

AMENDED IN ASSEMBLY MARCH 24, 2008

CALIFORNIA LEGISLATURE—2007—08 REGULAR SESSION

ASSEMBLY BILL

No. 1860

Introduced by Assembly Member Huffman
(Coauthors: Assembly Members Feuer and Ma)
(Coauthor: Senator Migden)

January 30, 2008

An act to add Chapter 2 (commencing with Section 108040) to Part 3 of Division 104 of, and to repeal the heading of Chapter 2 of Part 3 of Division 104 of, the Health and Safety Code, relating to product safety.

LEGISLATIVE COUNSEL'S DIGEST

AB 1860, as amended, Huffman. Unsafe products: recall or warning.

Existing federal law authorizes the United States Consumer Product Safety Commission to establish and enforce product safety standards that it finds necessary to protect against unreasonable risk of injury. Once the commission staff determines a product violates a specific statute or regulation, the staff notifies the responsible manufacturer, importer, distributor, or retailer, and assists the responsible firm with the development and implementation of a remedial repair, replacement, or refund program, also known as a recall.

Existing state law provides for the establishment and enforcement of various product safety standards for consumer products, including, among others, requiring specified warning labels for water heaters, and prohibiting the sale of contaminated toys and lead-tainted tableware.

Existing state law prohibits the manufacture, production, preparation, compounding, packing, selling, offering for sale, or keeping for sale within the State of California, or the introduction into this state, of a

misbranded hazardous substance or banned hazardous substance. Any violation of this provision is punishable as a misdemeanor. Existing law requires the manufacturer, distributor, or retailer of any banned hazardous substance to repurchase the article or substance from the person to whom it was sold, and to refund the purchase price paid.

This bill would prohibit a commercial dealer, manufacturer, importer, distributor, wholesaler, or retailer from ~~knowingly~~ manufacturing, remanufacturing, retrofitting, distributing, selling at wholesale or retail, contracting to sell or resell, leasing, or ~~subletting~~ *subletting*, or otherwise placing into the stream of commerce, a product that is unsafe *knowing that the product is unsafe*, as specified. The bill would provide for an unsafe product to be retrofitted, and would permit the sale of the retrofitted product if accompanied by a specified notice.

The bill would require a commercial dealer, manufacturer, importer, distributor, or wholesaler that has placed into the stream of commerce a product for which a recall or warning has subsequently been issued to initiate specified steps within 24 hours after issuing or receiving the recall notice or warning, including contacting all of its customers, other than end consumers, to whom it sold, leased, sublet, or transferred that particular product, and posting prominently on its Web site a link to recall or warning information that contains the specific recall notice or warning that was issued for the product in question and other specified information.

The bill would require the manufacturer of the product to provide for the safe return of the product to the manufacturer at no cost to the end consumer or retailer, and would require the manufacturer to properly dispose of the product and not export the product, or permit it to be exported, for disposal in a manner that poses a significant risk to the public health or the environment. The bill would require the manufacturer to prepare and, at the request of the Department of Toxic Substances Control, submit within 28 days of the date of the request, technical documentation or other information showing that the manufacturer complied with these requirements. The bill would impose additional requirements upon retailers of products determined to be unsafe, including removing the product from the shelves of its stores or programming its registers to ensure that the item cannot be sold, within 3 days after receiving the recall notice or warning of the unsafe product.

This bill would provide that the Department of Toxic Substances Control is responsible for the administration and enforcement of these

provisions. The bill would authorize any authorized agent of the department, for the purpose of enforcement, to enter and inspect any factory, warehouse, establishment, vehicle, or place in which any product is manufactured, held, transported, distributed, used, or sold, and would require the department, upon request, to report to the Legislature concerning the number and findings of inspections performed and samples taken to determine compliance. The bill would make it unlawful for any person to refuse to permit entry or inspection, the taking of samples or other evidence, or access to copying of any record, or to conceal samples or evidence, or withhold evidence. The bill would authorize the department to impose a civil penalty of up to \$5,000 per day upon any person who violates these provisions, and would specify related procedures. If the violation is committed after a previous imposition of a penalty or with the intent to mislead or defraud, or the violation concerns a product primarily used by children or marketed for children, the bill would make the violation punishable by imprisonment in a county jail for not more than one year or in the state prison, by a fine of not more than \$10,000, or by both that imprisonment and fine. By creating a new crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
 State-mandated local program: ~~no~~-yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. The heading of Chapter 2 of Part 3 of Division
- 2 104 of the Health and Safety Code is repealed.
- 3 SEC. 2. Chapter 2 (commencing with Section 108040) is added
- 4 to Part 3 of Division 104 of the Health and Safety Code, to read:
- 5
- 6 CHAPTER 2. PRODUCT RECALL SAFETY AND PROTECTION ACT
- 7
- 8 108040. This chapter shall be known, and may be cited, as the
- 9 Product Recall Safety and Protection Act.

