



From Chemicals of Concern to EPR: The Current State of Play for Food Packaging Regulation

April 17, 2024

Mitzi Ng Clark

Partner

San Francisco, CA

+1 415.948.2838

clark@khlaw.com



Keller and Heckman LLP: A Global Law Firm with a Scientific Advantage



- ◆ Founded in 1962
- ◆ Five offices worldwide
 - ◆ 83 Attorneys
 - ◆ 19 Scientists

Serving Business Through Law and Science

Agenda

- ◆ PFAS Bans and Restrictions
- ◆ Other Bans on ‘Chemicals of Concern’
- ◆ California’s Proposition 65
- ◆ Extended Producer Responsibility (EPR) Laws
- ◆ Developments in Europe

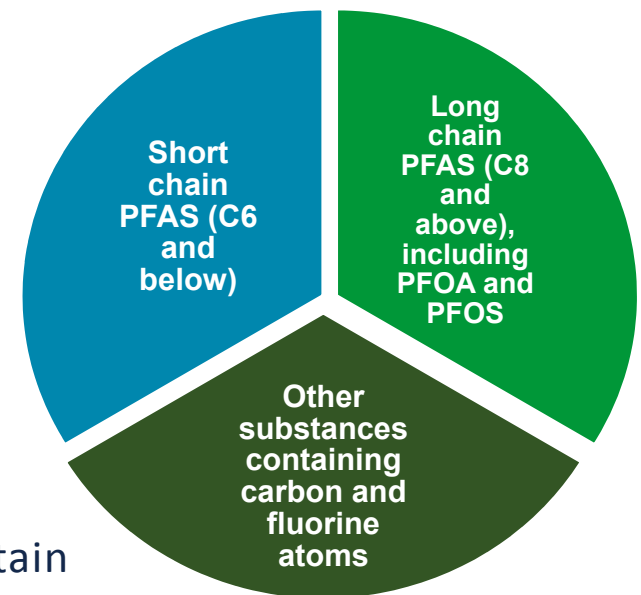




PFAS Bans and Restrictions

What are PFAS?

- ◆ PFAS: per- and poly-fluoroalkyl substances
 - ◇ Thousands of chemical compounds with different toxicity profiles
 - ◇ Category rather than a definition
- ◆ Resist grease, oil, water, and heat
- ◆ Used in a wide variety of food-contact materials
 - ◇ Food packaging, cookware, food processing equipment
- ◆ Dubbed 'Forever Chemicals'
 - ◇ Many do not break down easily in the environment
- ◆ States have consistently defined PFAS as substances that contain "at least one fully fluorinated carbon atom"
 - ◇ This is a broad definition that encompasses many fluoropolymers



State PFAS Laws – General Provisions



State laws generally prohibit food packaging containing “intentionally added” PFAS

- Each state defines “intentionally added” differently, but this is typically defined as **deliberate use** where the presence of the PFAS is desired to produce a **specific characteristic or effect** in the product

Definition of “food packaging” varies by jurisdiction

- Some states define food packaging broadly
- Some states ban PFAS only from paper, paperboard, or fiber
- Most state bans are limited only to packaging that directly contacts food
- Some state bans apply only to specific packaging types (*e.g.*, wraps, liners, plates, pizza boxes, etc.)

State PFAS Bans and Restrictions



State	Effective Date
California	January 1, 2023
Colorado	January 1, 2024
Connecticut	December 31, 2023
Hawaii	December 31, 2024
Maine	January 1, 2030 ¹
Maryland	January 1, 2024
Minnesota	January 1, 2024
New York	December 31, 2022
Oregon	January 1, 2025
Rhode Island	January 1, 2024
Vermont	July 1, 2023
Washington	February 1, 2023
Michigan	Proposed Legislation
Massachusetts	Proposed Legislation
Vermont	Proposed Legislation ²

¹ Maine requires that the presence of PFAS be reported by January 1, 2025, but the ban does not go into effect until January 1, 2030.

² As written, Vermont’s proposed legislation does not include food packaging.

