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California Legislation And Regulation To Watch In 2018

By **Kat Greene**

Law360, Los Angeles (January 1, 2018, 3:04 PM EST) -- California lawmakers are likely to spend 2018 responding to workplace sexual harassment scandals in Hollywood and beyond, as well as the potential privacy dangers of internet-connected devices, flexing a Democratic supermajority to maintain the state's reputation for cutting-edge employment and consumer protection laws, experts told Law360.

California Gov. Jerry Brown signed more than 850 bills into law in October, launching big moves in consumer and worker protections and affordable housing that are expected to set off a flurry of follow-on regulations in 2018.

"California likes to be on the vanguard," said Andrew Livingston of Orrick Herrington & Sutcliffe LLP. He noted that, in some ways, the Golden State was playing catch-up last year, adopting employment laws like a ban on employers asking applicants about their pay history that mirrored laws already on the books in other states.

That new law, signed in October and set to take effect in January, is "part of California stepping back into the vanguard," he said.

In addition to regulations flowing from those newly signed bills, a news cycle loaded with sexual harassment allegations against titans in a variety of industries presented a fresh set of problems lawmakers are likely to address in 2018, experts said. And devices like the Amazon Echo and Google Home, together with new innovations that make nearly every appliance "smart," may spur new legislation on consumer privacy.

Here are some of the regulatory and legislative developments that California attorneys will be watching for in 2018:

Addressing the Weinstein in the Workplace

With seemingly daily revelations of sexual harassment and worse pouring out of Hollywood, the courts, the state Legislature itself and other workplaces, lawmakers are under pressure to take action with new bills aimed at protecting victims, attorneys told Law360.

Increased awareness of sexual harassment in the workplace started with allegations in October that Harvey Weinstein pressured actresses and other female entertainment industry employees to have sex

with him, in some cases allegedly sexually assaulting them. Those claims were quickly followed by allegations of sexual misconduct by other prominent figures in Hollywood and beyond.

Employment attorneys have taken note, with several saying that California's Legislature is likely to respond to the high-profile scandals with new rules about the workplace.

At least one California lawmaker, Sen. Connie Leyva, D-Chino, has vowed to introduce a bill in 2018 that would ban confidentiality agreements in settlements struck over employee harassment allegations. Employment attorneys told Law360 that such proposals offer clear benefits, but also costs.

Munger Tolles & Olson LLP litigation partner Hailyn Chen told Law360 that, on the one hand, confidentiality clauses are part of the framework that allowed Weinstein to continue his alleged abuse for decades. But on the other, companies may be unwilling to settle if the dispute can't be kept quiet.

"That is a tricky issue," she said. "A lot of individuals and companies who are accused may think, 'Well, if I can't get confidentiality, I'll take my chances in litigation,' and the plaintiffs or complainants may not necessarily want that."

Hogan Lovells partner Robin Samuel agreed that banning confidentiality agreements could be either beneficial or detrimental to complainants, depending on the situation.

The reasoning behind a ban on confidentiality agreements, he said, is that confidentiality allows a perpetrator to continue with his or her career relatively unscathed and limits discourse on a subject that would benefit from the light of day.

"But all of that really presupposes that the allegations made are true and that the perpetrator is trying to cover his or her tracks," he said. "In reality, life is often more complex than that."

He said a middle ground, wherein confidentiality clauses are barred only for employees who don't have attorney counsel, could potentially be more effective.

He also cautioned that employers eager to appear responsive to harassment concerns may wind up treading on the due process rights of the accused, noting that several prominent figures were fired the moment allegations about bad behavior were made public.

"I don't, frankly, understand how some of the publicly reported suspensions and terminations can take place so quickly," he said. "While I fully support the victims of sexual assault and harassment ... it just seems to me in the very recent past, [when someone is accused], by that afternoon or evening, they're publicly fired. I just don't see how an employer can conduct an investigation that quickly."

Munger partner Chen noted that many of the women coming forward with allegations against powerful entertainment industry figures were powerful in their own right, but hesitated to voice their concerns. That, Chen said, raises questions about how effective the state's anti-retaliation laws are, which could be an area for the Legislature to address in 2018.

"What we're seeing now are so many instances of women who, even though they have these laws available to them, still feel like they can't come forward to report things for all sorts of reasons because of the impact it might have on their career," Chen said. "That, to me, should be where the focus is ... I think looking at the anti-retaliation laws would make sense."

Camille Hamilton Pating, head of the workplace investigations practice at Meyers Nave Riback Silver & Wilson PLC, told Law360 that the "Weinstein effect" has been "effectively a giant public service announcement to all employers saying that harassment is real and it's pervasive. And these complaints need to be taken seriously."

"Everyone needs to pull out their policies and take a look at them immediately," she said of corporate human resources departments.

Adjusting to the New Salary History Rule

The new year has brought with it a slew of new rules for employers considering job applicants, and several attorneys warned that employers could easily fall into legal traps if they aren't careful during job interviews.

Gov. Brown in October signed a bill banning companies from asking employees about what they were paid at a prior job, bolstering the state's already rigorous equal pay laws. The new law, A.B. 168, prohibits all employers — including state and local governments — from seeking salary history information about an applicant, either personally or through an intermediary such as a recruiter.

Orrick's Livingston told Law360 the law introduces a host of potential pitfalls for employers negotiating with job applicants.

