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Navigating the PFAS Regulatory Landscape: Insights for Consumer Brands and Retailers



Per- and polyfluoroalkyl substances (PFAS), known as "forever chemicals," have been in

use since the 1940s and have been added to a wide variety of products to make them resistant to heat, water, oil, and corrosion. PFAS chemicals are not only in firefighting foam but can also be found in numerous consumer products, including food packaging, cosmetics, personal care products, cookware, furniture, carpets, textiles, clothing, and apparel. PFAS chemicals have recently garnered significant attention due to their ubiquitous presence, alleged health risks, and environmental persistence.

This Update examines current state law developments in regulating PFAS chemicals in consumer products and food packaging, summarizes recent litigation against product manufacturers, and outlines next steps that manufacturers, retailers, and distributors of consumer products should consider to minimize their potential liability and risk.

Regulating PFAS in Consumer Products and Food Packaging

Bills aimed at banning PFAS chemicals in consumer products have all failed in Congress; however, there are a few signs that Congress may act in the future, at least in targeted ways. For example, Congress enacted a law banning PFAS in [food packaging provided to the military](#). Federal regulatory scrutiny of PFAS is also increasing, but the primary focus has been on the impacts of PFAS on the environment, reporting under the Toxic Release Inventory program and the Toxics Substances Control Act, establishing cleanup levels under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and establishing allowable drinking water limits under the Safe Drinking Water Act. *See* U.S. Environmental Protection Agency's (EPA) [PFAS Strategic Roadmap](#). In the absence of comprehensive regulation of PFAS by Congress, several states have taken action to eliminate or restrict the use of PFAS chemicals in consumer products and food packaging. Companies should anticipate more states enacting future restrictions on PFAS chemicals in consumer products and food packaging and the need to keep apprised of the changing regulatory landscape.

Consumer Products

At least seven states have passed PFAS restrictions or reporting requirements for a range of consumer products, excluding food packaging. Maine has taken the most aggressive approach with a complete ban on the sale, offer for sale, or distribution in the state of *any* products containing "intentionally added" PFAS as of January 1, 2030. With some variation between the state laws, "intentionally added" generally means PFAS chemicals that a manufacturer has intentionally added to a product and that have a functional or technical effect on the product, including PFAS chemicals that are breakdown products of an added chemical.

Other states have passed more targeted legislation, focusing on products most likely to contain PFAS chemicals or that pose a higher risk to the public. These types of products include:

- Apparel, leather, and textile articles, with an emphasis on outdoor and extreme weather apparel and gear.
- Carpets and rugs.
- Children's products.
- Cookware.
- Cosmetics.
- Stain and water-resistant fabric treatments, ski wax, and related products.
- Upholstered indoor and outdoor furniture.

Product manufacturers, distributors, and retailers should expect the list of PFAS-regulated products to expand in coming years. For example, Washington state's Toxic Pollution law^[1] gives the Washington State Department of Ecology (Ecology) broad authority to issue enforceable administrative orders to manufacturers seeking detailed information about products containing chemicals designated as a "priority" by Ecology, including PFAS. Ecology has used this authority to issue administrative orders to several outdoor-focused apparel and gear providers, requesting detail about PFAS use in apparel and gear products sold or offered for sale in the state in the preceding five years. Washington may therefore be following states like California and New York and

expanding its PFAS restrictions to include apparel and gear products.

While most of the current state laws prohibit only PFAS chemicals that are "intentionally added," California's legislation restricts the presence of PFAS chemicals in juvenile products (products designed for use by infants and children under 12 years of age) and textiles (which includes apparel, accessories, handbags, backpacks, draperies, shower curtains, furnishings, upholstery, beddings, towels, napkins, and tablecloths) at or above 100 parts per million (ppm) (reduced to 50 ppm commencing January 1, 2027, for textiles).

In some states, distributors and retailers may be protected from enforcement of PFAS restrictions if they have a certificate of compliance (CoC) from the manufacturer stating that no PFAS has been intentionally added to covered products or that PFAS levels do not surpass state limits. Distributors/retailers should be aware of which states allow for this safe haven and ensure they have adequate CoCs from manufacturers. Similarly, manufacturers should be prepared to provide such CoCs upon request and be familiar with how states define "intentionally added."

Food Packaging

There are at least 12 states that have moved to regulate PFAS in food packaging, and many other states are considering doing so. While specific provisions vary, the overall goal is reducing consumer exposures to PFAS by regulating food packaging. Implementation timelines and enforcement mechanisms differ among states, as outlined in more detail below. Compliance with this patchwork of state laws poses a challenge for businesses involved in food packaging, since they must navigate supply chain management, product testing, and potential reformulation of food packaging products to comply with the range of state requirements. Additionally, the potential exists for "regrettable substitutions." This occurs when a chemical is banned but is replaced with a chemical that is potentially less well-studied but equally (or more) harmful. To address this, some states, including Washington and Maine, have required an analysis of safer alternatives to PFAS in food packaging.

