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California Legislation And Regulation To Watch In 2019

By **Bonnie Eslinger**

Law360 (January 1, 2019, 12:03 PM EST) -- Outgoing California Gov. Jerry Brown has teed up implementation challenges for regulators in 2019 by signing more than 1,000 bills during his final year in office, including online data protections for consumers and legislation targeting workplace sexual harassment, while legislators are expected to address recent court rulings concerning gig workers and online sales taxes.

Experts tell Law360 they also expect Golden State lawmakers to expand legislative and regulatory efforts to meet California's ambitious new environmental goals. And lawyers envision new laws on the horizon to address the state's devastating wildfires and issues of liability.

These are among the major legislative and regulatory developments that California attorneys will be watching in 2019.

A Landmark Privacy Law Will Induce Corporate Headaches

In June, Brown gave his approval to California's Consumer Privacy Act, a landmark bill that will give consumers the ability to control how online companies use and share their personal information and the right to request the deletion of that data.

California lawmakers rushed to pass the bill to preempt a potentially more stringent privacy initiative on its way to the November election ballot, which was subsequently pulled by its backers. State legislators then got to work on "clean-up" legislation to address the range of concerns raised by businesses, consumer advocacy groups and the state's attorney general about the law.

Emily Tabatabai, a partner in the cybersecurity, privacy and data innovation practice at Orrick Herrington & Sutcliffe LLP, said the firm expects additional amendments to be introduced in 2019, "though it's tough to say whether the amendments will strengthen or weaken the privacy protections as privacy advocates and industry groups are pushing hard on all sides."

The law also requires the California attorney general to establish regulations guiding the privacy act's implementation and enforcement, although the recently passed amendment pushed the deadline for that out to July 1, 2020, six months after the statute's Jan. 1, 2020, effective date.

Tabatabai told Law360 that there's been a lot of discussion about the fact that the law provides consumers with a private right of action in the event of a data breach. She sees other concerns ahead as

well, including a potential negative impact to the digital advertising industry, which will be required to provide an opt-out mechanism for consumers who don't want to have their data sold to third parties.

"These opt-out mechanisms will create practical challenges as well as fiscal ones, to the extent they limit a business's ability to offer free online services that depend on advertising dollars for revenue," Tabatabai wrote in an email.

And although the CCPA borrows its concept from the General Data Protection Regulation adopted several years ago by the European Union, there are enough differences that "businesses may struggle to align their practices to comply with both regimes," the Orrick partner said.

Michael Rubin, a partner with Latham & Watkins LLP and a leader of the firm's data privacy and security practice, told Law360 that the CCPA's "breadth and ambiguity" will hit hard in California, which is home to much of the world's tech industry, but he said they will also impact businesses outside the state due to the statute's jurisdiction provision.

"One important dynamic at play is the movement at the federal level to potentially enact a federal privacy law that could have pre-emptive effect," Rubin said. "The states, and California in particular, have already said they are not interested in being preempted. That tees up a situation where you could see a state-level amendment that adjusts some of the key factors that are motivating the federal interest."

"All in all it's a very fluid situation that's creating a lot of uncertainty and cost, and we're still a year away, he continued.

Jacqueline Cooney, a senior privacy adviser at Paul Hastings LLP, said in order to be ready to comply with the law, companies should be working now to understand how the data they receive from their online services is collected, where it is stored and with whom it is shared.

"Coupled with possible amendments, several of which have already been proposed, the shifting guidance and requirements will cause headaches for companies over the next year," Cooney said in an email.

#MeToo Laws Will Change How Workplace Sexual Misconduct Claims Are Treated

Several major pieces of legislation aimed at curbing sexual misconduct were passed in 2018 following a tidal wave of high-profile misconduct scandals. Corporate lawyers are busy advising their clients on the implications of these laws, which took effect Jan. 1.

Bruce Sarchet, a shareholder at Littler Mendelson PC, said California employers face significant hurdles in complying with the state's new sexual harassment laws.

For example, SB 1343 requires even small employers — those with only five or more employees in the state — to provide sexual harassment training to employees.

"Such employers likely do not have a separate human resources department, and coming up with a training solution will present a challenge," Sarchet said.

