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248/267-3277

Getting the lead out

Tighter product safety laws on the fast track

Legislation now in committee will affect the way manufacturers, importers, distributors, and retailers of consumer goods—especially children's toys and products—do business in the future.



Both the U.S. House and Senate have passed bills that would make the most extensive changes to the nation's product safety system in a generation, and the two versions are now being reconciled before being enacted into law.

Under both proposals, lead in all children's products—not just toys—would be effectively banned, and it would be illegal to knowingly sell a recalled product. The bills require independent third-party testing of all toys to ensure safety, and mandate that toys be marked in a way to facilitate identification of recalled items.

But that's not all. Maximum civil penalties increase from \$8,000 to \$250,000 per violation, and penalties for a related series of violations jump from \$1.8 million to \$100 million. Anyone knowingly violating the Consumer Product Safety Act would be subject to up to a year's imprisonment—and willful violations would be punishable up to five years. The Act would also eliminate the need for repeated warnings before going forward with criminal prosecution.

Before the bills can be enacted into law, a couple of significant differences must be resolved. One concern is whether to grant whistle-blower protection to informants, or whether proposed protections might incentivize people to wait until a problem becomes less manageable in order to reap a greater financial reward.

An even larger issue is how to structure a proposed complaint database. Manufacturers and retailers argue that public disclosure of all complaint information—no matter how trivial or ill-motivated—could alarm consumers, falsely accuse companies, or expose trade secrets.

To follow the progress of these consumer product safety bills, visit our Web site. If you would like to review the effect of pending legislation on your business, contact the author.

Are your policies up to date?

NEW WORKPLACE CONCERNS FOR EMPLOYERS

Ontario's Human Rights Code Undergoes Significant Change



Employers, be ready. Ontario is cracking down on discrimination and harassment in the workplace. Starting in June, amendments to its Human Rights Code take effect—expanding just about everything, from what constitutes an offense to compensation award caps.

The Code—which is intended to prevent discrimination and harassment on the basis of gender, marital or family status, sexual orientation, disability, race, or place of origin—is tough. And penalties for failing to adequately protect your employees and promote compliance with the human rights law are even tougher. The risk of employer exposure to liability could be virtually unlimited. Here's why.

Expedited complaint process

The cumbersome claim process—typically a four-year ordeal that discouraged wronged employees from pursuing remedies—has been streamlined. Complaints can now be made directly to an expanded Human Rights Tribunal, or be prosecuted as an independent cause of action in the civil courts.

Restitution caps removed

Monetary compensation for mental anguish, once limited to \$10,000, is no longer capped. The tribunal or court can order restitution in an amount that fully compensates a claimant for all losses suffered as a consequence of prohibited conduct—including compensation for loss of dignity, self-respect, or hurt feelings.

Workplace extended

The Code expands the concept of what constitutes a workplace. If an employee is subjected to harassment after work hours and away from work premises by a supervisor, the employer could be held responsible.

New employer obligations

If prohibited conduct results in dismissal, the employer's liability is no longer limited to the required period of notice. Employers could now be required to pay damages to the dismissed employee for all lost income until replacement employment is found—as well as for mental harm suffered.

Under Code amendments, complainants are allowed to seek redress for prohibited conduct as an “independent cause of action” if they were terminated in an otherwise lawful manner for an otherwise justifiable reason (workforce size reduction, for example).

No defense

An employer cannot claim to have been unaware that prohibited acts were being committed. Employers are deemed to be responsible for the wrongful conduct of employees regardless of whether they authorized, acquiesced, or knew what was going on.

How to limit your liability

It's more important than ever before for employers to have effective policies in place that prohibit discrimination and harassment. Policies also should mandate that employees report any type of prohibited conduct or risk dismissal. Call our office if you need some help.



Miller Canfield Grows Globally

Shanghai, here we come To Toronto, and beyond

Shanghai is China's technology hub, and its largest commercial, financial, industrial, and communications center. What better place for our firm to grow its international practice?

In March, we filed an application with the Ministry of Justice of the People's Republic of China, requesting approval to open an office in this bustling city. If approved, we expect to be up and running during the fourth quarter of this year.

The Shanghai office will serve Miller Canfield's North American and European clients in the life sciences, automotive, and other manufacturing sectors—helping them expand their own global markets. We also expect the new presence to extend our services in intellectual property and environmental law, and enhance our corporate and securities practice, facilitating cross-border mergers, acquisitions, joint ventures, and direct foreign investment.

We've opened an office in downtown **Toronto**—right in the heart of the city's financial district. And our presence in Ontario is now better and broader than ever.

Located on Bay Street in the Brookfield Place TD Canada Trust Tower, the new office will serve our clients in a number of sectors including finance, life sciences, and manufacturing, while focusing on intellectual property, bankruptcy and insolvency, and various corporate and securities transactions.

According to the Department of State, the relationship between the U.S. and Canada is the closest and most extensive in the world—as evidenced by the volume of bilateral trade now totaling \$1.5 billion a day.

