

ARTICLE

Peloton Recall Highlights Rise in Consumer Product Injuries During COVID-19 Pandemic

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Last week, the fitness tech firm Peloton Interactive, Inc (Peloton) announced voluntary recalls of two treadmill machines. Peloton's announcement, and a corresponding announcement by the U.S. Consumer Product Safety Commission (CPSC or Commission), report one child's death and more than 70 non-lethal incidents in which children, animals, or objects have become entrapped, pinned, and pulled under the rear roller of Peloton's treadmill products. The recalls affect about 126,000 products in the U.S. and follow an April 17, 2021 warning from the CPSC for consumers to stop using the Peloton treadmill "Tread+." From a legal perspective, Peloton's recall is striking for several reasons:

First, as a survey of any law firm would quickly confirm, Peloton products are particularly popular among attorneys. For these individuals, the recalls serve as a reminder to follow Peloton's safety guidelines while using its products.

Second, the Peloton recalls highlight that products can be recalled for safety hazards inherent to their use. In its Recall Handbook, the CPSC acknowledges that "not all products that present a risk of injury are defective. A kitchen knife is one such example. The blade has to be sharp to allow the consumer to cut or slice food. The knife's sharpness is not a product defect, even though some consumers may cut themselves while using the knife." In this vein, Peloton originally defended the safety of its treadmill products on the grounds that all motorized exercise equipment is inherently dangerous, but that "Tread+ is safe for the home when used in accordance with warnings and safety instructions." CPSC indicates that companies should ask

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the following questions, among others, in determining whether a risk of injury associated with a product could make the product defective: What is the nature of the risk of injury that the product presents? What is the population exposed to the product and its risk of injury? Are there adequate warnings and instructions that mitigate the risk? Is the risk of injury the result of consumer misuse, and is that misuse foreseeable?

Third, the Peloton recalls serve as one example of a rise in consumer product injuries that have resulted as consumers, who are spending significantly more time at home, have had increased exposure to certain kinds of household products. In a January 2021 report titled "Effect of Novel Coronavirus Pandemic on Preliminary NEISS Estimates" the CPSC determined that when compared to the same period in 2019, certain household accidents occurring from March–September 2020 increased dramatically. For example, the Commission determined that ER-treated injuries resulting from the use of skateboards, scooters, and hoverboards increased by 39%. ER-treated injuries relating to the use of cleaning agents saw an 84% increase. Increased injuries were also found in relation to the use of massage devices, glass bottles and jars, miscellaneous household appliances, etc.

Companies whose products have become popular during quarantine should be vigilant in monitoring reports of harm caused by their products that are received from the public. Section 15(b) of the Consumer Product Safety Act (15 U.S.C. § 2064) requires manufacturers and importers to *immediately* (within 24 hours) inform CPSC upon receipt of "information which reasonably supports the conclusion" that a product (1) fails to meet CPSC requirements, (2) contains a defect creating a substantial product hazard, or (3) creates an unreasonable risk of serious injury or death.

If a company is uncertain whether information is reportable, it may spend a reasonable time investigating the matter. That investigation, however, should not exceed 10 working days unless the company can demonstrate that a longer time is reasonable under the circumstances.

Once a company has submitted a section 15(b) report to the CPSC, the Commission will make a preliminary determination as to whether the product contains a defect that presents a substantial hazard. This determination then guides the Commission's selection of the level and intensity of corrective action to be imposed. In many cases, a firm or company may initiate a recall voluntarily without a mandate from the CPSC. Such recalls are often the product of a negotiation between the product manufacturer/retailer and the Agency. Voluntary product recalls are considered to be safeguards against potential lawsuits and other similar risks. However, the CPSC or a U.S. District Court also has the right to issue a mandatory or compulsory product recalls.

Alternatively, companies may seek to use an alternative procedure that the CPSC has established to expedite recalls called the "Fast Track Product Recall Program." This program allows companies to avoid a preliminary determination from the CPSC that their products contain a defect that creates a substantial product hazard, if they report potential product defects and, within 20 working days of the filing of the report, implement with the CPSC a consumer-level voluntary recall that is satisfactory to CPSC staff.

There are different approaches to executing product recalls, and strategically navigating communications with CPSC, interfacing with customers and the public, and mitigating potential product liability. In addition to CPSC recalls, the need to quarantine, recall, cancel or phaseout products under the supervision of the government may arise under laws administered by the U.S. Environmental Protection Agency (EPA) and the U.S. Food and Drug Administration (FDA).