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PFAS and Food Packaging: The State of Regulation

Introduction

In the absence of comprehensive federal legislation, states have started to regulate per- and polyfluoroalkyl substances (PFAS) in food packaging. This Update provides an overview of the current regulatory landscape.

PFAS include thousands of human-made chemicals such as perfluorooctanoic acid (PFOA), perfluorooctane sulfonic acid (PFOS), and GenX. PFAS have non-stick and grease-, oil-, and water-resistant properties. PFAS have been used in food contact substances (FCS) in the United States since the 1960s, including cookware, food processing equipment (such as gaskets and O-rings), processing aids for other FCS (such as to reduce buildup on manufacturing equipment), and food packaging (for instance, as a grease-proofing agent).

Today, PFAS are virtually ubiquitous: PFAS have been detected in up to 99% of human blood samples taken during biomonitoring studies of the U.S. population. PFAS are also persistent and bioaccumulative, meaning they remain and build up in the environment for decades or longer.

Given their potential to migrate into foods, PFAS are regulated by the U.S. Food and Drug Administration (FDA) as food additives under the Food, Drug, and Cosmetic Act (FDCA). PFAS can migrate into food when used in food packaging, which has been alleged to pose a consumer risk. It is also theoretically possible for PFAS to migrate into landfills and compost.

Federal Regulation of PFAS in Food Packaging

In 2016, the FDA revoked its regulations authorizing the use of long-chain PFAS, including PFOS and PFOA, in food contact applications. The FDA has also worked with manufacturers to phase out certain short-chain PFAS. The U.S. Environmental Protection Agency (EPA) has taken other actions related to PFAS. For example, in 2022, it removed the last two remaining PFAS from its Safer Chemical Ingredients List (SCIL).

Congress has yet to pass nationwide legislation restricting PFAS in food packaging, although a bill was introduced in late 2021 that would amend the FDCA to prohibit the introduction into interstate commerce of any intentionally added PFAS.

State Laws Regulating PFAS in Food Packaging

In the absence of federal legislation, 11 states have passed laws regulating PFAS in food packaging, and at least five other states are considering such legislation. This is a rapidly developing area of the law.

An overview of the current state laws, effective dates, and varying approaches follows.

Current State Laws and Effective Dates

New York (December 31, 2022). New York bans the distribution and sale of food packaging containing intentionally added PFAS.

California (January 1, 2023). California's law prohibiting any person from distributing, selling, or offering to sell any food packaging that contains PFAS (either intentionally added or at or above 100 parts per million (ppm)) takes effect.

Washington (February 1, 2023). Washington's law provides for a tiered ban on the manufacture, sale, and distribution in Washington of any "food packaging to which PFAS chemicals have been intentionally added in any amount" once safer alternatives have been identified. The first bans take effect in February 2023 and apply to wraps, plates, food boats, or pizza boxes; these will be followed by bans, in May of 2024, on bags and sleeves (made from flexible material), bowls, flat serveware (such as trays and plates), open-top containers, and closed containers. The law requires the Washington State Department of Ecology to identify safer alternatives to PFAS in food packaging.

Vermont (July 1, 2023). Vermont's law bans the manufacture, sale, and distribution of any food package to which PFAS have been intentionally added and are present in any amount.

Connecticut (December 31, 2023). Connecticut's law bans food packaging to which PFAS have been intentionally introduced during manufacturing or distribution.

Colorado (January 1, 2024). Colorado's law phases out the sale or distribution of certain products and product categories in the state that contain intentionally added PFAS between 2024 and 2027. The ban on PFAS in food packaging takes effect on January 1, 2024.

Maryland (January 1, 2024). Maryland's law bans a manufacturer or distributor from manufacturing, selling, or distributing "a food package or food packaging component designed and intended for direct food contact to which PFAS chemicals were intentionally added."

Minnesota (January 1, 2024). Minnesota's statute will ban the manufacture, sale, or distribution of food packaging containing intentionally added PFAS; it provides for a range of civil and criminal penalties, in addition to injunctive relief.

Rhode Island (January 1, 2024). Rhode Island will ban food packaging to which PFAS have been intentionally introduced during manufacturing or distribution.

Hawaii (December 31, 2024). Hawaii's law makes it unlawful to manufacture, sell, or distribute "any food packaging specified in subsection (b) [wraps and liners, plates, food boats, and pizza boxes] to which PFAS chemicals have been intentionally introduced in any amount."

Maine. Maine law also provides that the Maine Department of Environmental Protection (the Department) may, by rule, "prohibit a manufacturer, supplier or distributor from offering for sale or for promotional purposes in the State a food package to which PFAS have been intentionally introduced in any amount greater than an incidental presence." The law also directs the Department to initiate a major substantive rulemaking to prohibit the use of PFAS in food packaging after it makes a determination that safer alternatives to the use of PFAS in specific applications of food packaging are available.

Definitions of "Food Packaging"

Generally speaking, the laws define food packaging by reference to its functionality—e.g., "any package or packaging component that is applied to or in direct contact with any food or beverage."

Some of the definitions of "food packaging" focus on the composition of the product. For example, California's law defines food packaging as any "nondurable package, packaging component, or food service ware" that "is intended to contain, serve, store, handle, protect, or market food, foodstuffs, or beverages" if it is composed, "in substantial part, of paper, paperboard, or other materials originally derived from plant fibers." Colorado's law similarly defines "food packaging" as being "composed, in substantial part, of paper, paperboard, or other materials originally derived from plant fibers."

Other states define a food package more broadly. Maine's law, for example, defines a "food package" as including, but not being limited to, "a food or beverage product that is contained in a food package or to which a food package is applied, a packaging component of a food package and plastic disposable gloves used in commercial or institutional food service."

Certificates of Compliance

Certificates of compliance (COC) are documents that affirm that the components meet the relevant legal requirements. Requirements for COCs vary among the states. Some (like Connecticut, Maine, Maryland, and Vermont) require a COC to be furnished to the purchaser and/or agency upon request; some (like New York) do not affirmatively require it to be provided but provide a defense if a purchaser relied on one.

Others (like Rhode Island) require a COC to be provided to the purchaser regardless of request, and Washington requires a COC to be prepared, kept on file, and furnished to the Department of Ecology "upon request." Also, some requirements apply only to the manufacturer (Maine, Maryland, New York, Vermont, Washington), whereas some apply to a manufacturer and to suppliers/distributors (Connecticut, Rhode Island).

Additional Requirements

One difficult issue in toxicology is "regrettable substitutions." This occurs when a chemical is banned but is replaced with a chemical that is potentially less well-studied and equally (or more) harmful.

To address this, states have imposed "least toxic alternative" requirements. The most obvious examples of this approach are Washington and Maine, but others have also recognized the difficulties created by substitutions. For example, California's law states that a "manufacturer shall use the least toxic alternative when replacing regulated perfluoroalkyl and polyfluoroalkyl substances or PFAS in food packaging." Likewise, Connecticut's law prohibits substituting any component that creates a hazard as great as or greater than PFAS.

Penalties

Penalties vary widely from state to state. In some states, they can be quite substantial; in others, they are nominal. Connecticut provides for civil penalties of up to \$10,000, criminal penalties and fines of up to \$50,000 in some circumstances, and injunctive relief. By contrast, Maine provides for a civil penalty of \$100. However, each package or packaging component that violates the law is the basis of a separate offense.

Takeaways

In the absence of nationwide legislation, state legislatures have created an uneven patchwork of regulations. Given that, manufacturers and distributors should be aware of the applicable requirements in different states.

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