

Regulatory Oversight Newsletter — August 2024

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Regulatory Oversight Blog

Make sure to visit Troutman Pepper's [Regulatory Oversight](#) blog to receive the most up-to-date information on regulatory actions and [subscribe](#) to our mailing list to receive a monthly digest.

Regulatory Oversight will provide in-depth analysis into regulatory actions by various state and federal authorities, including state attorneys general and other state administrative agencies, the Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission (FTC). Contributors to the blog will include attorneys with multiple specialties, including regulatory enforcement, litigation, and compliance.

Podcast Updates

MANAGING EMPLOYEE COMPLIANCE IN HIGHLY REGULATED INDUSTRIES

By [Tracey Diamond](#) and [Evan Gibbs](#)

In this episode of the *Hiring to Firing Podcast*, hosts Tracey Diamond and Evan Gibbs are joined by Josh Riggs, owner of Social Cannabis, based in Denver, CO. They delve into the complexities of managing employee conduct in the highly regulated cannabis industry and reflect on the evolution of the industry, highlighting its unexpected sophistication and the challenges of compliance with various laws. Tune in for a unique discussion featuring clips from Dave Chappelle's *Half Baked*.

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Troutman Pepper Spotlight

CYBERSECURITY SUMMIT: SEC DISCLOSURES, MDL INSIGHTS, AND REGULATORY PERSPECTIVES ON INCIDENT MANAGEMENT

We are pleased to invite you to join us for our Cybersecurity Summit, a half-day in-person Continuing Legal Education (CLE) event, followed by a reception and dinner. This agenda is ideal for organizations seeking to enhance their incident response capabilities, drawing on lessons learned from recent breach litigation and

regulatory investigations. We encourage companies to have their legal and cybersecurity professionals attend together, as these issues transcend traditional legal boundaries and directly impact both teams.

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TROUTMAN PEPPER WELCOMES FORMER MISSOURI DEPUTY SOLICITOR GENERAL

By [Troutman Pepper State Attorneys General Team](#) and [Jeff Johnson](#)

[Jeff Johnson](#), former deputy solicitor general in the Missouri attorney general's (AG) office, has joined Troutman Pepper's Regulatory Investigations, Strategy + Enforcement (RISE) practice and nationally recognized State AG team.

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Government Contracts Updates

CONTRACTOR'S GUIDE TO THE REVISED DAVIS-BACON ACT REGULATIONS

By [Bonnie Gill](#), [Timothy McHugh](#), [Hilary Cairnie](#), and [Trey Smith](#)

Did the 2023 update to the Davis-Bacon and Related Acts, which apply to contractors and subcontractors performing on certain federally funded or assisted contracts, appropriately modernize or unduly expand the Davis Bacon Act's (DBA) prevailing wage rule? Following the Department of Labor's (DOL) enactment of a final resolution on August 23, 2023 (final rule), interested parties immediately challenged the final rule, seeking a preliminary injunction. The parties argued that specified portions of § 5.2 and the entirety of § 5.5(e) in the final rule exceed the DOL's authority under the DBA and will result in undue hardship and irreparable harm for government contractors in the construction industry.

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Dear Mary Advice Column

RESTRICTIONS ON PAYING A RANSOM DEMAND

By Troutman Pepper

Dear Mary,

Which states now have statutory laws prohibiting payment of ransom following a data security breach? Are there others working on such legislation, to your knowledge?

– Dick Clarke (But Not the New Year's Eve Guy)

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UNDERSTANDING ACCESS VS. ACQUISITION

By Troutman Pepper

Dear Mary,

Each of the 50 states has its own definition of what constitutes a reportable data breach. For some, it requires “unauthorized access” to personal information. For others, it requires “unauthorized acquisition.” And then, some states have further qualifications to their definition, such as whether that unauthorized access or acquisition “compromises” or “materially compromises” the integrity, security, or confidentiality of the data. No states (apart from New York) define access or acquisition, and no state defines compromise vs. material compromise. How would you suggest analyzing all these varying terms?

– Patchwork

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UNDERSTANDING BREACH NOTIFICATION OBLIGATIONS UNDER CALIFORNIA LAW: WHAT DOES THE CCPA REQUIRE?

By Troutman Pepper

Dear Mary,

I am the privacy compliance officer at a cloud-based software company. We recently experienced an incident where, although none of our client’s data was compromised, it appears that our employees’ information may have been copied and removed from our environment. This information includes employees’ full names, salaries, and salary schedules. All of our employees reside in California, and given the CCPA’s broad definition of personal information, I am assuming notification will be required?

– Frowning in Fresno

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PRESERVING FORENSIC ARTIFACTS FOLLOWING INCIDENT DETECTION

By Troutman Pepper

Dear Mary,

One of our employees recently fell victim to a phishing attack, allowing unauthorized access to their email account for a brief period. To be safe, we reset everyone’s passwords and terminated all active sessions. We’re now in the process of hiring a law firm to determine if we need to notify anyone about the incident. It’s taking a little longer to get them engaged, but I’m hoping to have this done soon. In the meantime, is there anything else we should be considering?

