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New Law Builds Employee Whistleblower Protections into Consumer Products

Consumer Product Safety Improvement Act is the Latest Big Concern for Consumer Products Companies

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August 2008

Whistleblowing gained new prominence six years ago, when the Sarbanes-Oxley reforms were introduced. For a variety of reasons, whistleblowing under Sarbanes-Oxley has not materialized as a significant source of litigation. Now, with none of the fanfare of Sarbanes-Oxley, the Consumer Product Safety Improvement Act of 2008 (the "CPSIA"), signed by President Bush and effective August 14, 2008, has the potential to sweep across industry sectors and confer whistleblower protections on a broad range of employees.

The Consumer Product Safety Commission (the "Commission") is charged with protecting consumers and families from products that pose a fire, electrical, chemical or mechanical hazard or that can injure children. Legislative reauthorization for fiscal years 2010 - 2014 expands the statute's reach beyond ensuring the safety of consumer products and creates new protections outside the consumer marketplace by prohibiting employers from taking unfavorable personnel action against employees for blowing the whistle.

Something Old, Something New

The whistleblower protections of the CPSIA contain some familiar features—and some that are new and significant departures from existing laws and their mainstream construction. The CPSIA does not merely borrow from Sarbanes-Oxley or other similarly structured laws. Instead, it builds on that base and introduces legislative clarity to issues where administrative or judicial determinations have disappointed whistleblower advocates. Compliance with the CPSIA requires appreciation of its material distinctions from other laws.

What the CPSIA Covers

An enormous part of the workforce—those having anything at all to do with consumer products anywhere in a manufacturing, private labeling, distribution or retail sales channel—comes within the class of employees potentially protected from unfavorable personnel actions for blowing the whistle about unsafe consumer products or "any other Act enforced by the Commission, or any order, rule, regulation, standard or ban under any such Acts."

As with other laws, the CPSIA broadly protects participation in proceedings by way of testimony or otherwise, just as it protects the objection or refusal to participate in conduct violative of the full panoply of federal consumer product safety laws and related orders, rules, regulations, standards and bans. The CPSIA's protection of reporting activity is not limited to providing information to the employer or agencies of the federal government having oversight or enforcement authority; the CPSIA adds protection for communications broadly to the "Federal Government" and the attorney general of any state.

To clarify that the protection is intended for those who blow the whistle in the scope of their duties and to avoid disputes arising under other laws, the CPSIA provides protection of those who blow the whistle in the ordinary course of their job duties—in addition to those who act on their own, independent initiative.

How the Whistleblower Protections Are Enforced

As with 16 other federal whistleblower laws, including Sarbanes-Oxley, investigation and administrative processing will initiate with OSHA and proceed through the Department of Labor and its administrative law judges and Administrative Review Board. Borrowing from those laws, the CPSIA remedial scheme includes conventional remedies of reinstatement, backpay and recovery of "special damages." The CPSIA also perpetuates the preliminary order of reinstatement—a matter of particular controversy in Sarbanes-Oxley cases—prescribing reinstatement of a discharged employee upon a mere showing of reasonable cause that a complaint has sufficient merit to warrant an administrative hearing. This means the statute endeavors to confer an entitlement to preliminary reinstatement on a complainant who offers enough evidence to survive an administrative investigation by showing a *prima facie* case—before any witness has offered sworn testimony subject to examination, cross-examination, impeachment or rebuttal.

A whistleblower whose case has been dismissed following an administrative investigation may file anew in a United States District Court. Opting out of administrative proceedings to gain access to federal courts is available also if, as is probable, the full administrative process of hearings and decisions has not concluded with issuance of a final decision within 210 days after the employee filed the administrative complaint. In a court proceeding, the employee's case is addressed *de novo*, without regard to the administrative proceedings. Removing uncertainty of

other whistleblower laws, the CPSIA expressly authorizes trial by jury once a lawsuit has been filed.

Looking Forward

The CPSIA whistleblower provisions extend to classes of employers not impacted by laws focused narrowly on select industries or companies having publicly traded securities. The CPSIA codifies substantive and procedural terms that were subject to varying administrative and judicial constructions. It retains a remedial scheme of preliminary reinstatement that continues to be unsettling to employers and unsettled in the courts.

What is clear is that many employers outside the reach of narrowly cast laws will no longer have bystander status; being a manufacturer, private labeler, distributor or retailer of a consumer product sweeps them into the CPSIA's expanded coverage which protects whistleblowers.

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Through its Whistleblowing and SOX Subpractice Group, EpsteinBeckerGreen lawyers counseling clients on whistleblowing issues continually monitor developments and aid in establishing compliance programs and representation in administrative and court proceedings. If you have any questions regarding this topic, please contact:

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