How Cos. Can Prep For Calif. Ban On PFAS In Food Packaging

By **John Epperson and Peter McGaw** (October 4, 2022)

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The largest economy in the nation advances efforts to ban a group of chemicals known as PFAS on Jan. 1, now barely three months away.

That is when California's ban on the sale of nondurable food packaging in California containing per- and polyflouroalkyl, or PFAS, chemicals goes into effect.

However, the ban on PFAS in food packaging is just one element of California's A.B. 1200, which was enacted in October 2021.A.B. 1200 also requires replacing PFAS in food packaging with the least toxic alternative, and requires disclosure of a broad range of non-PFAS chemicals in cookware.

Ban on PFAS in Food Packaging

A.B. 1200 prohibits selling or distributing food packaging made of plant fibers, such as takeout boxes and food wrappers, if it contains PFAS that were intentionally added or are present at or above 100 ppm.[1]

The law goes beyond regulating the two PFAS commonly in the news, perfluorooctanoic acid, or PFOA, and perfluorooctane sulfonate, or PFOS. Its definition of "PFAS" encompasses the entire range of polyfluorinated substances.[2]

The law draws no distinction between PFAS for which available information establishes a potential for public harm and PFAS for which no data demonstrates a public health risk.

PFAS refers to a group of over 9,000 chemicals[3] that have been used in many products to enhance desirable properties, such as water or stain resistance in clothing and carpets or, in the case of food packaging, preventing leakage of sauces and oil or grease out of the packaging.

Many businesses substituted cardboard and paper packaging for closed-cell extruded polystyrene foam, e.g., Styrofoam, and single-use plastic packaging because they are perceived as better alternatives for the environment, given the widely acknowledged problems with recycling plastics and Styrofoam that have resulted in a glut of these materials being sent to landfills as recycling options dwindle.

To make cardboard and paper suitable for holding food products, they needed to be lined with a material that would prevent liquids from soaking into the fiber packages. Adding a lining that included PFAS seemed to be the perfect solution.

Now, in line with the law of unintended consequences, these alternatives to plastic and Styrofoam containers are themselves coming under fire.

PFAS compounds have made headlines lately because some have been identified as having potential health effects, although the science of which of the PFAS chemicals are hazardous and at what levels is still being developed.[4]

PFAS are also known as forever chemicals because their inert nature makes them resistant to breaking down, meaning they can be found throughout the environment, including in human bodies.

However, long before the recent concerns over their persistence and potential harm, PFAS chemicals were key ingredients in many products and, in some cases such as fire-fighting foam and fume suppressants, were — or still are — mandated by state and federal regulations.[5]

The persistence of these substances has resulted in a push to regulate PFAS, generally, and to ban some of them altogether. The U.S. Environmental Protection Agency recently announced public health goals for some PFAS in drinking water at levels below the current ability to detect them in a lab.[6]

The EPA has also announced that it is starting the process to list several PFAS chemicals as hazardous substances,[7] which will have far-reaching regulatory consequences.

At least 11 other states have enacted bans or restrictions on PFAS in food packaging, most with future deadlines, but California's ban impacts the largest market. A number of other states, as well as the European Union, are considering similar prohibitions or have laws and regulations either pending or in place.

Increasing public awareness and concern over PFAS and their use in food packaging is likely driving businesses to find alternatives that do not contain PFAS regardless of their regulatory status. At some point, when a sufficient number of jurisdictions have prohibitions in place, manufacturers of food packaging will presumably switch to PFAS-free alternatives rather than producing both.

However, in the interim, when taking into account the global supply chain and the built-in delays between manufacturing and availability at your local sandwich shop, California businesses may find it challenging to comply with the ban on PFAS in food packaging by Jan. 1.

Several major lawsuits over the use of food packaging containing PFAS have certainly increased the visibility of the issue and pressure on businesses, as well.

So far, these lawsuits are largely based on consumer fraud claims, alleging that using food packaging containing PFAS is inconsistent with a company's claims of serving healthy food and being environmentally conscious.