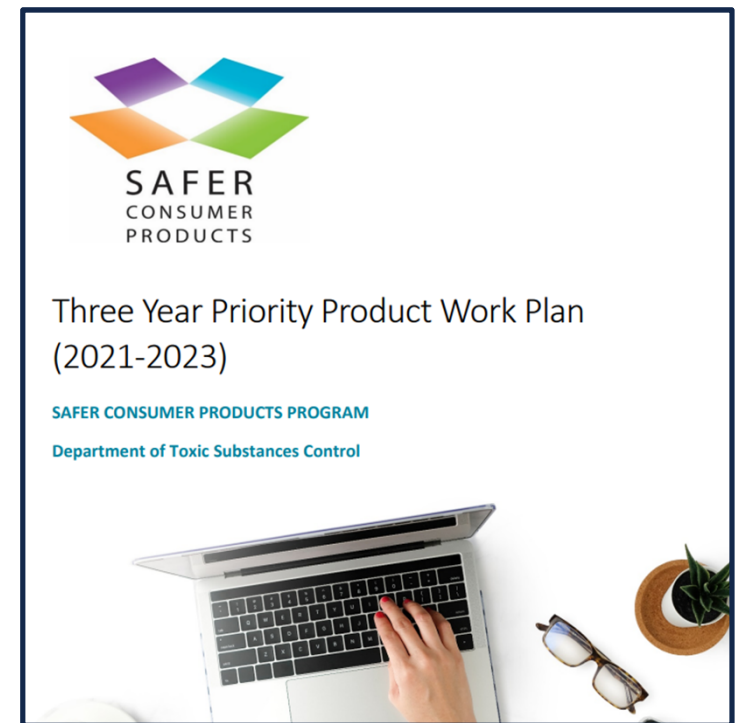


Other Bans on 'Chemicals of Concern'

California Safer Consumer Products Program



- ◆ California's Department of Toxic Substances Control (DTSC) maintains a list of Candidate Chemicals
- ◆ DTSC identifies priority products that expose consumers or the environment to Candidate Chemicals
 - ◆ Food packaging first identified in [2018-2020 Work Plan](#)
 - “Hazardous chemicals found in food packaging may be incorporated into recycled products, potentially exposing downstream users.”
 - ◆ DTSC 3-Year Priority Work Plan for 2024-2026 expected soon



California Safer Consumer Products Program (2)



- ◆ 3,290+ substances listed on the Candidate List
 - ◇ Includes styrene, toluene, chromium compounds
 - ◇ Based on authoritative lists (e.g., Prop 65, NTP)
 - ◇ **Proposal** to add microplastics to the Candidate Chemicals List
 - Limited to products containing other chemicals on the Candidate Chemicals List
- ◆ Candidate Chemical List cross-referenced in legislation requiring disclosure of chemicals of concern



California's AB 1200: Chemicals of Concern in Food Packaging and Cookware



- ◆ Codified in Section 15 of CA Health & Safety Code, Section 109000 et. seq.
- ◆ Focus is on “hazardous” chemicals in:
 - ◇ Plant-based food packaging (PFAS only)
 - Regulated PFAS include both “intentionally added” PFAS and the presence of PFAS in a product or product component at or above 100 ppm (measured in total organic fluorine)
 - Manufacturers must use the “least toxic alternative” when replacing PFAS in food packaging
 - ◇ Cookware
 - Prohibition on “Free of” claims if chemical belongs to same chemical group/class of chemicals on DTSC list
 - Cookware that contains any chemical on the DTSC list must call out the presence of the chemical on the internet and product label
- ◆ Cross-references DTSC Candidate Chemicals List (for cookware)



Bans on Phthalates in Food Packaging

- ◆ “Phthalates” (a.k.a. “*ortho*-phthalates”) are a class of chemicals commonly used as plasticizers
 - ◇ Toxics in Packaging Clearinghouse’s model legislation defines “phthalates” as “esters of phthalic acid that contain 2 carbon chains located in the *ortho* position”
- ◆ State Activity on Phthalates
 - ◇ Maine (ban in effect July 1, 2022)
 - ◇ Vermont (ban in effect July 1, 2023)
 - ◇ Michigan (proposed legislation)



Other State Activity: Washington

- ◆ On May 31, 2023, Washington's Department of Ecology adopted regulations requiring producers to report or restrict:
 - ◆ PFAS in aftermarket stain- and water-resistance treatments, carpets and rugs, and leather and textile furnishings.
 - ◆ Ortho-phthalates in vinyl flooring and in personal care product fragrances.
 - ◆ Organohalogen flame retardants in electric and electronic products.
 - ◆ Flame retardants (as defined in RCW 70A.350.010) in recreational polyurethane foam.
 - ◆ Phenolic compounds in laundry detergent, food and drink can linings, and thermal paper.
- ◆ Manufacturers must comply with the regulations by January 1, 2025



