

## What GCs Can Do As Regulators Eye 'Forever Chemicals'

By Michele Gorman

*Law360 (January 10, 2023, 4:46 PM EST)* -- Increasing federal and state oversight of certain widespread chemicals is outside the typical realm of issues for most general counsel, but the complex and quickly evolving space should push top corporate lawyers to gather data to fully understand their supply chains and any associated business risks, experts say.

Per- and polyfluoroalkyl substances, or PFAS, also known as "forever chemicals" due to their longevity in the human body and the environment, are used in a wide range of consumer and cleaning products, often to give materials water-, grease- and stain-resistant or nonstick properties.

The chemicals, which experts refer to as ubiquitous, are well known not just for their durability and persistence in the environment but increasingly for their potential risks to human health, including an increased risk of some cancers, reduced immune response and developmental delays, according to data from the U.S. Environmental Protection Agency.

Some companies have faced years of litigation from environmental advocates and state attorneys general over the potential impacts of PFAS. With a law that took effect on Jan. 1, California banned PFAS in food packaging. Two months earlier, the Golden State had sued 3M and more than a dozen other chemical manufacturers, alleging that they continued to make and use the chemicals and downplayed their risks despite knowing about their toxicity for decades.

"From a general counsel standpoint, it's really important that you have a good understanding of what your risks are, and that requires data," said Steven Cook, of counsel at Bracewell LLP, who formerly served in the EPA's Office of Land and Emergency Management. "That's always my recommendation to in-house lawyers: You need to have facts, you need to understand what you're dealing with."

PFAS aren't a single compound. The term represents potentially thousands of different compounds; some were intentionally manufactured, while others have been identified as likely byproducts of chemical reactions, Cook explained.

Given the widespread nature of PFAS, companies in various industries will be affected differently. According to experts, while PFAS can be in everyday products such as waterproof clothing and cookware, measuring the compounds at certain levels can be extremely difficult. Sometimes it's not clear that PFAS are in a product, as they can be present in quantities as small as parts per trillion, according to experts.

PFAS have increasingly been in the spotlight in recent years because of activity such as new regulation from states and the Biden administration, which in June said it was drastically lowering the levels at which four PFAS chemicals are considered safe in drinking water. Numerous state product bans are centered on food packaging and firefighting foam, while others focus on products like carpets, cosmetics and cookware, according to Conrad Bolston, counsel for environmental and natural resources at Vinson & Elkins LLP.

The chemicals have been found all over the country and are the focus of a wave of lawsuits, which have been lodged by consumers and workers exposed to the substances as well as by local and state governments over water and environmental contamination issues.

Environmental law experts who spoke with Law360 Pulse suggest that legal chiefs work with specialized counsel to understand, to the best of their ability, what they need to anticipate from federal and state authorities. Bans and ongoing litigation are quickly evolving, and it's crucial for general counsel to pay attention and understand their companies' exposure, which requires a comprehension of the supply chain, experts said — for instance, is the company intentionally adding PFAS, or are they an unintended byproduct?

"A cosmetics company might look at this differently than a tire company, [which] might look at this differently than a foods products company or a pharmaceuticals company," Bolston said. "The next group of people that might be very interested in PFAS developments are the people that own property that has groundwater that might be contaminated with PFAS."

Legal department leaders should consider performing a risk analysis to determine what kinds of products and raw materials a business uses, as well as its environmental practices, Bolston said.

Additionally, general counsel play a role in helping companies determine if they can continue to make a product that's banned in one state while continuing to sell it in another. But Cook cautioned general counsel have to think about consumers' expectations and the growing emphasis on environmental, social and governance, or ESG, issues. As Cook pointed out, part of ESG is being aware of emerging trends and concerns.

"Clearly, this is of concern to society as a whole, to certain consumers," he said. "That should be part of your ESG program — being aware of new developments."

One of the first companies to develop and use PFAS in the U.S. was 3M, and similar companies in the industrial sector have been dealing with these issues on a regular basis. Last month, 3M announced that it will stop making and using PFAS by the end of 2025, a decision the company said was based on multiple factors, including a focus on reducing the chemicals' presence in the environment and changing stakeholder expectations.

But the ubiquitous nature of PFAS could catch general counsel in other industries off guard when they realize PFAS are in the food containers, clothing or other items they make, said Anne Austin, an environmental lawyer and partner at Pillsbury Winthrop Shaw Pittman LLP.

Ultimately, Austin suggests, general counsel should be proactive on internal due diligence and have situational awareness.

"I think you're going to find a number of companies and different sectors of industries that are pulled

into this over time, not realizing, 'Oh goodness, we didn't know that this would go as far as what we do or what we produce,'" Austin said.

And looking at previous trends, it's likely states will follow the lead of others, Bracewell's Cook said.

"That's part of your challenge as a business, is trying to figure out: Is this going to be in the Northeast? Is it just a West Coast phenomenon? Is it across the country? Is it going to go international?" Cook said.

"It's important to really understand your business, because that helps you identify the scope of your risk."

"The key," he added, "is to get good information, good analysis of the law, and then each company makes its decision of what kind of business risk they're willing to take."

--Additional reporting by Tom Lotshaw and Juan Carlos Rodriguez. Editing by Alanna Weissman.