1 108042. As used in this chapter, the following terms have the
2 following meanings:

3 (a) “Commercial dealer” means any person who deals in
4 products or who otherwise by his or her occupation holds himself
5 or herself out as having knowledge or skill peculiar to products,
6 or any person who is in the business of remanufacturing,
7 retrofitting, selling, leasing, subletting, or otherwise placing into
8 the stream of commerce, a product.

9 (b) “Department” means the Department of Toxic Substances
10 Control.

11 (b)

12 (c) “Distributor” and “wholesaler” means any person, other than
13 a manufacturer or retailer, who sells or resells, or otherwise places
14 into the stream of commerce, a product.

15 (e)

16 (d) “End consumer” means a person who purchases a product
17 for any purpose other than resale.

18 (d)

19 (e) “First seller” means any retailer selling a product that has
20 not been used or has not previously been owned. A first seller does
21 not include an entity such as a second-hand retail dealer, thrift
22 shop, resale store, or any other establishment or individual, agent,
23 or employee thereof that sells, distributes, rents, or leases products
24 of any kind.

25 (e)

26 (f) “Importer” means any person who brings into this country,
27 and places into the stream of commerce, a product.

28 (f)

29 (g) “Manufacturer” means any person who makes, and places
30 into the stream of commerce, a product.

31 (g)

32 (h) “Person” means a natural person, firm, corporation, limited
33 liability company, or association, or an employee or agent thereof.

34 (h)

35 (i) “Product” means an item that is designed or intended for use
36 by the general population or segments of the general population.
37 “Product” does not include ~~any medication, drug, or food, or other~~
38 ~~item intended to be ingested.~~ *food, drugs, cosmetics, medical*
39 *devices, firearms and ammunition, boats, motor vehicles, aircraft,*
40 *or tobacco.*

1 ~~(i)~~

2 (j) “Recall” means any repair, replacement, or refund program
3 implemented in accordance with state or federal law upon a
4 determination that a product violates a statute or regulation, and
5 notification to the product manufacturer, importer, distributor, or
6 retailer that corrective action to address the violation is warranted.
7 “Recall” includes a voluntary recall where a product is returned
8 to the manufacturer for repair or replacement, usually due to
9 defects or safety concerns, or public notice that a product is
10 defective and must be returned to the manufacturer or retailer.

11 ~~(j)~~

12 (k) “Retailer” means any person other than a manufacturer,
13 distributor, or wholesaler who sells, distributes, sublets, or leases
14 consumer goods of any kind.

15 ~~(k)~~

16 (l) “Sell” or “sale” means a transfer for consideration of title
17 or of the right to use, by lease or sales contract, including, but not
18 limited to, transactions conducted through sales outlets, catalogs,
19 or the Internet or any other, similar electronic means.

20 108044. (a) No commercial dealer, manufacturer, importer,
21 distributor, wholesaler, or retailer shall knowingly manufacture,
22 remanufacture, retrofit, distribute, sell at wholesale or retail,
23 contract to sell or resell, lease, or sublet, or otherwise place into
24 the stream of commerce, a product that is unsafe *knowing that the*
25 *product is unsafe, as defined in subdivision (b).*

26 (b) A product shall be deemed unsafe for purposes of this
27 chapter only if it meets one or more of the following criteria:

28 (1) The product does not conform to state and federal laws and
29 regulations setting forth standards for the product.

30 (2) The product has been recalled for any reason, or it has been
31 recalled in cooperation with an agency of the federal government
32 or the product’s commercial dealer, manufacturer, importer,
33 distributor, or wholesaler, and the recall has not been rescinded.

34 (3) A state or federal agency, or the product’s commercial dealer,
35 manufacturer, importer, distributor, or wholesaler, has issued a
36 warning that the intended use of a specific product constitutes a
37 safety hazard, and the warning has not been rescinded.