"It's a little bit of quicksand for the employer," he said. "It shifts the balance quite a bit in discussions about compensation. And it limits, obviously, what the employer may do, and it places additional obligations on the employer."

Those obligations include a provision requiring employers to provide applicants with a pay scale for the relevant position upon request. Employers will have to be more creative about how they determine what pay is appropriate for the position the company is looking to fill, Livingston said.

But the salary history rule may simply be an extension of what was already a good practice, said Gina Roccanova, chair of the labor and employment practice at Meyers Nave.

"Clients already knew it was kind of a bad idea to ask about salary history anyway," she said, noting that the state's Equal Pay Act, which was amended in 2016, already prevented companies from using salary history as a justification for disparate pay.

"So the Legislature essentially took something that was a really good idea and just made it a law," she said. "That's something employers will get used to."

Spurring Development of Much-Needed Housing

California lawmakers recently passed a slate of legislation aimed at alleviating the state's housing crisis, and voters in November will consider a $4 billion bond to fund housing projects, marking major developments in the Golden State's policies on real estate development and use.

The bills signed into law by Gov. Brown in October included SB-2, the Building Homes and Jobs Act, which creates a permanent source of funds for affordable housing development initiatives, as well as a

law that requires the inclusion of affordable housing in certain types of new real estate developments and a bill that puts the $4 billion housing bond on the November 2018 ballot.

"It was really extraordinary how much legislation was passed last year," said Jon Goetz of Meyers Nave. "It's like all these ideas that have been floating around for years were all passed together."

Goetz said he's expecting state regulatory agencies, including the Department of Housing and Community Development, to be hard at work in 2018 crafting ways to implement the new laws. For one thing, SB-2 will give the state between $200 million and $300 million in funds for real estate development initiatives, and in the coming months, half of that money is supposed to be spent on planning activities, he said.

Goetz says he expects cities to use those funds to craft policies for developers that encourage affordable housing. Such policies might include redevelopment-style areas where homebuilders can take advantage of a streamlined — albeit more expensive — process for getting plans approved by state and local authorities. California is notorious for its strict environmental requirements, and cities may find ways to soften those enough to get building started, he said.

Tay Via of Coblentz Patch Duffy & Bass LLP said that the new laws are a major development in spurring affordable housing, but hopefully are just a start. The recently passed slate of bills "starts to set the table with a combination of carrots and sticks around local land use regulations," she said.

"The state can do more to push the localities in the direction of planning for density at the right locations, and streamlining the process for doing that," Via said.

Building in California can be an expensive enterprise, not only because the costs of land, labor and materials are high, but also because regulations like the labyrinthine California Environmental Quality Act are complex and time-consuming to conform with. The new rules point to possible changes that could ease those burdens for developers, she said.

"Many of us who make a living guiding clients through a complex regulatory environment would gladly have less work in exchange for a streamlined approval process for infill development," Via said.

Protecting Privacy in a Connected World

With technology companies working their way into our homes and lives with ever-smarter internet-connected devices — from refrigerators that alert owners to buy more milk to in-home assistants like Amazon Echo and Google Home — lawmakers may turn their attention in 2018 to regulating the way such devices protect user data, attorneys said.

Tim Toohey, head of the cyber security practice at Greenberg Glusker Fields Claman & Machtinger LLC, told Law360 that device security is a "very fertile area for legislation."

One problem in the industry, he said, is that many new connected devices coming to market don't have strong security systems built in, sometimes leaving the devices and their owners vulnerable to hackers.

"Consumers themselves are not all that sophisticated in terms of what kind of security they have on the device, and they keep passwords at their defaults," he noted. "These devices are inexpensive. They are seemingly innocuous. Consumers love them, but they don't think about the security implications."

In 2017, California legislators hatched Senate Bill 327, which would have required device makers in California to set out a plan to secure internet-connected devices in the event of a hack, and to provide notice to consumers about how their personal information is collected and stored.

The bill was criticized for being too broad — it included "any device, sensor or other physical object that is capable of connecting to the internet" — and its sponsor, state Sen. Hannah-Beth Jackson, ordered it inactive in June.

That bill could be revived with improvements in 2018, said Michael Rubin of Latham & Watkins LLP.

"That bill as it's currently set would pose some real challenges for manufacturers of connected devices," he said. "It's confusing both in what it considers to be a connected device ... and then it imposes some pretty vague standards."

Older consumer protection laws, by contrast, have proven flexible enough to expand to cover even the most inventive of devices so far, Rubin said.

Hueston Hennigan LLP partner Alex Giza was optimistic that state lawmakers could craft a set of rules to protect consumers without discouraging innovation. There were problems with S.B. 327 as it was originally pitched, he said, but it may be possible to refine it in 2018.

"We've got a lot of very active politicians that are really trying to make things better for us, even though sometimes the result isn't," he said of California's lawmakers, adding that it may be time for an overhaul of the state's privacy laws.

Giza suggested that California lawmakers thinking about connected-device security should take a look at the Cybersecurity Framework created by the U.S. Department of Commerce's National Institute of Standards and Technology. The framework is a set of guidelines for providing security to consumers who are using connected devices.

Giza says Silicon Valley companies don't necessarily use the framework in designing connected devices, but state laws encouraging companies to adopt these standards could boost industry participation and increase consumer protections.

"I think it would be a mistake for the Legislature to try to figure out what technical security measures are required, so maybe leaning on an industry expert source like NIST would make sense," he said.

--Editing by Philip Shea and Catherine Sum.