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Mich. Dems Eye Ambitious Agenda With Slim Majority

By Carolyn Muyskens

Law360 (March 3, 2023, 3:21 PM EST) -- Democrats in Michigan have control of the House, Senate and governor's office for the first time in 40 years, and with progressives eager to put pent-up legislative ideas into action, attorneys expect efforts to change the state's civil rights, employment and election laws.

Several of the first proposals are aimed at undoing the policies of the last decade under the previous governor, Republican Rick Snyder. But the ability of Democrats to implement a bold agenda in Michigan may be tempered by the narrow, two-seat majorities in both the House and the Senate.

The hurdles were on display as Democrats in the House struggled in February to pass their first major piece of legislation, a tax package, due to a single Democratic member's opposition to the economic development incentives rolled into the bill. Ultimately a Republican crossed over to vote for the package.

Mark A. Burton, a partner with Honigman LLP, compared the dynamic to that in the U.S. Senate, where opposition from West Virginia Sen. Joe Manchin has torpedoed more than one Democratic proposal.

"People have seen it federally with Joe Manchin over the last several years, but the power of one individual usually is something you can manage relatively peacefully. But now all of a sudden when it's the difference between something passing or not, it's something that takes on a life of its own," Burton said.

Additionally, two Democratic state representatives, Rep. Lori Stone and Rep. Kevin Coleman, have announced mayoral runs in Warren and Westland, respectively. If those campaigns succeed, the representatives will have to resign from the House, leaving those seats up for grabs in special elections and potentially eliminating Democrats' majority.

That means Democrats are likely to try to pack a lot of legislation into the first six months of the two-year session, said Burton, who is a former adviser to Gov. Gretchen Whitmer.

A shooting at Michigan State University that killed three students and wounded five others on Feb. 13 had an immediate impact on the legislative session too, as Democrat promised to respond quickly to impose new restrictions on purchasing firearms.

"I think you'll see certain things that were originally meant to be fast-tracked get placed a little bit on the back burner just because of what happened at Michigan State University," said Scott Eldridge, a senior principal with Miller Canfield Paddock & Stone PLC.

Expanding Civil Rights Law to LGBT Individuals

Democrats have moved quickly to advance a bill adding protections for sexual orientation and gender identity to the Elliott-Larsen Civil Rights Act, which prohibits discrimination in employment, housing, public services and public accommodation.

Senate Bill 4, passed by the Michigan Senate Wednesday, codifies a decision by the Michigan Supreme Court last year in **Rouch World LLC v. Department of Civil Rights** finding that the prohibition on sex discrimination in the ELCRA also prohibits sexual orientation discrimination.

In its opinion, the court adopted the reasoning of the U.S. Supreme Court in its 2020 **Bostock v. Clayton County decision**: that sexual orientation discrimination is inherently discrimination "because of sex."

The proposed expansion to Michigan law makes clear that gender identity is also protected. The Michigan Supreme Court was not asked to address gender identity in the Rouch World decision.

Attorneys noted Michigan's civil rights law includes prohibitions on discrimination in public accommodation, public services and housing in addition to employment, so the civil rights law expansion has an even broader effect in Michigan than the expansion of Title VII under the Bostock decision, which affected only employers.

The law is likely to be challenged as insufficiently protective of organizations and individuals who refuse to hire or provide services to people in same-sex marriages or transgender individuals as on religious grounds. A proposed amendment to the Senate bill to include more religious protections failed Wednesday.

Several lawsuits filed last year following the Rouch World decision have sought to test the limits of the ELCRA expansion, including one suit from a religious health care provider that says it should be able to refuse to provide gender transition care to individuals based on its religious objections.

Restoring Pro-Labor Policies

Labor and employment lawyers are watching Democrats' efforts to repeal Michigan's right-to-work law, introduced as one of the Democratic caucus's Day 1 priorities in January.

Right-to-work laws, which are in place in a little over half of U.S. states, make it unlawful to force workers to join or financially support a union as a condition of employment.

The proposed legislation is a simple repeal of the 2013 right-to-work law in Michigan, which, if passed, will make it legal for unions and employers to agree to collective bargaining agreements that make union membership and payment of union dues a condition of continuing employment.

Opponents of right-to-work say it isn't fair for non-union members in unionized workplaces to benefit from the union's work without paying their fair share and accuse right-to-work advocates of trying to weaken union power. Proponents, on the other hand, say the goal is to give workers freedom to choose whether to support a union and argue that right-to-work laws make a state more attractive for businesses.

"I think that's going to be a fairly big and prominent fight, and I think it's going to be one that the governor's going to have to think fairly hard about when it comes to being presented with a bill to sign because there's also potentially a negative economic impact to the state if we revert to where we were before 2013," said Eldridge of Miller Canfield, adding that Michigan's history as a union-friendly state may "make outside companies that may be considering doing business a little bit nervous."