38 (c) (1) An unsafe product, as determined pursuant to subdivision
39 (b), may be retrofitted if the retrofit has been approved by the
40 agency issuing the recall or warning, or the agency responsible for

1 approving the retrofit if it is different from the agency issuing the
2 recall or warning.

3 (2) A retrofitted product may be sold if it is accompanied at the
4 time of sale by a notice declaring that it is safe to use. The notice
5 shall include all of the following:

6 (A) A description of the original problem that made the recalled
7 product unsafe.

8 (B) A description of the retrofit that explains how the original
9 problem was eliminated and declaring that it is now safe to use.

10 (C) The name and address of the commercial dealer,
11 manufacturer, importer, distributor, or wholesaler who
12 accomplished the retrofit, certifying that the work was done, along
13 with the name and model number of the product retrofitted.

14 (3) The commercial dealer, manufacturer, importer, distributor,
15 or wholesaler is responsible for ensuring that the notice described
16 in paragraph (2) is present with the retrofitted product at the time
17 of sale. This paragraph and paragraph (2) shall not apply if either
18 subparagraph (A) or (B) applies:

19 (A) The retrofit meets all of the following:

20 (i) The product requires assembly by the consumer.

21 (ii) The retrofit kit is provided with the product by the
22 commercial dealer, manufacturer, importer, distributor, or
23 wholesaler.

24 (iii) The retrofit kit is accompanied at the time of sale by
25 instructions explaining how to apply the retrofit.

26 (B) The seller of a previously unsold product accomplishes the
27 approved or recommended repair prior to sale.

28 108046. (a) A commercial dealer, manufacturer, importer,
29 distributor, or wholesaler that has placed into the stream of
30 commerce any product for which a recall or warning has
31 subsequently been issued, shall initiate the following steps within
32 24 hours after issuing or receiving the recall notice or warning:

33 (1) Contact all of its customers, other than end consumers, to
34 whom it sold, leased, sublet, or transferred that particular product.
35 The contact shall be made to a person designated for that product
36 by the customer and shall include a copy of the recall notice or
37 warning.

38 (2) If the commercial dealer, manufacturer, importer, distributor,
39 or wholesaler maintains a Web site, the entity shall place
40 prominently on the home page or first point of entry of its Web

1 site, a link to recall or warning information that contains the
2 specific recall notice or warning that was issued for the product
3 in question. The recall or warning information shall include a
4 description of the product, the reason for the recall or warning, a
5 picture of the product, and instructions on how to participate in
6 the recall or warning. The information shall include only the
7 product recall or warning information and shall not include sales
8 or marketing information on that product or any other product,
9 excluding return and exchange policies. The recall or warning
10 information shall permit participation in the recall or warning
11 through the Web site of the commercial dealer, manufacturer,
12 importer, distributor, or wholesaler.

13 (3) If the commercial dealer, manufacturer, importer, distributor,
14 or wholesaler sold directly to an end consumer, and the consumer
15 provided either a shipping address or e-mail address at the time of
16 sale or that consumer contact information is otherwise on file, then
17 the commercial dealer, manufacturer, importer, distributor, or
18 wholesaler shall send a notice of the recall or warning to the
19 consumer at each of those addresses. The notice shall include a
20 description of the product, the reason for the recall or warning, a
21 picture of the product, and instructions on how to participate in
22 the recall or warning. The notice shall include only the product
23 recall or warning information and shall not include sales or
24 marketing information on that product or any other product,
25 excluding return and exchange policies.

26 (b) (1) The manufacturer of the product shall provide for the
27 safe return of the product to the manufacturer at no cost to the end
28 consumer or retailer.

29 (2) The manufacturer shall properly dispose of the product in
30 a manner that is in compliance with all applicable federal, state,
31 and local laws, regulations, and ordinances, and shall not export
32 the product, or permit it to be exported, for disposal in a manner
33 that poses a significant risk to the public health or the environment.

34 (3) The manufacturer shall prepare and, at the request of the
35 Department of Toxic Substances Control, submit within 28 days
36 of the date of the request, technical documentation or other
37 information showing that the manufacturer complied with
38 paragraphs (1) and (2).

