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ANALYZING AND HANDLING A PRODUCT RECALL: DO YOU HAVE A PLAN?

The Consumer Product Safety Improvement Act of 2008 (CPSIA) was enacted on the heels of several high-profile recalls in 2007 and 2008 involving consumer goods such as pet food, toothpaste and toys. The Act's purpose is clearly stated as establishing consumer product safety standards for children's products and modernizing the Consumer Product Safety Commission (CPSC). While the Act's objectives are laudable, the CPSIA has resulted in a regulatory nightmare for both the CPSC and businesses.

Among its many problematic provisions, the CPSIA mandates that a consumer product database be established that is (1) publicly available, (2) searchable, and

(3) accessible over the internet through the CPSC's website. This database, among other things, shall include reports of harm relating to the use of consumer products received by the CPSC from (1) consumers, (2) local, state and federal agencies, (3) health care professionals, (4) child service providers, and (5) public safety entities. Reports must be filed within 24 hours of obtaining information that reasonably supports the conclusion that a product does not comply with a CPSC safety rule or contains a defect that could create substantial risk of injury to the public or an unreasonable risk of serious injury or death. Reporting of unsafe products can be made directly to the CPSC on-line at www.cpsc.gov/talk.html.

Reporting requirements extend to any company that is a manufacturer, distributor, im-

porter, or seller of a product. It is important to realize that the entire CPSC regulatory framework applies to every company regardless of its size. Therefore, a small business, no matter how many hours a week it operates or how many employees are on its payroll, is governed by the CPSC, and has a reporting obligation.

With such widespread information being made available to the public and stringent reporting requirements, it is imperative that companies have a product recall plan in place. Once a report is made concerning a potentially unsafe product, a business must carefully evaluate the potential need for a

recall and be prepared to execute a recall plan. Although every company's product recall plan must be tailored to meet that company's structure, products and resources, the basic structure of any recall

plan is as follows: (1) establish a recall team; (2) develop a product recall plan; (3) ensure that the recall team has available information and resources to implement the plan; and (4) have the recall team deal with the aftermath of a product recall.

The first step in creating a recall plan is to put a recall team in place. This team ideally should consist of individuals involved in the business' management, marketing, product

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development, and both in-house and outside counsel. A dedicated liaison should be named to work directly with the CPSC. This will make any consultation and/or reporting more accurate and efficient. The recall team is responsible for (a) making any required reports to the CPSC, (b) making a determination as to the need for a recall and (c) developing and implementing a recall plan when a recall is needed. In developing a recall plan, the following should be considered:

1. Where the product was manufactured;
2. Where the product was distributed;
3. Where the product is currently located;
4. Notification to any product distributors; and
4. Potential communication with the public.

Ultimately, the recall team must have knowledge and be responsible for obtaining all information and documentation regarding a product.

Once made aware of a potential hazard or an incident, the recall team should convene in order to implement a corrective action plan. A recall not

only includes when a product is being removed from the market, but also instances in which the manufacturer has elected to voluntarily make a change or adjustment to its product while keeping it on the market. Considerations that should be made to determine if the company is going to recall the product include the incident type, the frequency of the incident, and the risk relative to the warnings. The recall team should consider evaluation of the product by company scientists and engineers. Once a decision to recall is made, the recall plan should reach the entire distribution chain from the point of manufacturing to the distribution to consumers who have the product. The recall team's work is not over at the decision to recall or not to recall a product. Rather, the team must follow the aftermath of the recall. More specifically, the team should be considering if additional product warnings or in-house training are necessary. Moreover, the team should be proactive with reporting to the CPSC.

Although establishing a team, initiating a plan, gathering product information and dealing with the aftermath can be time-consuming and costly to a company, should a product be found potentially hazardous or, in fact, be involved in a consumer incident, a solid recall plan will allow the company to deal with the issue in an efficient and effective manner.

