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Plans To Rein In Building Emissions Face Bumpy Road

By **Clark Mindock**

Law360 (July 15, 2022, 8:24 PM EDT) -- Cities across the country are using building code regulations to try to cut down on greenhouse gas emissions, but implementation is being dogged by supply chain woes, unfamiliarity with emerging technologies, and even skepticism from landlords that they will face punishment for noncompliance.

In New York; Washington, D.C.; Denver; and Berkeley, California, developers and landlords are on deadline to comply with strict requirements to improve building efficiency and even phase out the use of fossil fuel products, through such means as banning natural gas hookups in new construction.



Cities like New York are using strict building code regulations to cut down on greenhouse gas emissions, but experts say the cities' attempts are being met with challenges. (Roy Rochlin/Getty Images)

Those efforts mean a reconsideration of everything in buildings from the energy-intensive traditional heating and cooling systems that run throughout offices and apartment buildings, all the way down to the lights in the bathroom. But these ambitious attempts to rein in emissions are being met with sizable bumps in the road.

While perhaps the biggest challenge is funding — does the tenant or landlord foot the bill? — property owners also have questions about enforcement of the new codes, they are facing difficulty finding contractors to install the new technology, and they are grappling with supply chain issues in the wake of COVID-19 and ongoing geopolitical strife.

"We're entering a different type of building and asset management era," Bobby W. Dishell, an attorney at Moyer White LLP in Denver, told Law360. "We are focusing on different aspects that we might not otherwise be focusing on, and that's a monumental shift in an industry. So education and alignment from top to bottom is critical in order for this to work. And in order for everyone to be aligned, everyone needs to have an understanding of the purpose and the goals and the tools and the technologies that are available."

The U.S. Environmental Protection Agency lists buildings as contributing roughly 6% of total greenhouse gas emissions in the U.S., making it the fifth-largest individual pollution category measured by the agency. But in large, dense cities like New York City, buildings make up a much larger share of total emissions.

A 2016 mayoral report in the Big Apple, for example, determined buildings are the city's top emitter of greenhouse gases, accounting for more than 70% of emissions in the nation's largest metro.

Eyeing that carbon footprint and the emission reduction promises of the Paris Climate Agreement, cities and states began passing major building emissions cap laws during the Trump administration. Washington, D.C., led the way with a 2018 law aimed at reducing emissions by 50% by 2032.

New York followed suit a year later with a mandated 40% reduction in greenhouse gas emissions for buildings over 25,000 square feet by 2030, relative to 2005 levels. Other major cities, including Los Angeles and Denver, have introduced similar laws in the years since.

Taking a slightly different approach, Berkeley took aim at building emissions in 2019 by becoming the first U.S. city to ban new natural gas hookups in buildings.

Since then, the state of New Jersey and cities like San Francisco, Seattle, Denver, New York, and as of this week — pending mayoral signoff — Washington have followed suit, even as a pending suit challenging the Berkeley ordinance **has made its way** to the Ninth Circuit. On the other side, 20 states with Republican-controlled legislatures have responded by passing preemption laws that prohibit cities from banning natural gas hookups, including Texas, Louisiana, Florida and Wyoming.

At the federal level, the Biden administration recently stepped in to try to encourage building owners to embrace decarbonization, even if the federal government isn't writing city codes itself.

The White House announced a push last month for domestic manufacturing of clean energy technologies like heat pumps and building insulation as part of a nationwide building codes initiative, which could help lower costs for building owners hoping to switch from traditional heating and cooling or keep hot or cold air in through insulation.

Amy Turner, a senior fellow at the Sabin Center for Climate Change Law at Columbia Law School, told Law360 that the specifics of the state and city laws and approaches vary widely across the country. That variability explains, in part, the big differences being seen between heartland states that are limiting local control and more liberal or coastal states moving forward with strict building decarbonization plans, she said.

