

New Protections for Consumer Safety Whistle-blowers

By R. Scott Oswald and Jason Zuckerman

Prompted by consumer complaints of lead-laden children's toys and insufficient regulation of consumer product safety, Congress enacted the Consumer Product Safety Commission (CPSC) Reform Act on August 14, 2008.

The act, which is the most comprehensive consumer product safety law enacted since the creation of the CPSC in 1972, strengthens the authority of the commission, expands the scope of prohibited activities under the Consumer Product Safety Act (CPSA), and imposes new certification requirements on manufacturers and distributors.

To ensure that employees can blow the whistle on consumer product safety issues, Congress included in the CPSC Reform Act a whistle-blower protection provision that prohibits manufacturers, private labelers, distributors, and retailers from retaliating against an employee because the employee provided information to an employer, a regulatory agency, or a state attorney general about a reasonably perceived violation of the CPSC Reform Act or any other act enforced by the CPSC.

Elements of a CPSC Whistle-blower Retaliation Claim

Similar to the retaliation provision of the Sarbanes-Oxley Act (SOX), CPSC whistle-blower retaliation plaintiffs must prove that (1) they engaged in protected conduct, (2) the employer knew that they engaged in protected conduct, (3) the employer took adverse action against them, and (4) the protected conduct contributed to the employer's decision to take an adverse action.

Protected conduct. The whistle-blower provision of the CPSC Reform Act prohibits an employer from discharging or otherwise discriminating against an employee because the employee (1) provided information relating to a violation of the CPSC Reform Act or any act enforced by the commission to the employer, the federal government, or the state attorney general,

(2) testified or assisted in a proceeding concerning a violation of the CPSC Reform Act or any act enforced by the commission, or (3) refused to participate in an activity, policy, practice, or assigned task that the employee reasonably believes violates the CPSC Reform Act or any act enforced by the commission.

Specific examples of protected conduct include the following:

1. Reporting violations of the standard for the flammability of children's sleepwear;
2. Disclosing information about the use of consumer patching compounds containing free-form asbestos;

Congress adds anti-retaliation provisions to Consumer Product Safety Act reform bill.

3. Reporting an employer's violation of a safety standard for creating architectural glazing materials;
4. Reporting choking incidents involving marbles, small balls, latex balloons, and other small parts.

Recognizing that the "duty speech" doctrine limits state and local government employees from bringing 1st Amendment whistle-blower retaliation claims based on their work-related speech, the CPSC Reform Act, like SOX, explicitly provides protection for those employees who blow the whistle in the ordinary course of their job duties or who act on their own initiative.

Employer knowledge of protected conduct. Demonstrating knowledge of protected conduct is generally not difficult because the Department of Labor (DOL) recognizes the doctrine of constructive knowledge. DOL administrative law

judges (ALJs) will often impute knowledge of protected conduct to a supervisor who has knowledge of the protected conduct and had some influence on the decision to take adverse action.

Prohibited acts of retaliation. The CPSC Reform Act prohibits a broad range of adverse employment action, including discharge or discrimination with respect to employees' compensation, terms, conditions, or privileges of employment. The Supreme Court's *Burlington* standard will apply to the whistle-blower provision of the CPSC Reform Act, thereby prohibiting any conduct that would dissuade a reasonable employee from engag-

ing in protected conduct.

Causation. To prevail in a CPSC whistle-blower action, employees must prove by a preponderance of the evidence that their protected activity was a contributing factor in the unfavorable action. A CPSC whistle-blower need not show that the protected conduct was a significant or motivating factor in the adverse action.

Remedies. A prevailing employee is entitled to "make-whole" relief, which may include (1) reinstatement, (2) backpay, (3) compensatory damages, and (4) attorney fees and litigation costs, including expert witness fees.

Procedures Governing CPSC Whistle-blower Actions

Actions brought under the whistle-blower provisions of the CPSC Reform Act are governed by the same rules and procedures that govern analogous whistle-blower protec-

tion statutes, including the whistle-blower provisions of the Federal Rail Safety Act, Surface Transportation Assistance Act, and National Transit Systems Security Act provided by the 9/11 bill for employees in the rail, bus, and public transportation industries, which are at 49 U.S.C. § 20109; 49 U.S.C. § 31105; and 6 U.S.C. § 1142, respectively.

The complaint must be filed with the DOL within 180 days of the employee becoming aware of the retaliatory adverse action. The Occupational Safety and Health Administration (OSHA) will investigate the claim and can order preliminary relief, including reinstatement. Either party can appeal OSHA's determination by requesting a *de novo* hearing before a DOL ALJ. Discovery before an ALJ typically proceeds at a faster pace than discovery in state or federal court, and the hearings are less formal than federal court trials. For example, ALJs are not required to apply the Federal Rules of Evidence.

Either party can appeal an ALJ's decision to the DOL Administrative Review Board (ARB) and can appeal an ARB decision to the circuit court of appeals in which the adverse action took place. If the DOL does not issue a final decision within 210 days of the employee filing the complaint, the employee can remove the claim to federal court and is entitled to a trial by jury. Employers do not have an option to remove a CPSC retaliation claim to federal court.

The whistle-blower provision of the CPSC Reform Act provides a robust remedy for whistle-blowers in the manufacturing, private labeling, distribution, and retail industries, which is intended to encourage employees to identify and report consumer product safety issues, thereby preventing unsafe products from reaching consumers. ■

R. Scott Oswald and Jason Zuckerman are principals at the Employment Law Group law firm (www.employmentlawgroup.net) in Washington, D.C.