With Miller Canfield's Toronto and Windsor offices, we're well positioned to provide seamless, cross-border legal representation to domestic, foreign, and multinational companies whose business affairs are tied to this increasingly interdependent world economy.

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The Family and Medical Leave Act is Changing

[Will you be ready?]



In February, the Department of Labor proposed its first changes to the Family and Medical Leave Act since 1993. Following a period of comment, final regulations are expected to be issued before the end of this year.

Since several of the modifications will actually give additional rights to employers, it's not too soon to prepare.

The DOL hasn't completely backed off its position that an employer must notify employees of a decision to grant or deny a FMLA leave within a short period of time—but it has lengthened some of the notice periods from two to five business days. Employers who fail to comply with the timeline risk giving the employee unintended rights under the FMLA.

Left standing, too, is the requirement that, if FMLA leave is granted, an employer cannot later say that the employee was not eligible under the Act. However, the DOL recognizes a “no harm, no foul” offense—so an employee who claims that a notice provision has been violated is required to show harm as a result.

The biggest changes to the Act reflect an understanding that employers were having a difficult time managing attendance in light of the FMLA intermittent leave provisions. Under the revisions, the DOL has changed its previous commentary, now

agreeing that when an employee calls in sick, that employee has not done enough to trigger FMLA rights. Revisions also would allow employers to enforce absence-notice policies—such as to whom notice should be given and when.

In another assist to employers, the proposed regulations permit enactment of certain attendance-incentive plans that would deny bonuses to employees who miss work due to FMLA leave.

Changes also clarify when, and under what circumstances, an employer may request authentication directly from an employee's treating physician, and introduce a new medical certification form.

While the Department of Labor has yet to publish draft regulations addressing individuals serving in the armed forces and their families, it is expected to do so when final regulations are issued later this year.

In the meantime, here's the bottom line: Any absence-notice, attendance-incentive, and other policies must be clearly drafted to comply with new FMLA regulations. If you want to take full advantage of the changes that are coming, you should begin reviewing your written policies now.

AN ALERT

Rules tighten soon for Michigan's aboveground storage tanks

The latest Michigan Department of Environmental Quality (MDEQ) protection standards for aboveground tanks used to store flammable and combustible liquids are about to take effect — and the standards apply to all tanks, new and old alike.

New rules impose spill, overflow, and corrosion directives for aboveground tanks of any size, irrespective of their date of installation. Old rules had excluded coverage for tanks installed prior to 1992, but new rules omit any such exclusion. The deadline for compliance is August 12, 2008.

Owners and operators of storage tanks should promptly inventory their aboveground tanks and review the new rules to determine how they will be affected. Since compliance may be disruptive to business, time-consuming, and costly, advance assessment and planning are critical.




The choices are clear. By August 12, existing tanks must be:

- 1. Upgraded with mandatory spill, overflow, and corrosion protection**
- 2. Removed and replaced with new compliant systems**
- 3. Or permanently closed in accordance with the new rules**

If you decide to replace or close your tank, you must notify MDEQ at least 30 days in advance. It will also be necessary to assess the area for any toxic release to the environment. If there's visible, olfactory, or analytical evidence of a release, you'll need to take corrective action. Other requirements include proper emptying of the tank's contents and sludge from the system, and either safeguarding the tank against future vandalism or removing it for proper disposal.

Failure to meet the deadline could result in citations, fines, or "red tag" status that would shut down your operations pending compliance. The deadline for taking action is fast approaching, and tank contractors and suppliers are getting busy.

Don't put this off. If you own or operate aboveground storage tanks in Michigan and need some help with the state's Storage and Handling of Flammable and Combustible Liquids Rules, contact us soon.



To appeal or to settle? That is the question.

You and your opponent have been to court, and a judgment was rendered. Now you face the possibility of an appeal of the lower court's decision. Is pursuing an appeal in your best interest? Or should you settle? Consider the facts.

If the judgment was in your favor Bear in mind, there's a risk the decision could be reversed on appeal. Or the case will be remanded for a new trial, where the entire process starts all over again.

Then, there's the time factor. A typical appeal takes a year or two to wend its way through court—even longer if you're in a jurisdiction that allows the case to be assigned to another appellate court or panel. Even if you hang in and prevail on appeal, you must consider the cost and uncertainty of collecting your judgment, especially if no bond is in place.

If you're the losing party You've already experienced the psychological impact of losing and having a judgment entered against you. Now comes additional financial uncertainty.

If you appeal, be prepared to commit funds for a bond to stay the decision pending the appeal's outcome. Keep in mind, too, that—should the appellate court affirm the first court decision—accrued interest will add up to an even larger judgment.

If you want to settle Court costs, attorney fees, a lengthy process, and the uncertainty of an appellate decision combine to create a good argument for entering into settlement discussions.

