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Transportation Legislation And Regulation To Watch In 2019

By **Linda Chiem**

Law360 (January 1, 2019, 12:03 PM EST) -- Transportation attorneys are keeping tabs on potential highway and infrastructure funding legislation and new regulations addressing emerging technology such as self-driving cars and unmanned aircraft systems.

The Trump administration's deregulatory push will continue to influence transportation policy in 2019, experts say, but there is expected to be a renewed focus on expediting infrastructure investment projects and enhancing U.S. competitiveness in developing and deploying self-driving cars and drones.

Here, Law360 looks at transportation-related legislation and regulation to watch in 2019.

FAA Drone Regulations

Attorneys and drone industry stakeholders are eagerly waiting for the U.S. Department of Transportation's Federal Aviation Administration to finalize two proposed rules: one concerning the remote identification and tracking of drones in flight and one allowing for drone flights over people.

The proposed rules, which were sent to the White House's Office of Management and Budget for approval in May 2018 and are aiming to be finalized by this summer, are the next set of key building blocks to constructing the overall federal regulatory framework governing drones.

The FAA's yearslong rulemaking efforts have so far resulted in defining what types of drones can fly in the national airspace and the certifications needed to fly them.

As it is now, the commercial use of small drones weighing up to 55 pounds is governed by the FAA's Part 107, which took effect in August 2016. It prohibits drone flights over people, nighttime operations and flights that aren't within an operator's visual line of sight, among other restrictions. But operators can apply for waivers from those restrictions, which many drone advocates would like to see loosened.

But the next step is figuring out how to track drones once they're airborne so regulators and law enforcement can determine which drones should or shouldn't be flying in any given area, experts say.

"Remote ID is really the linchpin for all other drone activity on a regulatory front to move forward," Mark Aitken, senior policy adviser with Akin Gump Strauss Hauer & Feld LLP, told Law360. "There are other additional rulemakings that we know are in the queue such as operations over people, flight restrictions over critical infrastructure facilities and an advanced notice of proposed rulemaking regarding safe and secure drone operations."

Akin Gump partner Jennifer Richter agreed that having remote identification and tracking regulations in place is crucial for the next steps in building the FAA's regulatory framework, including establishing an unmanned aircraft system, or UAS, traffic management system and developing counter-UAS operations to fight back against unauthorized drone uses.

"Unless you know who's in the air now and who's not supposed to be in the air, you really can't have

a successful [traffic management system or counter-UAS program]," Richter said. "If you don't have remote ID and tracking, it's really hard to figure out who those bad actors might be and then to have a counter-UAS system that can protect the critical infrastructure from those drones. All of these things are really wrapped up together and they're absolutely essential to complete in order for us to have a UAS system that is functioning in the U.S."

Experts are also waiting to see what regulations might come out of the White House's drone integration pilot program that launched in October 2017. After receiving more than 100 applications, the DOT in May 2018 granted 10 state- and local-backed projects special licenses to test different ways of flying drones — including package delivery and nighttime flights — in collaboration with private-sector partners. The program gives those governments a larger-than-expected role in shaping the federal regulatory framework for drones, experts say.

The pilot program's aim, according to the White House, is to more thoroughly vet the public safety and security risks of drones in order to craft better regulations and prepare for widespread commercial drone activity. Experts say the pilot program will help inform efforts to tackle more permissive flights-over-people and line-of-sight rules.

"The drone issue is never an easy one for the FAA to handle, but at the same time, there's a lot of pent-up angst with the community to see further operations unlocked beyond just Part 107," Aitken said.

NHTSA Self-Driving Car Policy

The Trump administration has stuck to its promise to remain flexible in developing new regulations for so-called automated driving systems, better known as self-driving or autonomous cars. And it continues to embrace voluntary, consensus-based technical standards — meaning, no binding rules just yet — for developing self-driving cars.

The National Highway Traffic Safety Administration in October released its third version of the federal government's self-driving car policy, "Preparing for the Future of Transportation: Automated Vehicles 3.0," offering broad federal guidance on how auto manufacturers, technology giants, artificial intelligence developers and other companies should go about developing and testing their automated car technologies on U.S. roads.

The policy reinforces that NHTSA and the federal government will regulate the safety design and performance standards for all motor vehicles, including self-driving cars, and that any state laws on automated vehicle design and performance will be preempted. State, local and tribal governments will be responsible for licensing human drivers, registering motor vehicles, enacting and enforcing traffic laws, conducting safety inspections, and regulating motor vehicle insurance and liability.

But there's still concern that state and local governments might overstep and still come up with their own rules in the absence of concrete federal rules, experts say.

"What we're seeing with autonomous vehicles is we have the feds not yet really putting specific laws other than recommendations and guidance and principles, but we have states running around making lots of law," Foley & Lardner LLP partner Mike Overly told Law360. "An automobile is a long lead item meaning you cannot turn car production on a dime."

So it makes it difficult for auto manufacturers to get a handle on the federal guidance, with the prospect of diving into their monthslong or yearlong production process only to have it potentially upended if a state decides to enact a law pertaining to self-driving cars, Overly said.

"That is a tough item to try and design to at the last minute," Overly said. "There are concerns that right now there's too much uncertainty and everyone is proceeding ahead trying their very best, but worried that a particular state may enact something that will cause significant strain."

