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California Legislation And Regulation To Watch In 2017

By **Kat Greene**

Law360, Los Angeles (January 2, 2017, 1:03 PM EST) -- California lawmakers are expected in 2017 to push for expanded parental leave, reforms to state environmental laws, and legislative responses to the Wells Fargo fake accounts scandal, while state regulators will likely grapple with rapidly evolving automated driving technologies, experts told Law360.

As self-driving cars increasingly move from the laboratory to the bumper-to-bumper reality of Golden State roadways, the state's Department of Motor Vehicles, Department of Insurance and other agencies will be scrambling in 2017 to figure out how to keep drivers safe while maintaining a competitive regulatory environment for cutting-edge technology and automotive companies.

Meanwhile, the state's new Democratic supermajority may use its increased legislative clout to expand some of the Golden State's more progressive policies for workers, to smooth out some wrinkles that have cropped up in the far-reaching California Environmental Quality Act and to take steps to punish Wells Fargo & Co. for opening accounts without customers' permission and to discourage other financial institutions from committing similar frauds, experts said.

Here are some of the regulatory and legislative developments that California attorneys will have on their radar for 2017:

Paving the Way for Automated Vehicles

The DMV in September sought comment on proposed new regulations for self-driving vehicles, and it's likely to return in early 2017 with new drafts that could determine whether companies working on automated driving technology stay in California or head to less restrictive markets, attorneys told Law360.

California may have been the first to put legislation for autonomous vehicles on the books — it passed legislation in 2012 — but lawmakers seem to have taken their feet off the gas pedal since then, said Michael Reynolds of O'Melveny & Myers LLP.

Other states including Michigan, which approved permissive testing rules on Dec. 9, are becoming more attractive for companies working on the technology because they allow, for example, cars without steering wheels to be tested on the roads, he said.

"The big one is allowing the testing of vehicles without the presence of a driver with a steering wheel.

Michigan just passed a law allowing this, so other states are moving forward on this ... whereas California is still stuck behind," Reynolds said.

And once those vehicles are mature enough to start hitting the streets as real-world products, California and other states will have to work together on uniform rules of the road, so that drivers can cross state lines without running afoul of the law, said Katie Thomson of Morrison & Foerster LLP.

"For this technology to, across the country, deliver the benefits people hope it will provide, you want to have a common level of safety, and a relatively consistent liability regime," Thomson said. "But to do that, the states will have to agree, or some states will have to be the leaders and other states will fall in line."

State lawmakers and regulators are working to decide how California will handle issues including the way the vehicles are marketed to consumers, safety and law enforcement matters, questions about accident liability, and privacy concerns over geolocation data and passenger information.

Alexander C.D. Giza of Hueston Hennigan LLP told Law360 that the vehicles' ability to collect and share data with other vehicles, technology companies, automakers and law enforcement may create new efficiencies in how the cars work and how problems that lead to crashes can be avoided, but that ability also creates risks related to protecting both consumers' data and the technology companies' own intellectual property.

"[Data sharing] is an opportunity that doesn't really exist now, but it also opens up a can of worms," Giza said. "The vehicle now has all these sensors, and it's taking in data, so kind of like a black box on an airplane, you'll have a good idea of what happened in a crash."

Expanding Progressive Employment Initiatives Statewide

California Democrats in November claimed more than two-thirds of the Legislature's seats, giving the party a supermajority alongside the state's Democratic governor Jerry Brown, several attorneys noted.

That consolidated party power could embolden state legislators to expand employee protections to include some of the more progressive measures passed in cities like San Francisco, which in September passed a new parental leave law that requires certain companies to supplement California's paid family leave benefits.

"When you see expansions in places like San Francisco, there's certainly some chance that the Legislature will want to take that issue up," said Max Fischer of Sidley Austin LLP. "It's something that they haven't done yet, and it's something they could do in 2017."

The Golden State already has tough employment laws that can be challenging for companies expanding to California, he said, noting that some employers have equated operating in California to doing business in another country.

But with a President Donald Trump-led federal government expected to present "resistance" to minimum wage laws and other employee protections, Fischer said Golden state lawmakers can be expected to respond with stronger protections for employee rights within their purview.

"From an employer's perspective, we're certainly looking out for and anticipating in California in

particular that, at the state and local level, you're going to see those local and regional governments try to pick up where, essentially, the [Obama] administration left off to bolster some of those protections for employees," he said. "We are expecting some type of legislative momentum at the city and state level in that regard."

That momentum may prove difficult for a Republican presidential administration to stop, said Eric Akira Tate of Morrison & Foerster. For example, states and cities around the country are working to raise the minimum wage to $15, and that target may continue to climb in California's cities, especially where it's more expensive to live, he said.

"It feels like there is such a groundswell already, just across the country to increase the minimum wage," he said. "People have been talking about a living wage for decades, but now there is real movement."

Fully paid parental leave may catch on more slowly, but he said the president-elect's daughter Ivanka Trump — herself a working mother and accomplished professional — may have some influence in pushing the needle in a more progressive direction.

"What I'm really interested to see is what the 'Ivanka effect' is going to be," he said.

Meanwhile, employers would be wise to keep an eye out for recently passed changes to employment rules going into effect on Jan. 1 that may bring new litigation, said Andra Greene of Irell & Manella LLP.

For example, California issued new rules regarding how much an employer can investigate a job applicant's immigration status, limiting what California-based companies can ask from their workers and applicants, she said.

"Unfair immigration practices" will be a new buzzword in 2017, and she's expecting new lawsuits over it. Business in 2017 won't be slow, she said.

