

Bottom of the Ninth: Forever Chemical Bans Take Effect in 2025. What's in Your Team Apparel?

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There has been a significant uptick in class action litigation related to sustainability claims, which will only increase after bans in California and New York on forever chemicals in apparel go into effect January 1, 2025.

Per- and poly-fluoroalkyl substances (PFAS) are a broad group of thousands of man-made compounds often referred to as "forever chemicals" because they contain a strong carbon-fluorine bond and do not degrade easily in the environment. PFAS are most commonly recognized for their resistance to water, heat and oil. PFAS have been found in everything from your favorite team's apparel to your food packaging from the concession stand. Although only certain chains of PFAS have confirmed health risks, some studies now suggest that all PFAS could be harmful to human health and the environment.

Beginning January 1, 2025, California [will prohibit](#) the manufacture, distribution and sale of new athletic wear, sports uniforms, footwear, bags and other clothing or textile items that either contain intentionally added PFAS or contain 100 parts per million (ppm) or more of PFAS. Until 2028, intentionally added PFAS will be allowed in outdoor apparel designed for sports experts to use in severe wet or snowy conditions, such as offshore fishing and sailing, whitewater kayaking and mountaineering. However, beginning January 1, 2025, "Made with PFAS chemicals" disclosures will be required for any such outdoor apparel with intentionally added PFAS or 100 ppm or more of PFAS.

Also beginning January 1, 2025, New York will prohibit the sale of new apparel with PFAS intentionally added for a functional purpose or technical effect in the product. By 2027, New York will [establish a limit](#) on the amount of PFAS allowed in apparel regardless of whether it was intentionally added. Other states are considering or have already passed similar PFAS bans that will go into effect at a later date. For example,

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Maine is also [restricting the use of PFAS](#) in apparel, but the ban doesn't go into effect until 2026.

Already, plaintiffs are blowing the whistle on violations of a similar California ban on PFAS in food packaging that went into effect last year. The total organic fluorine test identified in California's statutes is relatively inexpensive to run, prompting plaintiffs to test products en masse. Based on the results, plaintiffs are using a variety of false advertising laws to threaten and file putative class actions against companies manufacturing, distributing and selling products that violate California's ban on PFAS. Similar litigation related to apparel items is expected.

Compliance with applicable state laws may not be sufficient. Your favorite team's apparel could still risk litigation even if PFAS are not intentionally added and even if it contains less than 100 ppm of PFAS. Plaintiffs have already started to target major apparel and athletic wear manufacturers, alleging that a product representation is false or misleading because the product contains PFAS, even in the absence of statutes regulatory PFAS.

Affirmative sustainability claims are particularly susceptible to litigation. Plaintiffs' attorneys often target products that tout they are "certified" with various third-party certifications as well as products that make claims like "green," "sustainable," "environmentally friendly," "reduce waste," "reduce your carbon footprint," "recyclable," "compostable" and "biodegradable."

For example, in Washington state, a consumer brought a putative class action against a manufacturer of outdoor gear and clothing, alleging that affirmative sustainability claims were false because the apparel contained PFAS. The case was dismissed – after a year and a half of costly litigation.

In Missouri, a consumer brought a putative class action against a manufacturer of athletic footwear, apparel and equipment, alleging the manufacturer's sustainability line of products were not made from sustainable and environmentally-friendly materials. Although the claims were dismissed by the district court as conclusory and unreasonable, the case litigates on before the Eighth Circuit.

In Illinois, consumers brought a putative class action against a manufacturer of children's apparel because they did not disclose the presence of PFAS in the apparel. In that case, the court reasoned that a consumer purchaser would not be misled because the manufacturer did not make any affirmative representations that would conflict with the presence of PFAS.

While several of these early cases have been dismissed, the new PFAS bans and increased focus on PFAS nationally may impact outcomes of future cases.

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So while we are in the ninth inning as PFAS bans are about to take effect, litigation risk and scrutiny on marketing will persist into next year's season.

WHAT SHOULD YOUR GAME PLAN BE IF YOU MANUFACTURE, DISTRIBUTE OR SELL APPAREL?

- Ensure compliance with the upcoming PFAS bans and monitor for additional state specific requirements.
- Understand the vulnerabilities in your supply chain.
- Eliminate the intentional use of PFAS in your apparel, if applicable, and conduct a review of your affirmative claims.

Contact counsel if you receive a pre-litigation demand or service of a lawsuit. Seasoned counsel will be familiar with the plaintiffs litigating in this space.

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