



PHILLIPS LYTLE LLP CLIENT ALERT ENVIRONMENTAL LAW

DECEMBER 2022



New York State DEC Updates Hazardous Packaging Act to Include Ban on PFAS in Food Packaging

Joining several other states, New York State passed a law in December 2020 that bans the use of per- and polyfluoroalkyl substances (PFAS),¹ a class of over 7,000 chemicals that includes perfluorooctanoic acid (PFOA), perfluorooctane sulfonate (PFOS), and GenX chemicals. PFAS are a diverse family of synthetic chemicals that are used in the manufacturing of everyday products with anti-stain, water, grease, oil and/or dirt-repelling properties. These products include fast food containers, microwave popcorn bags, paper wrappers such as those for sandwiches and butter, and many others. The PFAS in Food Packaging Law, an update to the New York State Hazardous Packaging Act, will take effect on December 31, 2022. The New York State Department of Environmental Conservation (DEC) will be testing for PFAS in food packaging beginning in 2023 in New York State.

WHAT THE LAW SAYS

According to the statute, the restriction on the use of PFAS in food packaging applies specifically to packaging with intentionally added PFAS. Food packaging includes any packages or packaging components that are intended for direct food contact and are comprised mainly of paper, paperboard or other materials derived from plant fibers. Packages can include items such as carrying cases, crates, cups, pails, trays, wrappers, bags and tubs. Intentionally added means “a chemical in a product that serves an intended function in the product component” such as to make food packaging with one of the abovementioned properties.

This law excludes glass, metal, plastic and other materials that are not derived from plant fibers.

Manufacturers of food products, distributors of food and purchasers of packaging components like to-go boxes or paper packaging products must ensure that the food products they are selling, distributing or promoting are in packaging that is in compliance with or has the proper exemption from the law.

The penalty for selling, distributing or promoting packaging components not in compliance can be up to \$10,000 for the first violation and up to \$25,000 for the second violation. Each package on the shelf constitutes a separate and distinct violation under New York State law.²

Manufacturers, distributors and purchasers cannot be granted an exemption to use their existing supply of food packaging into 2023 that was bought in 2022.

EXEMPTIONS

New York State exemptions to the Hazardous Packaging Act are as follows:

- Any packages or packaging delivered to a distributor or a manufacturer, or those packages or packaging components with a code indicating that the date of the manufacturing was prior to January 1, 1992.

¹ For more on what the Environmental Protection Agency and New York State are doing about PFAS, see <https://phillipslytle.com/publications/client-alert/environment-client-update-march-2019/>.

² See “Toxics in Packaging Fact Sheet,” https://nrc.org/adobe/overview_for_packaging_supply_chain.pdf.



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- Any packaging that complies with health or safety requirements of applicable federal law for which there is no practicable alternative.³
- Any glass container that is intended for reuse or refilling that uses pigments in or on the container.

DIFFERING FROM OTHER STATES

Unlike New York State, laws in Maine and Washington State allow for an exemption on specific food packaging categories if there is no safer alternative to the packaging containing PFAS. New York State's law does not contain this differentiation. New York State's law calls for a blanket ban on food packaging containing PFAS and does not allow for an assessment to be completed on the feasibility of safer alternatives. Washington State has determined there are acceptable alternatives for wraps and liners, plates, food boats and pizza boxes, but not bags/sleeves, bowls, trays, french fry cartons, clamshells and interlocking folded containers. Compliance may be a challenge for businesses as New York State's law is much more aggressive in timing as compared to Maine and Washington State.

There is no reporting requirement in the New York State law. This means it is on New York State businesses to comply themselves.

The limited exemptions under this law are unlikely to be applicable to a booming food manufacturer, food distributor or a restaurant ordering food packaging, thus it is important to ensure compliance come December 31, 2022.

Phillips Lytle can assess your classification as a manufacturer, distributor or user of food packaging that falls under this law to see if you must comply with it before the end of the year. Phillips Lytle can further counsel your food manufacturing facilities, restaurant/fast food chains, grocery stores, food banks or other businesses that use these packaging materials on how to comply with this new law.

Additional Assistance

For questions regarding the PFAS in Food Packaging Law and related regulatory changes, please contact any of the attorneys on our [Environmental Practice Team](#) or the [Phillips Lytle attorney](#) with whom you have a relationship. ■

3 Businesses must petition for a practicable alternative to the state administrative agency for any exemption based on compliance with state or federal law safety requirements.



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