

Retail Detail



New Rules Affecting Retail and Transportation Industry Reverse Logistics

By Jeryl L. Olson and Craig B. Simonsen

The Retail and Transportation Industries have been plagued by the expensive, complex, and often contradictory state and federal laws which govern the way retailers transport products characterized as recalls, customer returns, expired products, broken or spilled products, and seasonal products, among others (collectively "Returns"). These Returns are often shipped to commercial consolidation centers which sort them for reuse, resale, donation, recycling or disposal ("Reverse Logistics"). Many of these product Returns qualify under state and federal laws as "waste" and, as a result, generators of waste (retailers) as well as transporters, face strict labeling, and packaging and handling regulations with steep penalties for violations.

Unfortunately, the maze of regulatory requirements with respect to handling Returns using Reverse Logistics varies from state to state, and store employees at the local level, often with limited experience, are making these crucial decisions concerning identifying, packaging, labeling, handling, and manifesting hazardous materials which could potentially subject their employers to significant exposure under their state's regulatory scheme. For this reason, retailers have struggled to develop consistent policies and training regarding how to accumulate, store, label hazardous waste, record, package and label thousands of different product Returns across a number of states.

Retail Hazardous Materials Enforcement Activities

Because of recent high profile, high penalty enforcement actions against retailers in California, and with pressure from the retail and transportation industries, both the United States Environmental Protection Agency ("USEPA") and the Pipeline and Hazardous Materials Safety Administration ("PHMSA") are actively working to develop federal rulemaking intended to help save retailers, transportation companies and reverse logistics service providers millions of dollars spent on training, labeling, packaging, shipping documentation, licensing and other costs relating to Returns using Reverse Logistics. The goal is to establish national standards to avoid piecemeal state regulation, although states will likely be allowed to have stricter standards.

California law provides that even *de minimis* amounts of chemicals or drugs are considered "hazardous waste" at the point of generation (the store) if there is no known use for the products at the time they leave the store. Because the reverse logistics providers often do not determine a market (or lack thereof) until the returns arrive at the sorting facility, California contends the materials must be considered waste when the store generates them. California contends that if such "waste" products are not properly manifested, managed, and disposed, the retailer and transporter will be in violation of state laws and subject to steep fines. At present, California's law varies from many states and the federal Resource Conservation and Recovery Act ("RCRA") rules and guidance; the federal rules and many state rules allow that if the reverse logistics company can recycle the damaged, expired or returned product, the product was never hazardous waste in the first place when the store put it on the truck.

While only a few states have imposed penalties for reverse logistics of retail returns, such cases do underscore the disparity between state and federal requirements with respect to retail “waste” and how retailers should transport it. To address the disparity, USEPA and PHMSA are both developing federal rules designed to provide direction to retailers and transporters so they can avoid the enormous costs of maintaining differing policies from state to state on identifying and sorting wastes, training employees, developing safe packaging, arranging proper transport, manifesting, and performing recordkeeping and reporting.

USEPA Rulemaking

For its part, USEPA published a *Notice of Data Availability* (“NODA”) on February 14, 2014, and gathered comments through May. (79 Fed. Reg. 8926). USEPA’s regulatory relief effort is aimed primarily at retail stores (in a range of NAICS codes 441-454, and 722). The retail industry rulemaking is directed at motor vehicle and part stores and dealers, electronics and appliance stores, building materials and garden equipment and suppliers, health and personal care stores, gasoline stations, miscellaneous store retailers, and food and beverage stores, services, and dining and drinking places. Retailers are urging USEPA to create a special category of consumer product wastes or “universal wastes” that would be excluded from the complex regulations applied to hazardous industrial waste.

PHMSA Rulemaking

Similarly, new PHMSA rules are being developed for safely managing and transporting items containing hazardous materials through reverse logistics. *79 Fed. Reg. 46748* (August 11, 2014). The PHMSA Administrator, Cynthia Quarterman, noted that “reverse logistics is already a complex process, and when hazmat items are involved, the potential for error greatly increases.” “We are working with industry trade groups and stakeholders to devise a safety solution that provides a clear definition for reverse logistics in a hazmat context without being unnecessarily burdensome.” Specifically, PHMSA will add a new section to 49 CFR Parts 171-180 to address retail reverse logistics. The PHMSA rules will add training requirements for the transportation industry involved in reverse logistics, establish segregation requirements for retail wastes, establish packaging requirements, and specifically address the handling and transportation of lead acid batteries, among other things.

Conclusions and Recommendations

Retailers, distributors, shippers, carriers, and reverse logistic companies should closely follow the USEPA and PHMSA rulemaking activities because of their significant impact on the retail industry. While the USEPA NODA docket is now closed, the PHMSA reverse logistics docket remains open (until November 10, 2014) and we reserve judgment on PHMSA’s stated conclusion that there will be little new costs associated with the implementation of these new rules, or other provisions.

Generally, best practices suggest that corporate policies and procedures incorporate all local, state, and federal law requirements where possible. Larger companies should regularly audit their practices to ensure their compliance plans are current with the latest state and federal laws.

Jeryl L. Olson is a partner in Seyfarth’s Chicago office and *Craig B. Simonsen* is a senior litigation paralegal in the firm’s Chicago office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Jeryl L. Olson at jolson@seyfarth.com or Craig B. Simonsen at csimonsen@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Retail Detail is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Retail Detail | October 14, 2014

©2013 Seyfarth Shaw LLP. All rights reserved. “Seyfarth Shaw” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.