Another new law, SB 1300, sets out standards for litigating sexual harassment claims, including a provision that says harassment cases are "rarely appropriate for disposition on summary judgment."

"Currently, most sexual harassment claims that proceed to litigation are ultimately settled out of court," Sarchet said, adding that such litigation standards "may impact the settlement value that a plaintiff's attorneys attach to sexual harassment claims."

Several of the laws also limit nondisclosure and confidentiality provisions when an employer reaches a settlement with an accuser.

SB 820 bars nondisclosure agreements in lawsuits claiming sexual assault, sexual harassment or sex discrimination. That means companies can't prevent accusers from publicly discussing their allegations, even if a settlement is reached, said Ruth Zadikany, a partner in Mayer Brown LLP's litigation and dispute resolution practice.

"Thus, even after an employer settles a case, the employer will remain susceptible to reputational risk if the complainant chooses to publicly discuss his or her claims," Zadikany said. "That may cause some employers to choose to have the claim fully adjudicated and be vindicated rather than settle."

Employers should also know that the law does not apply to settlements reached before an employee files suit.

"The ability to settle these kinds of claims pre-litigation and keep the facts confidential may be a consideration when parties have an opportunity to settle before litigation commences," Zadikany said.

AB 1870 extends the statute of limitations for sexual harassment and discrimination complaints under the California Fair Employment and Housing Act. Under the bill, the deadline of one year after an action occurred to file a complaint with the state agency would be extended to three years, opening the door for more victims to pursue claims.

California Supreme Court Weighs In on What's a Gig

In April the California Supreme Court adopted a standard that presumes workers are employees instead of independent contractors, stepping away from a more flexible classification test that's been used in the Golden State for nearly three decades.

The ruling on behalf of drivers of package and document delivery company Dynamex Operations West will make it more difficult for businesses to classify so-called gig workers as independent contractors.

Sheppard Mullin Richter & Hampton LLP partner Tom Kaufman said the problem with the ruling is that the new test "may effectively eliminate the ability to have independent contractors within broad swaths of the economy where such relationships are desired by both the worker and the business."

The most problematic element of the new test, he said, is that an independent contractor can't perform a task central to the business of the company that hires the contractor. But there are many areas where businesses have used independent contractors in nonexploitative ways, including doctors who provide services for hospitals as independent contractors and real estate agents who work as independent contractors with real estate companies, Kaufman said.

Currently, the vast number of "gig economy" workers, such as Uber drivers, are treated as independent contractors. It's now unclear if these business agreements are still permissible under the new test, the Sheppard Mullin partner said. Legislation might be needed to create a classification model "that better recognizes the economic realities of the economy and is more narrowly directed to protect against exploitative relationships," he added.

Paul Hastings partner Zachary Hutton said companies have their work cut out for them confirming which vendors or contractors perform work outside the usual course of their business and thus qualify as independent contractors.

In many cases, "it's not a bright-line, and the consequences of getting it wrong are enormous," Hutton said.

In addition, at least one published, post-Dynamex decision, Garcia v. Border Transportation Group, LLC, holds that permitting a worker to engage in similar activities for other businesses is not sufficient to demonstrate that the worker is "customarily engaged in an independently established business" for the purposes of the new test, the Paul Hastings partner said.

"That puts companies in a difficult position because if a contractor is free to work for other companies, but chooses not to do so, that's outside of the hiring company's control," Hutton said.

In December, one California assemblywoman jumped in with proposed legislation for the 2019-2020 legislative session that would loosen the criteria employers use to classify workers as independent contractors.

Melissa Melendez, a Republican representing Riverside County's suburban 67th district, said in a press release that her bill aims to "roll back the dangerous precedent set" by Dynamex.

Where There's a Will, There's a Wayfair

Another bill for this legislative session introduced in response to a recent court ruling sets California up to collect sales and use tax from online and out-of-state retailers that don't have a physical presence in the state.

State Senator Mike McGuire, chair of the Senate Committee on Governance and Finance, and state Assemblywoman Autumn Burke, chair of the Assembly Committee on Revenue and Taxation, announced plans on Dec. 10 to introduce legislation to address the U.S. Supreme Court decision, South Dakota v. Wayfair.