In the meantime, California, Arizona, Nevada, Michigan and other states are out front in the race to get truly driverless cars ready to hit American roads by crafting new rules to test and deploy them.

The Golden State in 2018 began allowing autonomous cars to be tested on public roads without a

human driver and said it will also allow self-driving cars to pick up passengers from ride-hailing services for the first time.

And with California largely viewed as a pioneering state in this area, industry observers say other states could follow its lead and similarly take actions to prevent the federal government from stepping in with any rigid rules.

NHTSA is also considering whether to allow self-driving cars to be designed without steering wheels or brake pedals, asking industry stakeholders in October for more information on whether the agency should ax federal regulations mandating car features meant for human drivers. The agency said it is considering rulemaking on the issue.

Congress has also been looking for ways to speed up the development of self-driving cars with its consideration of federal legislation — the House's Self Drive Act and the Senate's AV Start Act — that for the first time would regulate the rollout of automated driving systems. The bills, which saw some momentum in late 2017 but stalled in 2018, notably carve out exemptions for automakers to test hundreds of thousands of self-driving cars without meeting existing auto safety standards.

Infrastructure Investment

Transportation stakeholders are also waiting to see if the Trump administration and Congress will deliver on a comprehensive infrastructure investment proposal in 2019 after falling short on earlier promises.

New committee leaders driving transportation policy after Democrats took control of the U.S. House of Representatives in the November 2018 midterm elections vowed to train a spotlight on increased infrastructure investment and oversight. And President Donald Trump, who had pitched a \$200 billion infrastructure proposal in early 2018, has said he's open to working with congressional Democrats in a range of areas including infrastructure, the environment and drug pricing, where he "would like to see bipartisanship."

But finding agreement on how to pay for highway, road, airport and other upgrades remains a long shot on still-divided Capitol Hill, experts say.

Venable LLP partner Jim Burnley, the U.S. secretary of transportation from 1987 to 1989, told Law360 that there's no question that congressional lawmakers are interested in putting an infrastructure package together, but whether it can be enacted is another matter.

"We don't do big issues in isolation, and there are cross-currents that can make or break any infrastructure bill," Burnley said. "We've seen meteoric rises and falls and concerns about the federal deficit beyond just transportation. There are massive shortfalls in the Highway Trust Fund that's covered by general fund revenues, and that chasm does get bigger every year."

Akin Gump infrastructure and transportation practice head Susan Lent told Law360 that there's been a lot of "positive bipartisan discussion" around infrastructure, but it's still largely unknown whether Congress will actually pursue a large infrastructure bill or will tackle some issues incrementally.

Attorneys say the next Congress will also have to start negotiating sweeping long-term legislation reauthorizing highway, transit, rail and vehicle safety programs, given that the most recent five-year bill — the Fixing America's Surface Transportation Act — expires in September 2020.

Experts say the biggest priority will have to be figuring out how to replenish the dwindling federal Highway Trust Fund, which pays for surface transportation projects nationwide.

The fund does not bring in enough money from the federal gas tax to cover all the projects that need funding. It takes in about \$40 billion a year from the tax, but that still falls short of annual demand. As a result, the Highway Trust Fund has often been propped up by cash infusions from the federal general fund and other sources, largely because Congress has refused to raise the gas tax, currently 18.4 cents a gallon, since 1993.

And there's widespread agreement that the Highway Trust Fund cannot continue to be propped up by

infusions. Since fiscal 2008, Congress has transferred approximately \$140 billion from the U.S. Treasury's general fund and other sources into the Highway Trust Fund. The most recent figures from the DOT peg the fund's cash balance at under \$30 billion. And the Congressional Budget Office has already projected that the Highway Trust Fund will not be able to meet its obligations beyond fiscal year 2020.

"I'm assuming we're going to see hearings, a lot of consideration about how do you pay for the bill, what types of innovation can be employed and how do you generate more money for infrastructure because everyone agrees more money should be invested in infrastructure," Lent said.

FMCSA Hours of Service Rule

The DOT's Federal Motor Carrier Safety Administration said in August that it's considering revising regulations that govern commercial truck drivers' rest breaks and limit the hours they can spend on the road to give truckers more flexibility in their operating schedules.

The FMCSA's **advanced notice of proposed rulemaking** sought the public's input on whether the agency should tweak its hours-of-service regulations in response to pleas from lawmakers and the trucking industry for less rigid mandates.

"I am optimistic that the federal government's regulatory activity relative to transportation will be narrow and, more importantly, the few regulations that are currently being discussed will largely empower, rather than fetter, the industry," said Marc S. Blubaugh, co-chair of Benesch Friedlander Coplan & Aronoff LLP's transportation and logistics practice group.

The agency's hours-of-service, or HOS, regulations generally limit commercial truck drivers to 11 hours of driving time within a 14-hour window after they come on duty, and they can only come on duty after taking 10 consecutive hours of off-duty rest time. According to the FMCSA, drivers that use sleeper berths in their trucks are allowed to combine two hours of off-duty time with eight consecutive hours spent in a sleeper berth to meet that 10-hour off-duty mandate.

The FMCSA said that it's looking to revise regulations covering four areas: short-haul operations involving less than 12 consecutive hours on the road, operations in adverse driving conditions, the 30-minute break rule and a time-splitting option for sleeper berth use.

"Proper changes in any of these areas could add flexibility and efficiency to the industry," Blubaugh said.

--Editing by Brian Baresch and Aaron Pelc.