– Not Entirely Clueless in Connecticut

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State AG Trends & Actions

2024 MID-YEAR REVIEW: STATE AGS SHAPING REGULATORY LANDSCAPES

By [Troutman Pepper State Attorneys General Team](#), [David Dove](#), [Timothy McHugh](#), and [Bonnie Gill](#)

In 2024, the landscape of state attorneys general (AGs) is poised for significant change, with numerous elections and regulatory actions reshaping priorities and enforcement strategies. This dynamic environment reflects the critical role AGs play in addressing key issues across various sectors, from environmental regulations and consumer protection to health care and privacy. As state AGs continue to influence policy and legal frameworks, their actions will have far-reaching implications for businesses and consumers alike. Troutman Pepper's State AG team is pleased to provide you with this mid-year review summarizing the activities in this regulatory space over the past six months.

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A LOOK AT STATE AGS SUPERMARKET ANTITRUST ENFORCEMENT PUSH

By [Michael Lowe](#), [Michael Yaghi](#), and [Tim Bado](#)

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Gone are the days when state attorneys general leave antitrust enforcement to their federal counterparts at the Federal Trade Commission or the U.S. Department of Justice Antitrust Division.

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PRESIDENT BIDEN NOMINATES NORTH CAROLINA SOLICITOR GENERAL RYAN PARK FOR THE FOURTH CIRCUIT

By [Troutman Pepper State Attorneys General Team](#)

President Joe Biden announced his nomination of Ryan Y. Park, the solicitor general of North Carolina, for the Fourth Circuit Court of Appeals. This selection underscores the pivotal role that attorneys general (AGs) offices play in the legal landscape, not just as enforcers of state laws but also as training grounds for future judges who will bring their unique perspectives to the bench.

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Multistate AG Updates

30 STATES REACH SETTLEMENT OUTLINING EXPECTATIONS FOR PAID ENDORSEMENTS

By [Troutman Pepper State Attorneys General Team](#)

Last week, a bipartisan coalition of 30 state attorneys general (AG), led by Florida, Illinois, New York, and Texas, reached a settlement with Cameo — an online service that allows fans to pay for customized messages from celebrities — establishing state AGs' expectations regarding a company's duty to include disclosures identifying the connection between a paid endorser and the business brand being endorsed. The settlement with Cameo not only demonstrates that state AGs are scrutinizing whether companies are complying with federal laws and regulations such as the [Federal Trade Commission's \(FTC\) endorsement guidelines](#), but also their willingness to establish clear, bright-line rules for compliance that other companies should heed.

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30 STATES URGE NINTH CIRCUIT TO REINSTATE DATA PRIVACY LAWSUIT

By [Troutman Pepper State Attorneys General Team](#), Mackenzie W.J. Jessup, and [Joshua Davey](#)

In an unusual move, attorneys general (AG) from 30 states and the District of Columbia filed a bipartisan amicus brief in the Ninth Circuit supporting efforts to revive a proposed class action against payment processor Shopify. The amici back plaintiff-appellant Brandon Briskin in his effort to convince the Ninth Circuit to overturn en banc a three-judge panel decision affirming the dismissal of his data privacy suit for lack of personal jurisdiction.

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Private Equity Updates

MONEY AND POWER AT ODDS: PE MEETS INCREASED OVERSIGHT FROM STATE AGS

By [Ashley L. Taylor, Jr.](#), [Jeremy Levy](#), [Michael Yaghi](#), and Blake Christopher

BACKGROUND

The number of private equity (PE) funds and the amount of capital deployed through private equity investing have grown dramatically over the last several decades. Some PE firms are buyout firms — they purchase controlling equity positions in (usually privately held) operating companies — while other PE firms make minority investments, either alongside other PE firms or on their own. In both cases, PE firms are typically granted significant controls and protections by the companies in which they invest.

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Environmental Regulatory Updates

ARIZONA FILES ANOTHER LAWSUIT AGAINST AUTOMOBILE INDUSTRY FOR ALLEGED EMISSIONS VIOLATIONS

By [Troutman Pepper State Attorneys General Team](#)

Last week, Arizona Attorney General (AG) Kris Mayes filed a [lawsuit](#) against FCA (formerly Fiat Chrysler) and Cummins for alleged violations of the Arizona Consumer Fraud Act by falsely advertising that certain vehicles were “clean diesel” vehicles, when in fact the vehicles allegedly had illegal emissions defeat devices. The lawsuit constitutes another example of the state of Arizona retaining outside counsel to take action against the automobile industry regarding the alleged use of emissions defeat devices.

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WISCONSIN AG RESOLVES INVESTIGATION INTO ALLEGED VIOLATION OF STATE AIR LAWS WITH \$85K SETTLEMENT

By [Troutman Pepper State Attorneys General Team](#)

Wisconsin Attorney General (AG) Josh Kaul has [announced](#) an \$85,000 settlement with the global food supply company [Kerry, Inc.](#) in relation to the company’s operation of a liquid smoke manufacturing facility.

