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A new federal cause of action for PFAS exposure? The proposed PFAS Accountability Act of 2021

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On April 22, 2021, U.S. Senator Kirsten Gillibrand introduced the PFAS Accountability Act of 2021 (S. 1334),[1] which has been referred to the Senate Environment and Public Works Committee.

Representatives Madeleine Dean (D-PA) and Dan Kildee (D-MI) introduced the House counterpart (H.R. 2751).[2] The bill seeks to create a federal cause of action for "significant" exposure to per- and polyfluoroalkyl substances (PFAS) and to provide a medical monitoring remedy.

Such actions could be brought on either an individual or class-wide basis. The bill also would lower certain standards of proof and permit courts to order a defendant to undertake and fund scientific studies.

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The bill broadly defines PFAS as any "perfluoroalkyl and polyfluoroalkyl substance with at least 1 fully fluorinated carbon atom."

The proposed legislation provides for actions against persons or entities who "(1) engaged in any portion of a manufacturing process that created the PFAS to which the individual was significantly exposed" and (2) "foresaw or reasonably should have foreseen that the creation or use of PFAS would result in human exposure to PFAS."

A plaintiff would have to prove four elements:

(1) "Significant" exposure to PFAS;

(2) Increased risk of developing a disease "associated" with exposure to PFAS;

(3) A reasonable basis to undergo periodic diagnostic medical examinations of a nature or frequency that is different from or additional to what would be prescribed in the absence of the exposure; and

(4) Availability of effective medical exams to detect a disease associated with PFAS exposure.

Regarding the first element, the bill creates a "presumption of significant exposure" where plaintiffs either (1) prove that PFAS was released into an area where they or class members would have been exposed for a "cumulative period" of at least one year, or (2) offer test results that demonstrate PFAS is or has been detected in their bodies or those of class members who share "sufficient common exposure characteristics."

As to the first ground, defendants could rebut the presumption by offering test results to confirm that the PFAS at issue likely was not present in the individual's or class members' blood "at the relevant time in a sufficient quantity to qualify as a significant exposure."

Where plaintiffs rely instead on blood tests, the bill provides no rebuttal grounds and refers to no threshold PFAS concentration, suggesting that detection at any level would establish the presumption.

Regarding the second element, the bill would not require proof that PFAS exposure "causes" a disease; instead, an "association" would suffice.

Further, where "insufficient toxicological data exists to reasonably determine whether an individual or class has suffered an increased risk of developing a disease associated with exposure to PFAS," the bill would permit courts to "lower the standard for scientific proof until independent and reliable toxicological data is available" and to order "epidemiological, toxicological, or other studies of investigations" as part of a medical monitoring remedy.

The bill does not indicate how a court should exercise its discretion to "lower the standard of scientific proof," or how or by whom it would be determined that "independent and reliable toxicological data is available" as to a specific PFAS.

Notes

[1] https://bit.ly/2RKdWCE

[2] https://bit.ly/3bef8oM

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