Congressional Activity

◆ **The Food Chemical Reassessment Act of 2023 (H.R. 3927)**

- ◆ If passed, would create new office within the Center for Food Safety and Applied Nutrition (The Office of Food Safety Food Assessment)
- ◆ Beginning in 2024, bill would require FDA review of at least 10 food additives every 3 years
- ◆ First 10 substances:
 - Butylated hydroxyanisole (BHA)
 - Butylated hydroxytoluene (BHT)
 - Brominated vegetable oil (BVO)
 - Perchlorate
 - Potassium bromate
 - Tert-butylhydroquinone
 - Titanium dioxide
 - Propyl paraben
 - Sodium nitrite
 - Sulfuric acid



◆ **S. 5163- Protecting Communities From Plastics Act**

- ◆ Would direct EPA to carry out certain activities to monitor covered petrochemical facilities
- ◆ Bill was introduced on December 1, 2022, but it did not receive a vote and was not enacted.



California's Proposition 65



California's Proposition 65

- ◆ Safe Drinking Water and Toxic Enforcement Act of 1986
 - ◇ Passed by California voters as a ballot initiative in 1986 (“Proposition 65”)
- ◆ Warnings required when:
 1. Discharging listed chemicals into sources of drinking water
 2. Exposing any individual to listed chemicals from:
 - use of a **consumer product**;
 - presence in the **workplace**; or
 - release to the **environment**



Lead Agency & Chemical List



- ◆ Administered by Office of Environmental Health Hazard Assessment (OEHHA)
- ◆ Publishes and updates list of chemicals known to cause cancer, birth defects, or reproductive harm
- ◆ Over 900 substances now listed
 - ◇ Some listings are associated with safe harbor levels (levels of exposure where warning is not required)
 - ◇ Many more listings are not!

STATE OF CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 CHEMICALS KNOWN TO THE STATE TO CAUSE CANCER OR REPRODUCTIVE TOXICITY February 25, 2022			
The Safe Drinking Water and Toxic Enforcement Act of 1986 requires that the Governor revise and republish at least once per year the list of chemicals known to the State to cause cancer or reproductive toxicity. The identification number indicated in the following list is the Chemical Abstracts Service (CAS) Registry Number. No CAS number is given when several substances are presented as a single listing. The date refers to the initial appearance of the chemical on the list. For easy reference, chemicals which are shown underlined are newly added. Chemicals or endpoints shown in strikeout were placed on the Proposition 65 list on the date noted, and have subsequently been removed.			
Chemical	Type of Toxicity	CAS No.	Date Listed
A-alpha-C (2-Amino-9H-pyrido [2,3-b]indole)	Cancer	26148-68-5	January 1, 1990
Abiraterone acetate	developmental, female, male	154229-18-2	April 8, 2016
Acetaldehyde	cancer	75-07-0	April 1, 1988
Acetamide	cancer	60-35-5	January 1, 1990
Acetazolamide	developmental	59-66-5	August 20, 1999
Acetochlor	cancer	34256-82-1	January 1, 1989
Acetohydroxamic acid	developmental	546-88-3	April 1, 1990
2-Acetylaminofluorene	cancer	53-96-3	July 1, 1987
Acifluorfen sodium	cancer	62476-59-9	January 1, 1990
Acrylamide	cancer	79-06-1	January 1, 1990



OEHHA
California Office of Environmental
Health Hazard Assessment

Warning

- ◆ As of 2018, regulations require:
 - ◆ Disclosure of the identity of at least one listed chemical from each endpoint (standard warning)
 - ◆ Warning symbol to accompany consumer products; box around food warnings
 - ◆ Warnings for internet and catalog sales
 - ◆ Warning in foreign language, if other consumer information is in foreign language
 - ◆ “On-product” or short-form warning option



Listed Substances Potentially in Food and Food Packaging



◆ Food

- ◆ Lead
- ◆ Inorganic arsenic
- ◆ Cadmium
- ◆ Mercury
- ◆ Acrylamide
- ◆ Furfuryl Alcohol
- ◆ 4-Methylimidazole (4-MEI)
- ◆ Ethyl alcohol
- ◆ N-Hexane
- ◆ Furan

◆ Food Packaging

- ◆ Acrylamide
- ◆ Styrene
- ◆ Polycyclic aromatic hydrocarbons
- ◆ Polychlorinated biphenyls (PCBs)
- ◆ Bisphenol A (BPA)
- ◆ Di(2-ethylhexyl)phthalate (DEHP)
- ◆ Perfluorooctanoic acid (PFOA)