39 (c) If a retailer receives notice of a recall or warning regarding
40 a product from a commercial dealer, manufacturer, importer,

1 distributor, wholesaler, or state or federal agency, and if the retailer
2 at any time offered the product for sale, then the retailer shall do
3 the following:

4 (1) Within three days after receiving the notice or warning by
5 the person designated by the retailer, the retailer shall remove the
6 product from the shelves of its stores or program its registers to
7 ensure that the item cannot be sold.

8 (2) If the product was sold through the retailer's Web site, then
9 within three days after receiving the notice or warning by the
10 person designated by the retailer, the retailer shall remove the
11 product from the Web site or remove the ability to purchase the
12 product through the Web site.

13 (3) If an e-mail or shipping address was provided at the time of
14 purchasing a product on the retailer's Web site for which a recall
15 or warning was subsequently issued, or if the retailer otherwise
16 has the purchaser's contact information on file, the retailer shall
17 contact the purchaser and send the recall notice or warning
18 information to each of those addresses. The recall notice or warning
19 information shall include a description of the product, the reason
20 for the recall or warning, a picture of the product, and instructions
21 on how to participate in the recall or warning. The information
22 shall include only the product recall or warning information and
23 shall not include sales or marketing information on that product
24 or any other product, excluding return and exchange policies. The
25 retailer shall comply with this paragraph within 30 days of
26 receiving the notice of the recall or warning.

27 (4) Within three days after receiving the recall notice or warning
28 by the person designated by the retailer, the retailer shall post in
29 a prominent location in each retail store the recall notice or
30 warning. The notice or warning shall remain posted for at least
31 120 days.

32 (5) If the product for which a recall or warning was issued was
33 sold on the retailer's Web site, the retailer shall within three days
34 after receiving the recall notice or warning by the person designated
35 by the retailer, post on the home page or first point of entry of its
36 Web site a link to recall or warning information that contains the
37 specific recall notice or warning that was issued for the product
38 in question. The recall or warning information shall include a
39 description of the product, the reason for the recall or warning, a
40 picture of the product, if one was provided, and instructions on

1 how to participate in the recall or warning. The information shall
2 include only the product recall or warning information and shall
3 not include sales or marketing information on that product or any
4 other product, excluding return and exchange policies.

5 (6) A retailer who is not a first seller shall comply with this
6 subdivision, except that the retailer has five days to comply with
7 paragraphs (1) and (2).

8 (7) A retailer who is a first seller shall accept any recalled
9 product for the purpose of returning it to the manufacturer or
10 distributor.

11 (d) A commercial dealer, manufacturer, importer, wholesaler,
12 or distributor who is also a retailer shall comply with subdivisions
13 (a), (b), and (c), as applicable.

14 108048. Nothing in this chapter relieves a commercial dealer,
15 manufacturer, importer, distributor, wholesaler, or retailer from
16 compliance with stricter requirements that may be imposed by an
17 agency of the federal government.

18 *108050. The Department of Toxic Substances Control is*
19 *responsible for the administration and enforcement of this chapter.*
20 *The department, upon request, shall report to the Legislature*
21 *concerning the number and findings of inspections performed and*
22 *samples taken to determine compliance with this chapter.*

23 *108052. (a) For the purposes of enforcing this chapter, any*
24 *authorized agent of the department may, upon presenting*
25 *credentials showing that he or she is an authorized agent of the*
26 *department and at a reasonable time, do any of the following:*

27 *(1) Enter any factory, warehouse, or establishment in which*
28 *any product is manufactured, held, distributed, used, or sold.*

29 *(2) Enter any vehicle that is being used to transport or hold any*
30 *product.*

31 *(3) Enter any place where any product is suspected of being*
32 *held or sold in violation of this chapter.*

33 *(4) Inspect any factory, warehouse, establishment, vehicle, or*
34 *place in which any product is manufactured, held, transported,*
35 *distributed, used, or sold, and all equipment, raw materials,*
36 *finished and unfinished materials, containers, and any product*
37 *therein. The inspection shall include any record, file, paper,*
38 *process, control, and facility that has a bearing on whether the*
39 *product complies with this chapter.*

1 (5) Secure any sample or specimen of any product. If the agent
2 obtains any samples prior to leaving the premises, he or she shall
3 leave a receipt describing any sample obtained. The department
4 shall secure only the quantity of product that is reasonably
5 necessary to conduct any testing as determined appropriate by the
6 department.

7 (6) Have access to all records of carriers in commerce relating
8 to the movement in commerce of any product, or the holding for
9 sale of the product, and the quantity, shipper, and consignee.