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CALIFORNIA AG SETTLES WITH OIL COMPANIES

By [Troutman Pepper State Attorneys General Team](#)

California Attorney General (AG) Rob Bonta [announced](#) a \$50 million settlement with Vitol, Inc. (Vitol) and SK Energy Americas Inc. along with its parent company SK Trading International (collectively SK), to resolve a lawsuit involving allegations of antitrust violations and unfair competition in California’s gasoline market. The AG accused the companies of inflating gasoline prices after an oil refinery in Torrance, CA exploded in 2015.

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Tobacco Regulatory Updates

ATF RIFT WITH CALIFORNIA TRIBE COULD EXPAND STATE AUTHORITY OVER TRIBAL TOBACCO SALES

By [Michael Jordan](#), [Agustin Rodriguez](#), and [Bryan Haynes](#)

In June, the Bureau of Alcohol, Tobacco and Firearms (ATF) [argued in federal court](#) that the federal [Prevent All Cigarette Trafficking \(PACT\) Act](#) requires tribal retailers to obtain state licenses to sell cigarettes on their own reservations. If accepted, ATF’s position would greatly expand the scope of state authority over tribal tobacco sales.

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EIGHTH CIRCUIT DECIDES CASE INVOLVING STATE’S AUTHORITY TO REGULATE TRIBAL CIGARETTE SALES

By [Bryan Haynes](#) and [Nick Ramos](#)

On August 2, the U.S. Court of Appeals for the Eighth Circuit decided a case addressing Nebraska's authority to require tribal cigarette manufacturers that are not parties to the [Master Settlement Agreement \(MSA\)](#) to comply with the state's escrow statute with respect to cigarettes sold in Indian country. See *HCI Distrib., Inc. v. Peterson*, No. 23-2311 (8th Cir., Aug. 2, 2024).

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FEDERAL COURT RULES MONTANA AG PREEMPTED FROM DE-LISTING CIGARETTE MANUFACTURER

By [Agustin Rodriguez](#), [Bryan Haynes](#), and [Zie Alere](#)

In late June, the U.S. District Court for the District of Montana held that federal law preempts the Montana Attorney General (AG) from removing the cigarette brands of Grand River Enterprises Six Nations, Ltd. (Grand River) from the state tobacco directory based on Grand River's alleged violations of the Federal Food, Drug, and Cosmetics Act (FDCA). The FDCA preempts state law actions based solely on FDCA violations if the U.S. Food and Drug Administration (FDA) has not already found that such violations exist, the court explained.

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Cannabis Regulatory Updates

THE IMPACT OF CANNABIS RESCHEDULING ON STATE LAWS AND REGULATIONS: INSIGHTS FROM CANNRA

By [Agustin Rodriguez](#), Jean Smith-Gonnell, and Cole White

In May, the U.S. Department of Justice (DOJ) issued a [notice of proposed rulemaking](#) to transfer cannabis from Schedule I to Schedule III of the Controlled Substances Act (CSA), a change that could significantly affect current state cannabis programs. In response, the Cannabis Regulators Association (CANNRA) submitted a detailed [comment letter](#) to the DOJ requesting clarity on how rescheduling will impact these existing regulatory structures. An examination of CANNRA's public comment offers insights for state-legal businesses into what the future may hold for the joint regulation of cannabis at the state and federal levels.

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THE PATH AND POLITICS OF MARIJUANA LEGISLATION: STATE-BY-STATE PROGRESS AND FUTURE DIRECTIONS

By Jean Smith-Gonnell

Despite marijuana's continued federal classification as a Schedule I controlled substance, 26 states and the District of Columbia have passed laws at least partially decriminalizing marijuana possession and recreational use. A majority of Americans now live in states where marijuana is legal for recreational use, and nearly three-quarters of Americans live in states that have legalized marijuana for either recreational or medical sales and

use. Currently, 14 states have only legalized medical use, while 24 states and the District of Columbia have implemented regulatory schemes for both medical and recreational use. Of the remaining 12 states where marijuana is still illegal, possession is decriminalized in two states. The map below illustrates these categories.

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NAVIGATING THE NEW LEGAL LANDSCAPE: THE IMPACT OF *LOPER BRIGHT* ON FEDERAL MARIJUANA RESCHEDULING

By Jean Smith-Gonnell and [Dascher Pasco](#)

The federal rescheduling of marijuana has been a topic of conversation within the marijuana industry since President Biden's statement requesting that the secretary of health and human services (HHS) and the attorney general (AG) "initiate the administrative process to review expeditiously how marijuana is scheduled under federal law." However, the Supreme Court's recent decision overturning the *Chevron* doctrine adds an additional layer to an already complicated process. While the exact impact of *Loper Bright Enterprises v. Raimondo* on the cannabis industry remains to be seen, this article explores the way in which it may impact the pending rescheduling.

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Stephanie Kozol, Senior Government Relations Manager – State Attorneys General, also contributed to this newsletter.

Our Cannabis Practice provides advice on issues related to applicable federal and state law. Marijuana remains an illegal controlled substance under federal law.

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