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WATSON, BENNETT, COLLIGAN JOHNSON & SCHECHTER, L.L.P.
PROUDLY ANNOUNCES THAT PAULINE COSTANZO WILL, ESQ.
HAS BEEN NAMED A PARTNER.



Ms. Will focuses her practice on complex toxic tort litigation, trucking defense litigation, products liability litigation and other litigation matters. Ms. Will represents clients in both New York State and Federal courts including at the Appellate level.

Ms Will is a graduate of the State University of New York at Buffalo Law School and of Canisius College. Prior to joining Watson Bennett, Ms. Will was an Assistant District Attorney for Erie County, New York.

Ms. Will is a member of the Buffalo Pro Zoo Board and is active in the Erie County Bar Association, the Women's Bar Association of the State of New York and the Trucking Industry Defense Association.

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EMPLOYERS BEWARE OF THE NEW ADA!

Congress intended the Americans with Disabilities Act of 1990 (ADA) to ensure that individuals with physical and mental disabilities were not precluded from fully participating in all aspects of employment. Under the ADA employers are prohibited from discriminating against disabled employees (including potential employees) and are required to provide them with reasonable accommodations.

Since its enactment, the courts have interpreted the ADA much more narrowly than its original intent; barring many employees from protection under the ADA. As a result, the Americans with Disabilities Act Amendments Act of 2008 ("Amendments") was signed into law last year to carry out the original intent of the ADA by bringing coverage to more people that otherwise would have been denied. As of January 1, 2009, the effective day of the Amendments, employers must comply with the new changes.

The Amendments aim at expanding coverage to employees by broadening the interpretation of the definition of "disability" under the ADA. "Disability" is defined under the ADA as a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. The Amendments require the Equal Employment Opportunity Commission (EEOC) to interpret the phrases used in the definition, such as "substantially limits" and "major life activities", far more broadly than in the past. Some of the key changes are:

1. The case law standard for determining what is a "major" life activity has been rejected. The Amendments now provide an expanded list of "major life activities," which is not exclusive and includes caring for oneself, performing manual tasks, standing, lifting, bending, learning, reading, concentrating, thinking, and communicating. The Amendments also include a non-exclusive list of major bodily functions, the operation of which contribute to major life activities. These include functions involving the digestive, neurological, respiratory, circulatory, and reproductive systems.
2. Congress specifically directed the EEOC to revise its regulations regarding the definition of "Substantially Limits". Previously, "substantially limits" was defined as "significantly restricted" which was a difficult standard to meet. The Amendments did not create a new standard, but directed the EEOC

to revise its regulations to broaden the definition

3. The ADA prohibits discrimination against people who are "being regarded as" having a disability. Pre-Amendments, the employee had to show that the employer regarded him or her as being substantially limited in a major life activity to be regarded as having a disability. The Amendments revise this standard by providing that an individual may be unlawfully regarded as having a disability "whether or not the impairment limits or is perceived to limit a major life activity." Excepted out of this definition, however, are transitory and minor impairments which have an actual or expected time duration of less than six months.

The Amendments have changed the focus of the ADA from whether an employee meets the definition of disabled to whether the employer has complied with the ADA. Employers should expect their actions to be closely scrutinized. Since the regulations will be slow to emerge, it is important for employers to be proactive in prohibiting discrimination in hiring practices and to respond in good faith to employees' accommodation requests.

Before the Amendments, an accommodation request (and possible discrimination case) was a cut and dry determination of whether an employee met the narrowly construed definition of disability. In most cases

the employee could not meet the standards established by case law, and accommodation was not required. Now, with the broadening of the statute and lack of guidance from regulations, most discrimination cases will revolve around the employer's actions and decisions. Documentation will be key to any defense.

We recommend that all employers revisit their company policies, handbooks, and hiring procedures to ensure compliance with the Amendments, and review the impact of the Amendments with all frontline supervisors, managers, and hiring personnel.

*For more information contact:
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