Proposition 65 Enforcement

- ◆ California Attorney General and local city and district attorneys can bring enforcement actions
- ◆ “Bounty Hunter” civil actions are more common
 - ◆ 60-Day Notice of Violation (NOV)
 - ◆ Settlement or Suit
- ◆ Penalties are permitted up to \$2,500/violation/day
- ◆ Burden is on *defendant* to show no violation if an enforcement action is filed

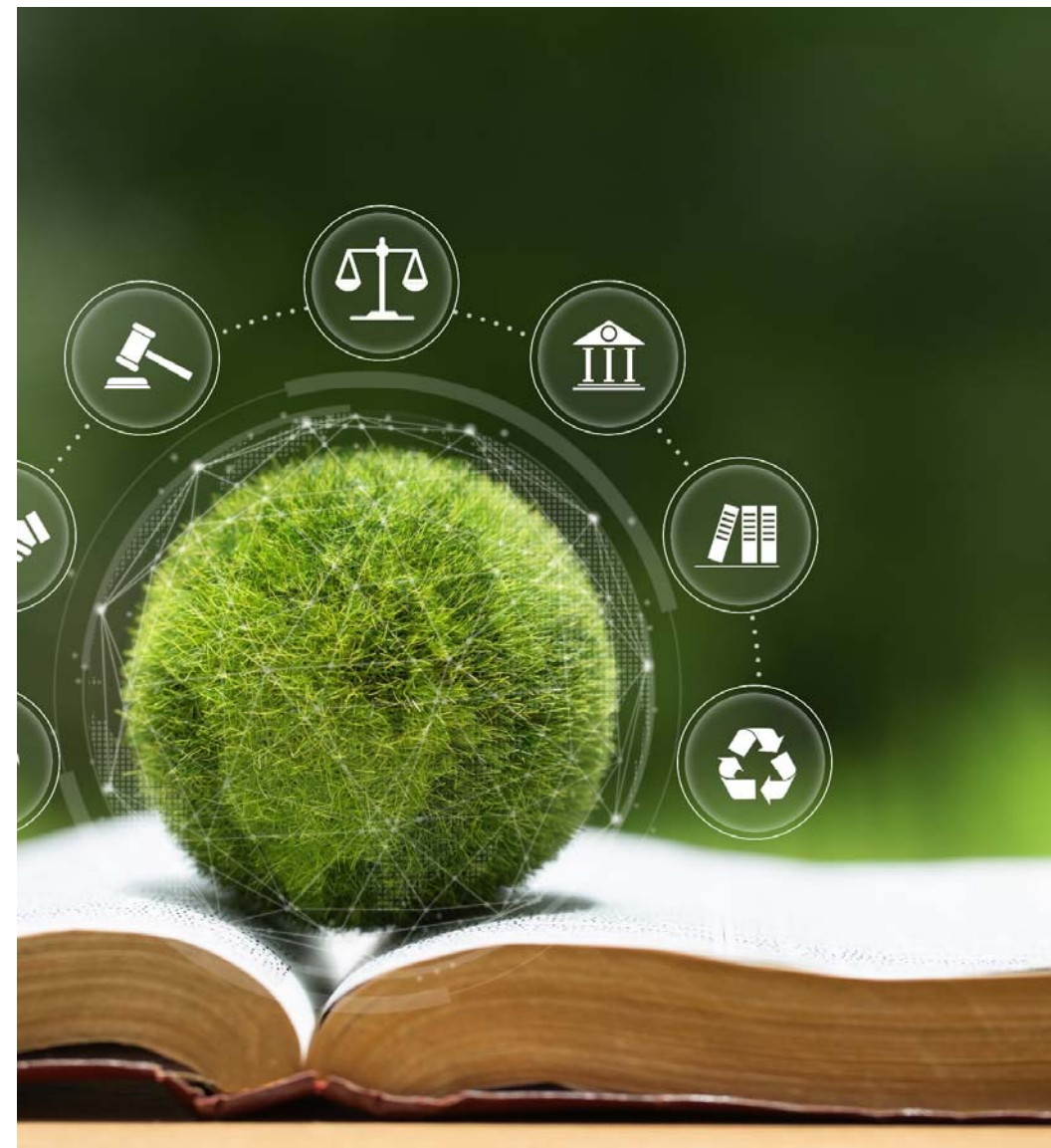


January 1, 2020 – March 15, 2024 NOVs



Search NOVs: <https://oag.ca.gov/prop65/60-day-notice-search>

Extended Producer Responsibility (EPR) Laws



What is EPR?