"I can imagine this will be a claim that gets asserted quite frequently if employers aren't careful," Greene said. "With new regulations come an increase in litigation. So I think we'll see people test these regulations, what they mean and their scope. I expect employment litigation and class action litigation will be alive and well in California in 2017."

Meanwhile, existing state laws on employee sick leave are being supplemented by individual cities that are seeking to expand how much paid sick time workers collect and how it's collected, said Loeb & Loeb LLP's Michelle La Mar.

Differing city rules are a challenge for employers, especially for service-oriented companies that may have workers who cross close city boundaries, like between San Francisco and Oakland or Los Angeles and Santa Monica, she said.

"I think we all have to watch it," she said. "We have to watch it every single day, every single meeting of a city regulatory board because the laws are being dictated in a way that are inconsistent with each other."

This inconsistency in the rules between cities could drive litigation, La Mar said.

"The employment attorneys are just gearing up, waiting for an employer to make a mistake when it

comes to these things," she said. "You have these employers who are trying desperately to do the right thing ... but how do they keep track of all these different regulations coming out?"

Shifting Ground on Environmental Rules

The California Environmental Quality Act was designed to empower state and local agencies to regulate the environmental impacts of real estate projects, but it has sometimes been misused as a weapon to slow developers down or kill projects for non-environmental reasons, Christopher Carr of Morrison & Foerster told Law360.

Real estate developments including proposed clean energy projects are being delayed by CEQA litigation that the Legislature probably never intended, including lawsuits by neighbors and other project opponents aimed at extorting a cash settlement or delaying a project long enough for a competing developer to move in, he said. With the state facing a sustained housing market shortage and an increasing need for clean power, CEQA's impact on slowing development has become an issue that "cries out for legislative reform," he added.

"CEQA really has become ... an extortion racket in too many instances," Carr said. "Obviously you can't throw the baby out with the bathwater, but something has to happen."

The state Supreme Court has taken on some CEQA cases, but the Legislature itself may be best positioned to iron out some of the wrinkles that have arisen in the law, he said.

Anthony Cortez of Greenberg Traurig LLP said there are a number of recent changes and proposals by state regulatory agencies that will keep companies on their toes in 2017.

For example, California in 2016 introduced changes to Proposition 65, the regulation that controls whether companies must label products with warnings that some ingredient of the product or packaging possibly causes cancer. Those changes — including requirements for a new label design and more specific information about the chemicals in the product — don't take effect until August 2018, but companies are scrambling to act sooner, Cortez said.

"We're fielding dozens of calls from companies that don't want to wait until the last minute," he said. "We believe in 2017 there will be a lot of companies working toward harmonizing their labeling programs."

What to Do About Wells Fargo

Wells Fargo revealed to the world in September that for years it had set aggressive sales targets that spurred bank employees nationwide to create more than 1.5 million deposit accounts and 565,000 credit card accounts for existing customers without their knowledge.

Federal and state regulators allege Wells Fargo put undue pressure on front-line employees to sign up those existing customers for other products in a process called cross-selling. The bank had a stated policy of trying to get consumers to sign up for eight different accounts because "eight is great."

The bank has agreed to pay $185 million and provide around $5 million in consumer relief in a settlement with the Consumer Financial Protection Bureau, the Office of the Comptroller of the Currency and the Los Angeles City Attorney's Office, and later its CEO stepped down, along with other

changes.

Bank regulation is primarily left to federal agencies, excepting banks that are chartered in California. But the Golden State has still taken several steps to protect bank customers from similar abuses, and it may initiate more, said John Hueston of Hueston Hennigan LLP.

“Pressure will continue to mount on local and state legislators and regulators to show strong bank enforcement measures,” Hueston said.

For example, in mid-December, California’s Insurance Commissioner Dave Jones launched an investigation into allegations by former Prudential Insurance Co. employees that Wells Fargo workers signed up bank customers for Prudential Insurance without the customers’ permission. The commissioner is looking into “all aspects” of these allegations, according to a statement, including possible violations of California laws that require people who sell insurance to have a special license issued by his department.

And the state’s Treasurer John Chiang suspended all California business with Wells Fargo for a year, including pulling the bank from some municipal bond deals.

“There are a number of tools that the state can and will employ against not just Wells Fargo, but also other banks that are suspected of and then caught in unethical conduct,” Hueston said. “These will include not only city legislation requiring that certain standards be met for banks to conduct business within their jurisdiction, but regulatory actions by the insurance commissioner and aggressive and creative ‘unfair business practices’ enforcement measures by the new California Attorney General.”

Meanwhile, legislators may work on new strategies for preventing fraud by financial institutions, said Nancy Peverini, legislative director for the Consumer Attorneys of California.

State Sen. Bill Dodd, D-Napa, introduced a bill at the beginning of the legislative session to address, in part, the Wells Fargo scandal. It calls for arbitration provisions to be waived in cases where the consumer is accusing the company of fraud and identity theft, among other things, she said.

“This Wells Fargo fraud fiasco perfectly demonstrates why forced arbitration in consumer contracts is bad for consumers and the agencies that want to regulate fraud,” she said. “Had these customers not been forced into these arbitration processes, Wells Fargo’s scandal would have been public much sooner.”

“California has probably the best labor, consumer and safety laws in the nation,” she added. “Those laws are useless if they can’t be enforced through a public forum.”

--Additional reporting by Melissa Daniels and Evan Weinberger. Editing by Brian Baresch.
