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MASS & TOXIC TORT UPDATE

New Limitations on Phthalates In Effect February 10, 2009

CPSC'S STAY OF TESTING AND CERTIFICATION REQUIREMENTS DOES NOT STAY NEW LIMITATIONS ON PHTHALATE CONCENTRATION

The regulation of phthalates at both the federal and state level continues to change. On January 30, 2009, the Consumer Product Safety Commission (CPSC) granted a one-year stay of the testing and certification requirements that had been imposed by the Federal Consumer Product Safety Improvement Act of 2008 (CPSIA). Those requirements apply to manufacturers and importers of regulated products, including products intended for children 12 years old and younger. The stay, however, does not apply to other requirements under the act, which become effective February 10, 2009. Yet, as recently as February 6, legislation was proposed in the U.S. Senate that would effectively give the CPSC sweeping power to delay enacting the entire CPSIA.

Unless additional action is taken on that legislation, manufacturers and importers of children's products must still meet the phthalates limits, mandatory toy standards and other requirements imposed under the CPSIA. Specifically, as of February 10, the CPSIA makes it unlawful for any person to manufacture for sale, offer for sale, distribute in commerce or import into the United States any children's toy or child care article that contains concentrations of more than 0.1 percent (1,000 ppm) of six specific phthalates.

Moreover, while federal law now regulates concentrations of certain phthalates in children's toys and child care articles, legislation pending in various states proposes to ban or limit the concentration of phthalates in other consumer products, including cosmetics, jewelry, IV tubing and food and beverage containers. At least 21 states have pending phthalate legislation.

State legislation must not be overlooked. While the CPSIA reiterates that the CPSC regulations preempt contrary state laws, it also expressly states that it does not preempt state regulation in areas where the CPSC has failed to act. This is important because states, including California, Vermont and Washington, already have their own laws that similarly ban phthalates in concentrations in excess of 0.1 percent in children's products and other states are considering banning phthalates in other products. In fact, Vermont's statute forbids a manufacturer from replacing phthalates with any substance listed on the U.S. EPA's "List of Chemicals Evaluated for Carcinogenic Potential" or any toxicants that the EPA has identified as causing birth defects, reproductive harm or developmental harm and specifically requires that "*Manufacturers shall use the least toxic alternative when replacing phthalates.*" A violation of that provision is deemed a violation of Vermont's Consumer Fraud Act. Other states have similar provisions pending.



It is clear that the CPSIA is only the initial step in the regulation of phthalates, and the landscape is constantly changing.

FOR MORE INFORMATION

If you have questions or would like more information about this topic, please contact:

Elizabeth B. Wright 216.566.5716 Elizabeth.Wright@ThompsonHine.com
Timothy J. Coughlin 216.566.5523 Tim.Coughlin@ThompsonHine.com

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