

Retailers Face Compliance Issues As PFAS Regulations Grow

By **Jessica Argenti, Priya Desai and Amy Rubenstein** (August 29, 2023)

Recently, considerable attention has been placed on per- and polyfluoroalkyl substances, or PFAS, which are universal, long-lasting chemicals found in various consumer, commercial and industrial products.

At the federal level, the U.S. Environmental Protection Agency committed^[1] to research efforts to better understand the exposure levels and corresponding health risks related to PFAS.

Concurrently, at the state level, various jurisdictions are enacting legislation mandating PFAS reporting, or in some instances, outright PFAS bans.

This article provides retailers with considerations to manage PFAS compliance in the evolving legislative landscape and a legislative update as many states close sessions for 2023.

Considerations for Retailers

New PFAS legislation brings new compliance and litigation risks.

As direct bans of PFAS come into effect, retailers could see personal injury and negligence per se claims. There is also an increased risk of employee and whistleblower claims against employers if companies fail to comply with PFAS regulations and requirements.

In addition, businesses may begin facing greater false advertising claims as goods may be promoted as environmentally friendly, safe or healthy, despite containing PFAS.

As PFAS legislation, and the potential for litigation, continues to evolve and spread nationally, retailers should focus on supply chain management, inventory audits, and developing and maintaining strong internal standard operating procedures as a way to manage PFAS compliance and minimize litigation risk.

Supply Chain Considerations

PFAS can be found in consumer goods even when not intentionally added.

For example, PFAS can be found in the lubricant on a sewing machine or conveyor, packaging, or water used in production. Other potential sources of hidden PFAS include fabrics, general dust and wire insulation.

As a result, contracts with suppliers and vendors will likely need to address PFAS reporting requirements and require verifications from suppliers and vendors certifying that all materials are PFAS-free. Additional risk-shifting efforts can be made through contractual language.



Jessica Argenti



Priya Desai



Amy Rubenstein

Inventory Audits

Retailers should remove any noncompliant products from inventory before compliance dates approach, which could include, for example, the performance of random inventory testing arranged through counsel to preserve confidentiality.

Standard Operating Procedures

Retailers should develop comprehensive internal policies and procedures to document green advertising claims and periodically review the claims after they are originally substantiated.

State Legislative Updates

California's Ban on PFAS in Juvenile Products

On July 1, California's A.B. 652[2] went into effect, which broadly prohibits any person, including but not limited to manufacturers, from selling or distributing into California any products designed or used by infants or children under 12 years old containing regulated PFAS chemicals.

This statute does not apply to:

- Children's electronic products;
- Medical devices;
- Internal components that would not foreseeably come into contact with a child's skin or mouth; and
- Adult mattresses, which may be regulated under separate legislation.[3]

Manufacturers of juvenile products are required to use the least toxic alternative when replacing PFAS chemicals in juvenile products.[4]

On Aug. 9, A.B. 347[5] was pulled from consideration. A.B. 347, as originally proposed, would move A.B. 652 under the purview of California's Department of Toxic Substances Control and allow the DTSC to assess administrative fines for violations.[7]

It would also require the DTSC to adopt compliance guidelines regarding the PFAS prohibition[8] and conduct random samplings, in each case, by Jan. 1, 2025.[9]

At this time, it is unclear whether AB 347 will progress or be further amended this year.

On Jan. 1, California Health and Safety Code, Section 108971, went into effect, with a compliance period commencing Jan. 1, 2025,[10] or in the case of certain outdoor apparel for severe wet conditions, Jan. 1, 2028.[11]

This legislation prohibits manufacturing, distributing, selling or offering to sell any new textiles containing regulated PFAS,[12] and manufacturers of a textile article must provide a certificate of compliance to any persons offering products for sale within the state.[13]

Maine's Amended PFAS Reporting Requirements

On June 8, Maine adopted an amendment to Public Law 2023, c. 138, titled "An Act to Support Manufacturers Whose Products Contain Perfluoroalkyl and Polyfluoroalkyl

Substances," or the Maine PFAS Reporting Act, which pushed back PFAS reporting requirements and prohibitions to Jan. 1, 2025.[14]

The Maine PFAS Reporting Act generally requires manufacturers of products for sale in Maine that contain intentionally added PFAS to submit to Maine's Department of Environmental Protection the following:

- A description of the product, including estimated units sold annually;[15]
- The purpose for which PFAS are used;[16]
- The amount of each of the PFAS;[17] and
- The manufacturer's contact information.[18]

If a manufacturer has not provided such report, a person may not offer for sale or distribute for sale in Maine such products containing intentionally added PFAS, absent applicability of a statutory exemption.[19]

The Maine PFAS Reporting Act does not apply to manufacturers that employ 25 or fewer people.[20]

Minnesota PFAS Reporting Requirements

This May, Minnesota's PFAS reporting bill, which closely mirrors the Maine PFAS Reporting Act, was passed into law, with reporting requirements starting in 2026.[21]

Minnesota's PFAS legislation, when viewed in totality, contains some of the broadest in the nation, including restricting all unnecessary uses of PFAS by 2023 and banning the use of PFAS in 13 product categories, such as common household items and items particularly important for retail companies, like cosmetics, textiles, upholstered furniture and more, by 2025.[22]