- ◆ OECD: “Extended Producer Responsibility (EPR) is a policy approach under which producers are given a significant responsibility – financial and/or physical – for the treatment or disposal of post-consumer products.”
- ◆ Internalizing Externalities (*i.e.*, building the cost of disposal into the cost of the product)
- ◆ No widely accepted nationwide model for EPR laws, but there are some trends:
 - ◇ Onus on producers (brand owner, licensee, importer)
 - ◇ Exemptions for certain types of materials (*e.g.*, packaging for infant formula, medical devices, drugs)
 - ◇ Exemptions for low volume producers (based on gross revenue and/or amount of packaging used)
 - ◇ May include recycling rate goals, source reduction goals, and/or PCR content goals
 - ◇ Primary focus is on single use packaging (with a particular focus on plastic single-use packaging)



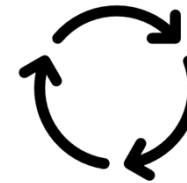
General Approaches to EPR



Reimbursement model

“Producers” of “covered products” pay into fund based on the amount and recyclability of packaging associated with their products.

Funds are used to reimburse participating municipalities for managing waste.



Stewardship/Producer Responsibility Organization model

Producers participate in management of end-of-life of packaging for products.

Producer Responsibility Organization establishes recycling rate goals, charges material specific fees, and develops markets to encourage use of materials that are more easily recycled through the system.

Adopted State EPR Laws



Maine	Covers all packaging materials
	Packaging Stewardship Organization will implement a program to assess and collect payments from producers
Colorado	Covers all packaging materials and paper products
	Nonprofit PRO manages program that provides recycling services
California	Covers all single-use packaging and plastic single-use food service ware
	Prohibits the sale of covered materials unless the producer joins a PRO
Oregon	Covers all packaging, food service ware, and printing/writing paper
	Producers required to join and pay membership fee to PRO (fee based on material type and quantity)
Connecticut	Covers <u>only</u> plastic beverage containers
	Requires minimum post-consumer recycled content in plastic beverage containers sold in the state
Illinois	Covers all packaging materials
	State will conduct a needs assessment to determine recycling/composting/reuse conditions for packaging materials
Maryland	Covers all primary, secondary, and tertiary packaging (including carry-out bags and beverage containers)
	Requires state to approve a PRO and establishes a producer responsibility advisory council to make recommendations

Proposed State EPR Laws

- ◆ Hawaii (SB649; HB1326)
- ◆ Massachusetts (S471; S572; H776; H779)
- ◆ New Jersey (S426/A1444)
- ◆ New Hampshire (HB1630)
- ◆ New York (S1064; S4246; A05322)
- ◆ North Carolina (HB279)
- ◆ Rhode Island (SB200/HB5091; HB7023)
- ◆ Tennessee (SB573/HB550)
- ◆ Washington (SB5154/HB1131)





Developments in Europe

Extended Producer Responsibility Laws



Italy

- Producers of covered materials must:
 - Register with the state
 - Pay membership fees and Environmental Contribution to Consorzio Nazionale Imballaggi (CONAI)
- Suppliers of empty packaging or packaging materials must join the national packaging waste association for the specific packaging material(s) they produce



United Kingdom

- Producers of covered materials must:
 - Collect data about all the empty packaging and packaged goods handled and supplied in the UK
 - Register with the environmental regulator
 - Pay an annual administrative and waste management fee from 2024
 - Report packaging data
 - Meet recycling obligations



Germany

- Producers of covered materials must:
 - Register with the state
 - Take back and reuse/recycle unused packaging
 - Submit a declaration of completeness to the state



France

- Producers of covered materials must:
 - Comply with “ecodesign obligations” (e.g., volume reduction, recyclability, limitation of hazardous substances)
 - Join a collective that collects and handles covered waste
 - Register with the state
 - File an annual report of packaging placed on the market

EU- Packaging and Packaging Waste Regulation (PPWR)

- ◆ Reduce packaging waste by restricting excessive packaging and promoting reuse and refillable packaging solutions
- ◆ Make all packaging designed for recycling (DfR) by 2030 and recyclable at scale by 2035
- ◆ Increase the use of recycled plastics in packaging through mandatory targets
- ◆ Address Substances of Concern (SoCs) in packaging
 - ◇ Ban per- and polyfluoroalkyl substances (PFAS) in food packaging





Thank You

Any questions?

Mitzi Ng Clark

Partner

San Francisco, CA

+1 415.948.2838

clark@khlaw.com

