

# Publications

## PFAS Regulations and Legal Actions Overflow in 2023

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By: Nina Webb-Lawton

While it is still only spring, 2023 has already been a significant year for both regulations and litigation related to PFAS. To learn more about what PFAS are, [click here](#).

## Regulatory Actions

There are an increasing number of state, federal, and European statutes and regulations requiring disclosure of PFAS in products and/or banning the sale of certain PFAS-containing products.

As of January 1, 2023, Maine requires the manufacturer of a product containing intentionally added PFAS to provide written information to the state regarding the product and the PFAS. California's Proposition 65 requires warnings to individuals if they may be exposed to "a chemical known to the state to cause cancer or reproductive toxicity . . ." Several PFAS, including PFOA and PFOS, are included on the list of chemicals that trigger the warning requirement.

California, Maine, New York, and several other states have enacted, or are considering, legislation banning the sale of certain PFAS-containing products, including food packaging, juvenile products, textiles, carpets, and cosmetics. For example, as of January 1, 2023, California has banned the distribution, sale, or offering for sale of any food packaging containing PFAS. New York also prohibited the use of intentionally added PFAS in food packaging, effective December 31, 2022. Maine has gone farther than any other state. In addition to prohibitions on the use of PFAS in various categories of products that will take place on a phased basis, Maine has enacted a ban on the sale, offering for sale, or distribution for sale of *any* product that contains intentionally-added PFAS, effective January 1, 2030.

The United State Environmental Protection Agency (U.S. EPA) and the Food and Drug Agency (FDA) have both enacted regulations that touch on PFAS. In 2016, FDA revoked its prior authorization for the use of PFAS in certain food contact applications. On April 13, 2023 EPA put out a

**request for public input** on whether to designate seven additional PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In March 2023, U.S. EPA announced a **proposal** to, among other things, regulate certain PFAS under the Safe Drinking Water Act and establish a National Primary Drinking Water Regulation for a number of PFAS.

The European Union (EU) has also established **regulations** governing the production and use of PFAS. Among other things, both PFOA and PFOS have been identified as persistent organic pollutants (POPs), such that their production and use, as well as placing them in the market, are prohibited. There are also thresholds in the EU for PFAS in drinking water and food.

## Litigation

Current lawsuits regarding PFAS generally fall into three categories:

1. Contamination of water and property, including personal injury caused by exposure to contaminated water and property
2. Consumer litigation
3. Insurance coverage litigation

These lawsuits have had varying success in the courts and have also resulted in several significant monetary settlements.

Manufacturers of PFAS or those using PFAS in the manufacture of other products have been the subject of numerous class action lawsuits by landowners alleging contamination of drinking water and property. These suits generally include claims of trespass, nuisance, and negligence. In many of these cases, the plaintiffs also seek damages for medical monitoring for future disease (whether medical monitoring is allowed as an element of damages depends on the state law governing the case). These contamination cases can be costly to defend, involving the retention of experts and the filing of class certification motions. They can also result in costly verdicts and settlements.

There has been an increasing number of cases involving claims that consumer products, such as those mentioned above, contain PFAS. These complaints generally include claims of misrepresentation, fraud, false advertising, and violations of state business codes, rather than personal injury. While a number of these cases have been dismissed, not all defendants have been so lucky. For example, in August 2022 in *Dawood v. Gamer Advantage LLC*, a California federal court denied defendant's motion to dismiss a case claiming that a product used to prevent eyeglasses from fogging contained PFAS. Whether or not these product cases will be less successful for plaintiffs, the monetary and reputational costs involved in defending the cases cannot be ignored by manufacturers and retailers.

Finally, it is likely that the number of insurance coverage disputes related to PFAS contamination and the use of PFAS in consumer products will continue to increase.

## What actions should manufacturers and retailers take to avoid these risks?

In order to comply with current regulations as well as those that will become effective in the future, it is essential that manufacturers examine their manufacturing processes to determine whether PFAS are being used or created in the manufacturing process. If PFAS are used, manufacturers should take appropriate actions to ensure compliance with all applicable environmental and other regulations. Retailers of products that contain intentionally added PFAS must ensure that they are complying with all statutes and regulations as well, paying particular attention to any reporting or warning requirements and the effective dates of any prohibitions against the sale of PFAS-containing products. Retailers should also establish systems to regularly examine their supply chain to ensure that PFAS are not being added to their products up the line.

## Contacts

Vorys has a group of attorneys who are actively monitoring PFAS regulations and litigation. If you have questions about PFAS or how PFAS regulations may impact your business, please contact your Vorys attorney or Rick Schuster ([rdschuster@vorys.com](mailto:rdschuster@vorys.com)), Susan Harty ([sbharty@vorys.com](mailto:sbharty@vorys.com)), or Nina Webb-Lawton ([niwebb@vorys.com](mailto:niwebb@vorys.com)).