Nevada Governor Vetoes PFAS Bill

On June 16, Nevada Gov. Joe Lombardo vetoed S.B. 76, which prohibited the sale or distribution in Nevada of certain products containing intentionally added PFAS in certain juvenile products and criminal penalties for violators.[23]

The products targeted by the legislation were:

- Carpets or rugs;
- Fabric treatments;
- Food packaging;
- Juvenile products;
- Cosmetics;
- Indoor textile furnishings; and
- Indoor upholstered furniture.[24]

Potential New York PFAS Legislation Pipeline

New York has several PFAS-related bills in the pipeline; however, the New York Legislature is now out of session. As a result, the earliest a bill could advance is spring of 2024.

S.B. S5648A and A.B. A3556A would prohibit the sale of products such as footwear, travel goods and textile articles that contain intentionally added PFAS on and after Jan. 1, 2025, and would require manufacturers of products containing PFAS to provide notice of such fact to anyone that offers the products for sale or distribution.[25]

S5648A and A3556A would also provide for penalties for violations.[26] Senate Bill S4171, which was referred to the Senate Environmental Conservation Committee, would prohibit the same on offers for the sale of any cosmetic product or personal care product containing PFAS substances.[27]

Oregon's Amendment to the Toxic Free Kids Act

On June 27, Oregon adopted H.B. 3043, an amendment to the state's Toxic Free Kids Act, which, effective Jan. 1, 2024, requires stock-keeping unit-level reporting on classes of chemicals.[28]

PFAS are anticipated to be added to the Toxic Free Kids Act, which could create additional reporting requirements.

Washington's Delay in Implementing PFAS Regulations for Consumer Goods

On May 31, the Washington Department of Ecology adopted Chapter 173-337 WAC, Safer Products Restrictions and Reporting, which creates reporting requirements and restrictions for certain priority consumer products, including aftermarket stain and water resistance treatments, carpets and rugs, and leather and textile furnishings, containing specified priority chemicals, including PFAS.

Some manufacturers, distributors and retailers must comply with applicable restrictions and reporting requirements beginning in January 2025.[29]

In 2022, the Washington Legislature amended the Safer Products for Washington law to include PFAS in the definition of consumer products.[30]

However, on Aug. 10, the Department of Ecology announced during its webinar that it has not made determinations about restrictions on PFAS in apparel and gear, and certain other consumer goods, which likely will delay any announcement of regulatory actions to 2027.[31]

Conclusion

Overall, the proliferation of PFAS legislation across the country and globally will significantly affect retail businesses.

Retailers should consider the benefits of engaging legal counsel to assist with the complexities of new compliance and reporting requirements, along with mitigating litigation risks that are undoubtedly coming to fruition as regulations on PFAS gain traction around the globe.

Jessica F. Argenti and Priya Desai are associates, and Amy Rubenstein is a partner, at Dentons.

Dentons shareholder Matthew H. Clark contributed to this article.

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[1] PFAS Explained, United States Environmental Protection Agency, <https://www.epa.gov/pfas/pfas-explained> (last visited August 21, 2023).

[2] Cal. Assembly Bill No. 652 - Product safety: juvenile products: chemicals: perfluoroalkyl and polyfluoroalkyl substances.

[3] Cal. Health & Safety Code §108945(c)(2).

[4] Cal. Health & Safety Code §108947.

[5] Cal. Assembly Bill No. 347 - Household product safety: toxic substances: testing and enforcement.

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] Cal. Health & Safety Code § 108971(a)(1) (2022).

[11] Cal. Health & Safety Code § 108971(a)(2) (2022).

[12] Cal. Health & Safety Code § 108971(a)(1) (2022).

[13] Cal. Health & Safety Code § 108971(c) (2022).

[14] H.P. 138, 2023 Leg. 131st Sess. (Me. 2023).

[15] Id.

[16] Id.

[17] Id.

[18] Id.

[19] Id.

[20] Id.

[21] H.F. 2310, 2023 Leg. 93rd Sess. (Minn. 2023).

[22] Id.

[23] S.B. 76, 2023 Leg. 83rd Sess. (Nev. 2023).

[24] Id.

[25] N.Y. Assembly Bill A3556A; S.B. S5648A.

[26] Id.

[27] S.B. S4171

[28] H.B. 3043, 82nd Leg. Assemb., Reg. Sess. (Or. 2023).

[29] Chapter 173-337 WAC – Safer Products Restrictions and Reporting, Department of Ecology State of Washington, <https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC-173-337> (last visited August 21, 2023).

[30] RCW 70A.350.090. See also, Safer Products for Washington, Department of Ecology Committees, Boards, and Workgroups, https://www.ezview.wa.gov/site/alias__1962/37555/safer_products_for_washington.aspx (last visited August 21, 2023).

[31] Safer Products for Washington, Department of Ecology Committees, Boards, and Workgroups, https://www.ezview.wa.gov/site/alias__1962/37555/safer_products_for_washington.aspx (last visited August 21, 2023).