

Federal Product Safety Legislation Takes The Stage, But States Still Acting

Over the past several months all eyes have been focused on the development and implementation of the sweeping federal consumer product safety legislation signed into law on August 14, 2008. While Congress was busy deliberating over the federal legislation and manufacturers and retailers have scrambled to determine how it would affect their obligations, however, several state legislatures were busy drafting product safety laws of their own.

For example, in the past six months, several states including Connecticut, New York, and Oregon have passed legislation relating to consumer product safety and imposing specific requirements on retailers and manufacturers of recalled and other non-conforming children's products. In New York, for example, manufacturers are now required to notify the state of a recall. While many provisions of these new state laws track the federal legislation, some differ in the details or impose even greater requirements, as summarized below. Finally, because some of these state provisions could potentially be subject to preemption, affected entities should continue to track legislative developments and any related guidance put forth by the Consumer Product Safety Commission.

Requirements for Manufacturers, Distributors, and Importers

In **New York**, commercial dealers (which include manufacturers, distributors, and importers) of children's products subject to a recall must, within twenty-four hours: (1) discontinue distribution of the recalled product; (2) contact in writing retailers to whom they sold

the product to inform them of the recall; (3) place a notice of the recall on the website; (4) give direct notice to the initial consumer, if contact information for such consumer is known; and (5) provide notification to the New York Consumer Protection Board of such recall or warning. Within ninety days after a recall, commercial dealers must provide the Consumer Protection Board with certification of disposition of the recalled products.

Requirements for Retailers

In **Connecticut**, retailers and wholesalers of any children's product subject to a recall or voluntary corrective action must, upon notification of such recall or other action, immediately dispose of all recalled products and return any products subject to voluntary corrective action to the manufacturer or distributor. Within seven days, retailers and wholesalers must also sign and date a certificate of disposition specifying the make, model, type, quantity, and final disposition of the affected products and retain the certificate for at least three years. Retailers and wholesalers must show the certificate of disposition when an inspector from the Department of Consumer Protection visits the store. The Department may conduct as many as two store inspections a week.

Further, the Department of Consumer Protection must compile and amend a searchable list of toys and other articles intended for use by children that are classified as banned hazardous substances and post the list publicly on the Department of Consumer Protection website. The Department may require retail stores to post notice that an article has been designated a banned hazardous substance.

When a retailer in **New York** is notified of a recall or warning regarding a children's product or juvenile product that it offers for sale, the retailer must remove

the product from the shelves. Within one business day after receiving notice of the recall or warning, the retailer must: (1) post recall and warning notices at the retailer's locations; and (2) if the retailer has a website, post a link to the recall information on its homepage for sixty days. Additionally, the retailer must contact the consumers for whom the retailer has contact information and inform them of the recall or warning. The resale of recalled products is prohibited.

Under **Oregon's** new product safety legislation, retailers must subscribe to or otherwise arrange to receive recall notices and warnings issued by the CPSC and warnings issued by manufacturers from which the retailer receives children's products. In any action brought under the new Oregon law, the retailer is presumed to have actual or constructive knowledge of all such notices and warnings. Retailers must dispose of any children's product identified in a recall notice or warning in strict compliance with disposal instructions and must comply with all return, repair, retrofitting, or remediation instructions issued.

KELLEY DRYE & WARREN LLP

Kelley Drye & Warren's Consumer Product Safety Practice Group is experienced in providing advice on the difficult issues of how and when potentially hazardous consumer products must be reported to the CPSC. If product recalls are necessary, we work with our clients and CPSC staff to quickly develop and implement cost-effective communications programs that satisfy product liability concerns and minimize potential penalties. When the CPSC threatens or brings enforcement actions, we advise our clients on appropriate strategies.

**For more information about this
Client Advisory, please contact:**

CHRISTIE L. GRYMES

(202) 342-8633

cgrymes@kelleydrye.com

JENNIFER NGAI

(202) 342-8866

jngai@kelleydrye.com