10 (b) It is unlawful for any person to refuse to permit entry or
11 inspection, the taking of samples or other evidence, including
12 photographs, or access to copying of any record as authorized by
13 this chapter, or to conceal the samples or evidence, or withhold
14 evidence concerning them.

15 108054. (a) The department may impose a civil penalty
16 payable to the department upon any person who violates this
17 chapter or any regulation adopted pursuant to this chapter in the
18 amount of not more than five thousand dollars (\$5,000) per day.
19 Each day a violation continues shall be considered a separate
20 violation.

21 (b) If, after examination of a possible violation and the facts
22 surrounding that possible violation, the department concludes that
23 a violation has occurred, the department may issue a complaint
24 to the person charged with the violation. The complaint shall allege
25 the acts or failures to act that constitute the basis for the violation
26 and the amount of the penalty. The complaint shall be served by
27 personal service or by certified mail and shall inform the person
28 so served of the right to a hearing.

29 (c) Any person served with a complaint pursuant to subdivision
30 (b) may, within 20 days after service of the complaint, request a
31 hearing by filing with the department a notice of defense. A notice
32 of defense is deemed to have been filed within the 20-day period
33 if it is postmarked within the 20-day period. If a hearing is
34 requested by the person, it shall be conducted within 90 days after
35 the receipt by the department of the notice of defense. If no notice
36 of defense is filed within 20 days after service of the complaint,
37 the department shall issue an order setting the penalty as proposed
38 in the complaint unless the department and the person have entered
39 into a settlement agreement, in that case the department shall issue
40 an order setting the penalty in the amount specified in the

1 settlement agreement. If the person has not filed a notice of defense
2 or if the department and the person have entered into a settlement
3 agreement, the order shall not be subject to review by any court
4 or agency.

5 (d) Any hearing required under this section shall be conducted
6 within 90 days after receipt of the notice of defense by an
7 administrative law judge of the Office of Administrative Hearings
8 of the Department of General Services in accordance with Chapter
9 4.5 (commencing with Section 11400) of Part 1 of Division 3 of
10 Title 2 of the Government Code, and the department shall have
11 all the authority granted to an agency by those provisions.

12 (e) Orders setting civil penalties under this section shall become
13 effective and final upon issuance thereof, and payment shall be
14 made within 30 days of issuance. A copy of the order shall be
15 served by personal service or by certified mail upon the person
16 served with the complaint.

17 (f) Within 30 days after service of a copy of a decision issued
18 by the director after a hearing, any person so served may file with
19 the superior court a petition for writ of mandate for review of the
20 decision. Any person who fails to file the petition within this 30-day
21 period may not challenge the reasonableness or validity of the
22 decision or order of the director in any judicial proceeding brought
23 to enforce the decision or order or for other remedies. Section
24 1094.5 of the Code of Civil Procedure shall govern any
25 proceedings conducted pursuant to this subdivision. In all
26 proceedings pursuant to this subdivision, the court shall uphold
27 the decision of the director if the decision is based upon substantial
28 evidence in the whole record. The filing of a petition for writ of
29 mandate shall not stay any corrective action required pursuant to
30 this chapter or the accrual of any penalties assessed pursuant to
31 this section. This subdivision does not prohibit the court from
32 granting any appropriate relief within its jurisdiction.

33 (g) The remedies under this section are in addition to, and do
34 not supersede or limit, any and all other remedies, civil or criminal.

35 (h) If the violation is committed after a previous imposition of
36 a penalty under this section that has become final, if the violation
37 is committed with intent to mislead or defraud, or if the violation
38 concerns a product primarily used by children or marketed for
39 children, the person shall be punished by imprisonment in a county

1 *jail for not more than one year or in the state prison, by a fine of*
2 *not more than \$10,000, or by both that imprisonment and fine.*
3 *SEC. 3. No reimbursement is required by this act pursuant to*
4 *Section 6 of Article XIII B of the California Constitution because*
5 *the only costs that may be incurred by a local agency or school*
6 *district will be incurred because this act creates a new crime or*
7 *infraction, eliminates a crime or infraction, or changes the penalty*
8 *for a crime or infraction, within the meaning of Section 17556 of*
9 *the Government Code, or changes the definition of a crime within*
10 *the meaning of Section 6 of Article XIII B of the California*
11 *Constitution.*