Currently, there are no statutory or regulatory standards for PFAS in packaging to facilitate these sorts of claims. However, as various state bans go into effect, future lawsuits may pivot to assert claims based on the prohibitions.

Replacing PFAS with "Least Toxic Alternative"

In addition to A.B. 1200's ban on all PFAS in food packaging, a manufacturer must use the least toxic alternative when replacing PFAS in food packaging to comply with the new law.[8] This particular provision is problematic for a number of reasons.

First, the term "least toxic alternative" is undefined. How is a manufacturer to know that it is using the least toxic alternative when it reformulated the lining.

Indeed, what distinguishes a reformulated food packaging product lining from a new food packaging product lining is a question that is unanswered by the legislation.

Second, the mandate to use the least toxic alternative is unencumbered by any consideration of economics. If two less toxic alternatives to PFAS are available, one of which costs 10 or even 100 times the other, the law seems to require that the selection of which alternative to use be driven exclusively by their relative toxicity without regard to their relative cost.

Chemicals in Cookware Disclosures

The other element of A.B. 1200 regarding disclosure of chemicals in cookware sold or distributed in California is also worth noting, although its provisions will apply to fewer businesses.

The bill requires manufacturers, broadly defined, of cookware, also broadly defined, to disclose on the product label or packaging if the product contains one or more of the chemicals on California's list of candidate chemicals associated with the state's Safer Consumer Products program.

In addition, the law prohibits a cookware manufacturer from advertising their product does not contain a particular compound when it contains other compounds of the same class, e.g., touting their cookware as PFOA free if it contains other PFAS chemicals like polytetrafluoroethylene.

The cookware labeling requirements take effect Jan. 1, 2024, giving a bit more time for manufacturers to come into compliance. However, the disclosure is not limited to PFAS. There are over 1,000 candidate chemicals, so the task for manufacturers will be daunting.

Moreover, unlike California's Proposition 65 warnings, which are only required to identify one of the more than 1,000 chemicals on Proposition 65, A.B. 1200 appears to require that every candidate chemical in a cookware product must be identified on the product's label.

In some cases, both A.B. 1200 and Proposition 65 warnings may be required, meaning the amount of label space available to describe the features of any product may be diminishing drastically.

Enforcement

Unlike California's infamous Proposition 65, which expressly authorized enforcement by private citizens, A.B. 1200 included no specific enforcement mechanism.

The default enforcement mechanism in California is its Business and Professions Code, Section 17200, which in essence prohibits doing business in California in any way that violates any law, regulation or ordinance, i.e., an unlawful business practice. Remedies include injunctive relief and civil penalties of up to $2,500 per violation.

An enforcement action may be initiated by the attorney general, any district attorney, and certain county counsel, city attorneys and city prosecutors. A private citizen may also pursue injunctive relief and restitution under the Unfair Competition Law, but not civil penalties.

Now and In the Future

Manufacturers of paper and cardboard food packaging, and those who use these products in their businesses, may already be behind the eight-ball if they have not already been planning for this new law to take effect.

Manufacturers of cookware, too, have precious little time to implement the big changes this law places on them.

Even if your business is not directly affected by this particular law, keep an eye open for more PFAS regulation that is certain to impact you eventually.

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[1] Calif. Health & Saf. Code § 109000(b).

[2] "'Perfluoroalkyl and polyfluoroalkyl substances' or 'PFAS' means a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom." Calif. Health & Saf. Code § 109000(a)(2).

[3] https://www.cdc.gov/niosh/topics/pfas/default.html.

[4] https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas; https://ntp.niehs.nih.gov/whatwestudy/topics/pfas/index.html.

[5] E.g., Only AFFF formulations containing fluorosurfactants currently meet the MILSPEC. https://pfas-1.itrcweb.org/fact_sheets_page/PFAS_Fact_Sheet_AFFF_April2020.pdf, page 5.

[6] https://www.govinfo.gov/content/pkg/FR-2022-06-21/pdf/2022-13158.pdf.

[7] https://www.epa.gov/newsreleases/epa-proposes-designating-certain-pfas-chemicals-hazardous-substances-under-superfund.

[8] Calif. Health & Saf. Code § 109000(c).