Attorneys will also be closely watching efforts to restore Michigan's prevailing wage law.

The proposal, **House Bill 4007**, was one of the first bills introduced in the legislative session, along with right-to-work. House Speaker Joe Tate, D-Detroit, highlighted it as a priority.

The prevailing wage law requires state-funded building projects to pay workers at union-level rates and benefits, set based on the "prevailing" rates in the geographic area where the project takes place. This essentially creates a special minimum wage for construction and skilled trades workers hired to work on publicly-funded projects.

Michigan's decades-old prevailing wage law was repealed in 2018. Since then, Whitmer has restored a state policy of paying prevailing wage on Department of Technology, Management and Budget-bid projects. However, reenacting prevailing wage policy in state law would extend its reach to projects that are funded with state money but not managed directly by the state, such as construction at public universities, and ensure the state policy stays in effect after Whitmer leaves office.

Making Polluters Pay

Attorneys expect Democrats to introduce some version of "polluter-pay" legislation that would hold companies liable for the cost to clean up environmental contamination.

Though no detailed proposals have been put forward, Democrats have not been shy about their nostalgia for the short time in the 1990s when Michigan's polluter-pay laws were considered the toughest in the country.

Legislation in this space is likely to address the degree of cleanup companies would be responsible for when pollutants are discovered and could also expand the parties who can be held liable.

Peter Langley, a senior attorney with Plunkett Cooney PC's government affairs practice, said polluter-pay is a catch-all term, and it's difficult to know exactly what the impact will be until detailed proposals have been put forward.

He's also watching how Whitmer's climate plan for the state, released last year, will translate into regulatory and legislative action.

The governor's MI Healthy Climate Plan called for Michigan to reduce its greenhouse gas emissions by 52% by 2030 through decarbonization of the electric grid, adoption of electric vehicles, and decarbonization of homes and businesses. Langley expects the legislature to tackle energy legislation at some point, including addressing how renewable energy generation is taxed.

And a bill has been introduced to undo a procedural check on state environmental regulatory power.

Senate Bill 14 would repeal provisions of Michigan's Administrative Procedures Act that prohibited state agencies from writing rules stricter than those promulgated by the federal government without a showing of "a clear and convincing need."

The "no stricter than federal" law was enacted in 2018 at the end of Snyder's administration.

Big Changes In Election Law

One of the first laws enacted this session, **P.A. 2**, moves Michigan's presidential primary election from mid-March to the fourth Tuesday in February. However, it is still unclear if the law will take effect in time to move the 2024 primary date.

Republicans opposed the move due to a national party policy penalizing states that move up their primaries with a loss of delegates. Without Republican votes, Democrats lacked the support to give the law immediate effect, and as a result, the law will not effect until 90 days after the end of the legislative session. The state legislature would have to end its session a month earlier than planned to give the law effect by the proposed 2024 primary date of Feb. 27 or else convince Republicans to get on board for a future immediate effect vote.

Wendy Richards of Miller Canfield, who specializes in election law, said to expect significant legislative action this session to implement Proposal 2, a ballot initiative voters passed in November amending Michigan's constitution to add a number of election-related provisions.

The changes range from the addition of nine days of early voting to limits on who can conduct post-election audits.

Michigan Secretary of State Jocelyn Benson has said she is working with lawmakers to introduce a Michigan Voting Rights Act, which would implement the Proposal 2 changes and potentially expand on them.

Shortly after the Michigan State University shooting, Benson announced the proposed act would include a ban on guns at polling places.

A bill has also been introduced that would end what is sometimes called "prison gerrymandering,"

the practice of counting people serving prison time as residents of the prison for the purposes of determining voting districts.

The proposed legislation, **Senate Bill 33**, would require the state to report a person's preincarceration address as their residence for the purposes of redistricting.

Looking to the High Court on No-Fault Reform

Legislators are taking another look at Michigan's no-fault auto insurance laws just three years after the law underwent a major overhaul but are likely to wait until they hear how the Michigan Supreme Court decides a highly anticipated no-fault case **argued** March 2.

Plunkett Cooney's Langley expects lawmakers to respond in some way to a drumbeat of criticism over the 2019 no-fault reform's cuts to reimbursement for services for the most severely injured. In advocating for changes, reformers said abuse of the old law's lifetime medical benefits was driving up auto insurance prices and capping benefits would help lower costs for the average insured in Michigan.

The case before the Michigan Supreme Court, **Ellen Andary v. USAA Casualty Insurance**, will determine whether the no-fault reforms — specifically a cap on the number of hours of attendant care that can be reimbursed and the fee schedule for reimbursements for medical care — apply to victims injured before the law went into effect.

"There will probably be some opportunities for legislators to make reforms regarding attendant care and retroactivity of the statute, depending on how the Supreme Court's decision turns out," Langley said.

--Editing by Alex Hubbard.

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