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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Construction Legislation & Regulation To Watch In 2019

By **John Kennedy**

Law360 (January 1, 2019, 12:03 PM EST) -- Now that the bottles of Champagne have popped to ring in another year, the construction industry's eyes are on the less lively but no less exciting workings of the federal and state governments as they consider policies that are expected to affect projects across the country.

In general, the industry is waiting to see if Congress and President Donald Trump can agree on a federal infrastructure plan, and if they do, how states and cities will react to it. And while Trump signed the Tax Cuts and Jobs Act **a year ago**, its effects on public utilities have only begun to be felt. Meanwhile, at the state level, those in the industry who would do business in Nevada are watching a number of bills that could go back before the Legislature now that there's a Democrat in the governor's office.

Possible Bipartisanship on Infrastructure

Much has changed since Trump's **mid-February announcement** that he'd like to use \$200 billion of federal funding to spur \$1.5 trillion in spending from states and other sources on infrastructure projects, but that doesn't mean the construction industry sees the issue as a lost cause.

Trump's plan fizzled on arrival in the Republican Congress, but now that the Democrats — who have also pushed infrastructure as a top priority — have control of the House, attorneys say they're waiting to see what infrastructure plans may come out of a divided government.

"Maybe the only thing Congress and Trump could agree on is the need for an infrastructure bill," said Kenneth M. Roberts, leader of Schiff Hardin LLP's construction practice group.

Of course, any eventual infrastructure plan will also affect the states, which will have to hammer out plans for funding projects if they are expected to contribute a higher percentage of funding than they currently do. Traditionally, the federal government has paid for more, but Trump may look to change that or at least increase the percentage of work covered by states and municipalities, lawyers said.

If that happens, some governments might not be able to foot the bill and will have to look at other sources of funding, including private money.

More **public-private partnerships** are a possibility, as are "value capture" strategies. Governments using the latter, for example, could convince a private company to invest in an infrastructure project by giving that business permission to develop the surrounding land, attorneys said.

Those funding plans will be up to states and cities, so the construction industry will be watching to see how they're handled.

"There's not a recipe out there that's proven, that everybody's adopted. That's really the key — it's to be determined," Roberts said. "It really doesn't exist in a well-proven model because if it did, I'm telling you, it'd spread like wildfire."

Tax Cut Complications

When Trump signed the Tax Cuts and Jobs Act in late 2017, most were expecting, well, tax cuts.

"Unfortunately for developers, in this particular instance, that's not what happened," said Sue Schultz of Sandberg Phoenix & Von Gontard PC.

The bill changed Section 118 of the U.S. Tax Code and made any "contribution in aid of construction" taxable income of a utility. Previously, any water or sewer system built by a developer but given over to a privately owned public utility were exempt from taxation.

That means in an area like the St. Louis suburb Schultz lives in, one side of the road might be served by a privately owned public utility that must pay taxes on its system, while the other side is served by a municipal provider that isn't taxed.

"You just created a market inequality between the two developments," she said. "It's something maybe only a tax nerd appreciates, but at the same time, it can be a huge cost to the developers."

Because of the new tax, developers may have to spend more money and reimburse utilities for the tax on the water and sewer infrastructure after they turn it over. But because developers won't encounter this issue until they've finished a project, some states may not even realize it's a problem yet. Of those that have, few, if any, have figured out how to resolve it, Schultz said.

South Carolina's Public Service Commission, for example, is considering a settlement in which a wastewater utility would cover any taxes related to contributions in aid of construction by collecting cash from the developers that built the system. And in Schultz's home state, the Missouri Public Service Commission approved Missouri-American Water Co.'s proposal that would see Missouri-American pay taxes linked to contributions in aid of construction.

The ultimate fix, Schultz said, would be a reinstatement of the federal law that excluded income taxes on water or sewer systems, but she added she's heard there's been pushback from the Trump administration on this front.

One-Party Rule in Nevada

November's midterm election shook up the political landscape across the country, and Nevada was no exception. What is different about the Silver State, though, is its biennial legislative sessions. It's one of four states — Montana, North Dakota and Texas are the others — to hold its regular sessions once every two years.

The last session was in 2017, when Gov. Brian Sandoval, a Republican, vetoed 41 bills passed by a Democrat-controlled Legislature. Now, with Democrats still in control of the Senate and Assembly, they're also getting a Democrat in the governor's office, Gov.-elect Steve Sisolak.

Many of the Sandoval-scrapped bills could find their way back to Sisolak's desk, including a number that were vetoed after the Legislature adjourned in 2017, and could be scheduled for a veto override vote at the start of 2019, according to McDonald Carano LLP partner Joshua J. Hicks.

Some of the 41 touch on construction, including SB173 and AB154, which deal with the use of prevailing wages in school construction. The former would require work on charter schools — which were previously exempt — to pay the prevailing wage, especially if the project uses a school district's money. The latter, meanwhile, would require school districts to pay full prevailing wage rates for construction projects as opposed to the 90 percent they're allowed under current law.

--Editing by Philip Shea and Bruce Goldman.

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