which any employee is engaged and also consulted before every substantial adverse employment action taken against an employee. In that way, Human Resources may be better able to ensure that the person deciding to take the adverse action against an employee who happens to be a whistleblower is not "tainted" with knowledge of the employee's whistle-blowing activity when making the adverse employment decision.

As always, seeking legal counsel prior to implementing severe or particularly risky personnel actions, especially terminations, is a prudent course of conduct for any employer. ◆

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