Overview of Current State PFAS Legislation

California. [California](#) had three PFAS-related requirements go into effect in 2023: (1) prohibiting any person from distributing, selling, or offering to sell any food packaging that contains PFAS (either intentionally added or at or above 100 ppm) as of January 1; (2) prohibiting any person from distributing, selling, or offering to sell any juvenile products that contain PFAS (either intentionally added or at or above 100 ppm) as of July 1; and (3) requiring cookware manufacturers to comply with internet notice requirements for intentionally added PFAS as of January 1. Additional labeling requirements for PFAS in cookware take effect January 1, 2024, and PFAS restrictions in cosmetic products and textile articles take effect January 1, 2025.

Colorado. [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, carpets, rugs, fabric treatments, and juvenile products takes effect on January 1, 2024. The ban will be extended to cosmetics, indoor textile furnishing, and indoor upholstered furniture on January 1, 2025, and then to outdoor textile furnishings and outdoor upholstered furniture on January 1, 2027. Internet website notice and product

labeling requirements for cookware containing intentionally added PFAS go into effect on January 1, 2024.

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

Hawaii. As of 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](#) requires product manufacturers to report the presence of any intentionally added PFAS in any of their products to the Maine Department of Environmental Protection (MDEP) as of January 1, 2025. Effective January 1, 2023, carpets, rugs, and fabric treatments containing intentionally added PFAS may not be sold, offered for sale, or distributed in the state. As of January 1, 2030, any products sold, offered for sale, or distributed in the state cannot contain intentionally added PFAS. [Maine's law](#) further provides that the MDEP 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 directs the MDEP to initiate a major substantive rulemaking to prohibit the use of PFAS in food packaging after it decides that safer alternatives to the use of PFAS in specific applications of food packaging are available.

Maryland. As of January 1, 2024, [Maryland's law](#) prohibits the manufacture or distribution of any food packaging, rugs, or carpets with intentionally added PFAS.

Minnesota. As of January 1, 2024, [Minnesota's statute](#) bans 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.

New York. New York currently bans the distribution and sale of [food packaging](#) containing intentionally added PFAS. After January 1, 2025, the distribution and sale of [apparel](#) containing intentionally added PFAS is banned. The ban extends to outdoor apparel for several wet weather conditions on January 1, 2028. By January 1, 2027, the New York Department of Environmental Conservation must also establish an overall limit on the presence of PFAS in regulated apparel, in addition to the ban on intentionally added PFAS.

Oregon. As of January 1, 2025, [Oregon's law](#) prohibits the sale or distribution of foodware containers with intentionally added PFAS, in addition to the use by food vendors of polystyrene foam containers for prepared food.

Rhode Island. As of January 1, 2024, [Rhode Island](#) bans food packaging to which PFAS have been intentionally introduced during manufacturing or distribution.

Vermont. As of July 1, 2023, Vermont's law bans the manufacture, sale, and distribution of any [food package, rugs, carpets, aftermarket stain and water-resistant treatments](#) for rugs or carpets, and [ski wax](#) and related tuning products to which PFAS have been intentionally added and are present in any amount.

Washington. Washington's food packaging prohibition 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.[2] The [first bans](#) took 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 serviceware (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. Washington also has a tiered approach for [other consumer products](#),

with notice requirements for leather and textile furniture/furnishing intended for outdoor use containing intentionally added PFAS going into effect January 1, 2024 (first notice due by January 31, 2025). Intentionally added PFAS is restricted in aftermarket stain and/or water-resistant treatments and carpets or rugs as of January 1, 2025, extending to leather and textile furniture and furnishing intended for indoor use as of January 1, 2026.

PFAS in Litigation

With the growth of state and federal regulations, litigation regarding consumer products also has expanded. Most early PFAS cases focused on personal injury and property damage. Claims have since evolved to include contamination of drinking water sources, harm to natural resources, and contamination from Aqueous Film Forming Foam (AFFF). But [only recently](#) have consumers begun to allege misrepresentation claims for PFAS in cosmetics, personal care products, food packaging, and textiles.

The cosmetic and personal care product industries are facing lawsuits for violations of consumer protection statutes, breach of express and implied warranty, misrepresentations, fraud, and false advertising after their products were alleged or affirmatively found to contain PFAS. Some of these cases have already been resolved, serving as potential bellwethers for other consumer product claims.

Cover Girl successfully defended against a lawsuit where the D.C. Superior Court found the alleged misrepresentations were mere commercial "puffery" about the "defendants' philosophy and aspirations."[\[3\]](#) This "puffery" included quotes that Cover Girl's "ambition is to put sustainability at the heart of innovation;" their "products have an environmental role to play in building a sustainable future;" and they "intend to keep sustainability at the heart of product innovation."[\[4\]](#) But another lawsuit is already underway against Cover Girl's waterproof mascara products.[\[5\]](#)

Recently, Thinx settled a class action for up to \$5 million to reimburse consumers and ensure that PFAS is not intentionally added during production of its underwear product.[\[6\]](#) This settlement is based on marketing harm and specifically excludes personal injury claims from the class members' released claims.[\[7\]](#) Unlike Cover Girl's "puffery," Thinx specifically asserted on its website that its product was "Absolutely!" free of harmful chemicals, and its products were "rigorously tested" and "independently certified."[\[8\]](#)

In another lawsuit, unsafe levels of PFAS were alleged in Burt's Bees products, which were marketed as "consciously crafted with ingredients from nature," "100% natural origin," and made "without . . . chemicals of concern."[\[9\]](#) Similarly, bareMinerals stated that their products were "free of harsh chemicals and unnecessary additives, and full of . . . natural minerals," "rigorously safety tested," and "clean, conscious beauty that's good to your skin, good for the community and good for the planet" but allegedly may contain PFAS.[\[10\]](#) It is yet to be determined whether these statements are more comparable to the "puffery" of Cover Girl's ambition and intent or Thinx's affirmative statements that the products are free of harmful chemicals.