Preparation should begin early in your case with the preservation of issues for appeal—both those

that are procedural and substantive. You will have better leverage to settle if you can present evidence that the judgment in question is susceptible to being reversed—or likely to be upheld—based on controlling law, recent appellate decisions, or legislative actions.

To identify strengths and weaknesses of your case, consider presenting your appeal to a moot court panel. This will give you an opportunity to negotiate for settlement from your strongest position, while raising weaknesses on your opposition's side.

Choose appellate counsel who is knowledgeable about all aspects of your case. Your counsel should be familiar with the appellate court and its judges, and know how they have ruled on similar appeals. That information will help to persuade the other party to settle before oral argument.

Settlement and mediation rules vary by state and court. Although parties can initiate discussion on their own, a court-ordered mediation or settlement discussion may provide a needed catalyst.

What's most important is having the right attitude. For a settlement to succeed, both parties must be willing to compromise on some issues and have the authority to make monetary and other decisions that might be necessary to reach resolution.

Not all cases lend themselves to settlement on appeal—but most will offer some opportunity. For those wanting to eliminate the uncertainty and ongoing cost of litigation, it's worth the effort.

RESEARCH CREDIT *for* MANUFACTURING & ASSEMBLY PLANTS

Is the credit available? It all depends.

An IRS advisory issued March 5, 2007, addressed the question of whether companies could claim a federal income tax credit for conducting research activities in their manufacturing and assembly facilities. Despite limitations suggested by the advisory, the answer seems to be yes... in appropriate circumstances.

To claim a credit, great care must be taken to ensure that research, testing, and analysis activities are conducted in such a way as to meet precise terms of the IRS regulatory guidance.

At issue is what constitutes research, and when and where it takes place.

Is research limited to the time and facility in which products are actually designed and engineered? Or might it extend to the trial and error period in which the product is launched in the manufacturing or assembly plant, the product design is corrected to achieve manufacturability at mass-production rates, and the first products are assembled on the plant floor?

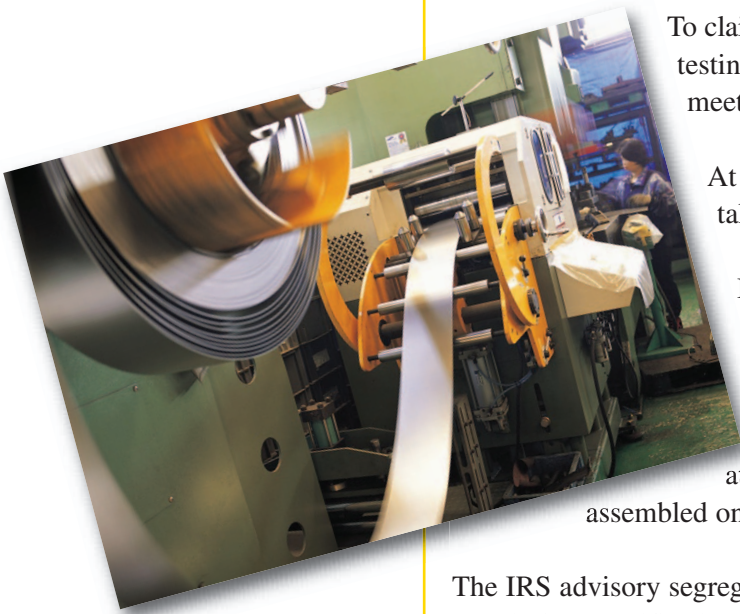
The IRS advisory segregates the two phases—product design in a research facility, and design modification in a manufacturing and assembly facility—contending that design and commercial production are achieved after engineering in the research facility is complete.

Further, the advisory assumes that the product meets basic functional and economic requirements for sale and use at that time. Thus, the window of opportunity for claiming a research credit would have closed according to the IRS advisory.

Under the IRS analysis, activities in the manufacturing or assembly facility would be a new research project and have to satisfy the legal requirements for the credit separately from those activities that had been conducted in the research facility.

Does that sound like the IRS is ruling out credits for assembly facilities?
Not exactly.

While it's true that a good deal of R&D precedes manufacturing, much of it is focused on the product design in a static environment. As any engineer or manufacturer knows, there are always design issues that must be tested and



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resolved during the early phase of mass production. And that's why it's so important to include the types of activities that are carried out at the factory level as part of a single research project to design a product that is to be mass-produced.

What should manufacturers do?

One strategy is to focus on the point in time when commercial production begins—that being the point at which development of the product meets the “basic functional and economic requirements for sale and use.”

In doing so, the taxpayer should determine if the company would have had an unacceptable economic outcome had it marketed and sold its product after completing only the first design step—and not after engaging in activities to correct design flaws in its launch activities in the manufacturing and the assembly plants.

By focusing on the precise point in time when design uncertainties were resolved, a taxpayer should be able to make a credible presentation that engineering activities in a manufacturing and assembly facility are part of a single research project and, as such, are eligible for the federal income tax credit for research activities. Our firm has the expertise to guide you through this complex process. Call if you'd like some help.

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