"The Wayfair decision is the most important development in tax law in decades, and it is difficult to overstate its consequences for taxpayers, small and large businesses, as well as the state and local governments," McGuire said in a press release.

Days later, the California Department of Tax and Fee Administration announced out-of-state retailers with sales of $100,000 selling into the state would have to collect and remit use tax. But then Burke intervened with a bill raising the threshold to $500,000.

Mark R. Yohalem, a Munger Tolles & Olson LLP litigation and appellate partner, said creating the framework needed to enact the new taxes will take time for a large state like California to ensure the changes are made in a thoughtful manner.

"The court's decision in Wayfair should help those changes proceed along lines that are economically rational and consistent with how other state taxes operate," Yohalem said.

California Dreaming: State Pursues Carbon-Free Future

In September, Brown signed SB 100, a bill requiring that all of the state's electricity comes from zero-carbon sources by 2045. The governor then doubled down by adding an executive order to further combat climate change requiring that statewide carbon neutrality be achieved by the same deadline.

But experts say California will face significant legal, regulatory and practical challenges on its road to a greener future.

Sheppard Mullin partner Nico van Aelstyn told Law360 that at this stage, SB 100 and the executive order "aren't game-changers so much as a significant increase in ambition."

The agencies working on climate change measures are expected to push harder on policy levers they've already been using, he said, in addition to seeking new, and more creative, policy tools. As a result, the Golden State will likely see an increase in the cost of electricity, at least until the full scale of a renewable energy infrastructure is built out.

Ali Zaidi, of counsel at Kirkland & Ellis LLP, said he expects SB 100 to have an impact on statewide policymaking with implications reaching the operations of businesses inside and outside the state. Key legislative and regulatory choices will shape how California reaches its 2045 target, including how different sources of power on the energy grid are valued and how difficult the permitting process will be for new technologies such as offshore wind, storage and carbon capture.

"Together, legislative and regulatory choices, court and campaign challenges, and the emergence of technology options will determine how far California gets and what the costs, net of benefits, will be," Zaidi said. "It's all in the implementation."

California Prepares for More Wildfires

As the effects of climate change increase, California is bracing for more wildfires and looking at legislation to deal with destruction left in the wake of the massive blazes that have seemingly become the norm.

In September, Brown signed a package of bills to help the state prevent and recover from the catastrophic infernos, including a controversial bill, SB 901, that critics call a bailout for Pacific Gas and Electric Co. but proponents say was needed to save the liability-burdened utility from bankruptcy.

Sheppard Mullin partner Marisa Miller said California legislators will likely now revisit inverse condemnation laws given the widespread devastation of the recent wildfires.

"These laws impose strict liability on California's investor-owned utilities for fires caused even in part by their equipment, regardless of whether the utilities have followed all applicable rules and regulations," Miller said.

While inverse condemnation liability was previously only imposed against public entities, courts have expanded the reach of the legal concept to privately owned utilities under a theory that these utilities could socialize the cost by applying for recovery in rates, the Sheppard Miller partner said.

Legislators Will Continue to Seek Solutions to California's Housing Crisis

In November, California voters overwhelmingly rejected a rent-control measure that proponents said would provide some relief to tenants feeling the financial squeeze of the state's housing shortage.

Phil Recht, partner-in-charge of Mayer Brown's Los Angeles office and co-leader of the firm's international trade and government relations and public law practices, said state leaders will continue to look for ways to increase the housing stock and address the obstacles that sometimes stand in the way of building plans.

"Housing is a big issue in the state and a big priority for the government," Recht said. "With respect to housing, we are likely going to see bills that try to tackle zoning and density issues, as well as bills that deal with environmental compliance and financial incentives."

New legislation is also expected from Governor-elect Gavin Newsom, who replaces Brown in a few days. When the state Legislature reconvened in December, Newsom presided over the state Senate's opening session, vowing to pursue "guaranteed health care for all," affordable housing, a "cradle-to-college promise for the next generation" and "all-hands approach to ending child poverty," among other promises.

The details remain to be seen. A spokesperson for Newsom did not respond to Law360's request for clarity on the former San Francisco mayor's legislative priorities.

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