Many large food brands have also faced proposed class actions for violations of false and deceptive marketing, including Nantucket Nectar and Snapple juice drinks marketed with "All Natural Ingredients."[\[11\]](#) McDonalds' packaging is alleged to contain PFAS even though McDonalds represents that its products are "safe" and "sustainable."[\[12\]](#) A recent lawsuit even alleges PFAS in cat and dog food packaging.[\[13\]](#)

Although consumer product cases are still in their early stages, the viability of these claims depends on the strength of the sustainable and toxic-free language. Claims and settlements appear to focus on marketing harm

rather than actual harm from PFAS, unlike damages in earlier cases based on environmental, property, and personal injury damages. And the settlement damages are also less than these other cleanup and personal injury lawsuits.^[14] But the growth in legislation will only encourage more litigation in consumer products, including state enforcement actions and strengthening consumer claims.

Looking Forward

PFAS chemical restrictions in consumer products are evolving. Businesses operating in various jurisdictions, both in the United States and internationally, need to stay abreast of the changing regulations to ensure compliance and avoid costly litigation, either based on the presence of PFAS chemicals in their products or statements that the products are "free" of harmful chemicals.

Manufacturers should consider product testing and require that product component manufacturers test their components and provide CoCs. Given the patchwork of current laws and expectation that additional states will pass similar (or more restrictive) laws, manufacturers may need to start manufacturing products that contain the lowest allowable concentration of PFAS chemicals, even if the chemicals are not "intentionally added." To potentially avoid liability or minimize risk, distributors and retailers should require that manufacturers provide adequate CoCs. Businesses should collaborate with legal counsel and other experts to enable informed choices regarding the manufacturing, distribution, and sale of consumer products containing PFAS chemicals.

Endnotes

[1] Wash. Rev. Code § 70A.350 (2022).

[2] Wash. Rev. Code § 70A.222.070 (2022).

[3] Order at 6, *GMO Free USA v. Cover Girl Cosmetics*, No. 2021-CA-004786 (D.C. Super. Ct. June 1, 2022).

[4] *Id.*

[5] *Brown v. Coty, Inc.*, No. 1:22-cv-02696 (S.D.N.Y. Apr. 1, 2022).

[6] Order Granting Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, *Dickens v. Thinx, Inc.*, No. 1:22-cv-04286 (S.D.N.Y. June 8, 2023).

[7] *Id.* at 6.

[8] Consolidated Class Action Complaint ¶ 32, *Dickens*, No.1:22-cv-04286 (Aug. 8, 2022).

[9] Second Amended Consolidated Class Action Complaint ¶ 95, *Gruen v. Clorox Co.*, No. 3:22-cv-00935 (N.D. Cal. Dec. 12, 2022) (alteration in original).

[10] Amended Class Action Complaint ¶ 2, *Onaka v. Shiseido Americas Corp.*, 1:21-cv-10665 (S.D.N.Y. Apr. 18, 2023).

[11] *Walker v. Keurig Dr. Pepper Inc.*, No. 2:22-cv-05557 (E.D.N.Y. Sept. 16, 2022); see also *Hamman v. Cava Grp., Inc.*, 3:22-cv-00593 (S.D. Cal. Apr. 27, 2022) (Cava grain and salad bowl packaging).

[12] Consolidated Class Action Complaint ¶ 4, *McDowell v. McDonalds Corp.*, No. 1:22-cv-01688 (N.D. Ill. July 1, 2022).

[13] *Humphrey v. J.M. Smucker Co.*, 3:22-cv-06913 (N.D. Cal. Nov. 4, 2022).

[14] Compare \$5 million Thinx settlement with the recent settlements in the AFFF Multidistrict Litigation for \$12.5 billion and \$1.185 billion and the property damage claims for cleanup of Wolverine's tannery for \$54 million. Press Release, Barron & Budd, "[Baron & Budd Obtains Historic \\$12.5 Billion Settlement With 3M Company To Resolve PFAS Contamination Suits](#)" (June 22, 2023); Press Release, DuPont, "[Chemours, DuPont, and Corteva Reach Comprehensive PFAS Settlement With U.S. Water Systems](#)" (June 2, 2023); Order Granting Plaintiffs' Motion for Final Approval of Class Action Settlement, Certification of a Settlement Class and Appointment of Settlement Counsel, *Zimmerman v. 3M Co.*, No. 1:17-cv-01062 (W.D. Mich. Mar. 29, 2023).

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