"This is an area where state law is really important, so in some places, like California, local governments have a lot of authority to amend the building codes at the local level. That's what they're doing for the most part to require or incentivize all-electric construction," Turner said. "Other states have a statewide building code that preempts local laws. So local governments are more limited."

Adam Stolorow and Evan Preminger of Sive Paget Riesel PC in New York told Law360 the city's 2019 law, known as **Local Law 97**, has spurred a range of responses, from clients who are working diligently to comply with its deadlines but are concerned their efforts might not go far enough, to landlords who are ambivalent and skeptical the city will bother with fines or other penalties for noncompliance.

Local Law 97 requires buildings over 25,000 square feet to meet energy efficiency and greenhouse gas emissions limits by 2024, with even stricter limits coming into effect in 2030. The overall goal is to reduce emissions from the largest buildings by 40% by 2030, and by 80% by 2050.

Stolorow and Preminger said their clients run the gamut in terms of how Local Law 97 is impacting them.

The law has spurred some landlords or property owners to take preemptive measures through audits and

address low-hanging fruit like changing out lighting systems or optimizing existing HVAC systems. Other clients are wrestling with questions about how to pay for these fixes and how this law impacts the types of leases they're willing to sign.

"Our biggest piece of advice for clients is to really look ahead five or 10 years to make these plans and changes for buildings, and to start the process," Stolorow said. "If they haven't started it already, start the process as early as possible in order to set themselves up for success."

Across the country, in California, a state often seen as being at the forefront of environmental causes, a patchwork of decarbonization laws have also garnered attention in recent years, including in Los Angeles, where officials are working to bring policy in line with a 2019 city Green New Deal.

While the city's Green New Deal, which establishes a series of targets leading to a goal of net zero emissions by 2050, has spurred work to decarbonize government buildings, officials there are currently considering strategies to address decarbonization in private office and rental buildings.

The latter of those has raised concern among renter advocates including Strategic Actions for a Just Economy. The group has estimated changing out gas appliances to all-electric ones, and other building improvements could cost \$28,000 per housing unit — costs they worry will be passed down to renters at a moment of significant housing shortages in the city.

Andrew Raines of Raines Feldman LLP said building owners in the Los Angeles area are particularly interested in how leases can be arranged so that the costs of modifications can be passed through to tenants.

Those building owners have to comply with city mandates as well as state energy-efficiency standards, which have been around since the late 1970s but were revamped in recent years to encourage the use of solar panels, battery storage, heat pumps and other technologies starting in 2023.

But beyond the lease structuring, Raines said the current geopolitical climate and supply chain shortages are making compliance more difficult as building owners look toward improving their properties' efficiency.

"Supply chain issues are affecting everything — inflation, timing on leases, force majeure, rent abatements," Raines said. "All of those are tied into supply chains, and that will stay with us until things normalize — and that's anyone's guess when that will happen."

Dishell, the Denver attorney at Moye White, said his clients in the state are seeing firsthand the impacts of supply chain woes and even challenges of implementing emerging technologies.

Denver passed a law last year requiring all commercial and multifamily buildings to reduce emissions through energy efficiency, renewable energy and building electrification. That includes a commitment to achieving net zero emissions by 2040 and a target goal of 80% reduction in actual emissions during that timeframe.

But even clients that are ready to embrace the cause are encountering roadblocks, including significant labor bottlenecks. Dishell said building owners who want to install energy-efficient heating and cooling systems like heat pumps have had trouble finding contractors experienced with those technologies, since the devices are relatively new to the market compared to more traditional heating systems.

"The challenges have been market-related challenges, where clients maybe wanted to install a heat pump a few years ago, but couldn't get a contractor who would recommend doing that because they said a furnace is less expensive," he said, noting those price concerns directly impact the structure of so-called green leases that are written up in these cases to determine who pays for installation of the new technology.

He added: "Heat pumps are relatively new technology, so clients are asking, what is the useful life of a commercial-grade heat pump, and can you pass that through to a tenant? How do you pass that through?"

Back in New York, Preminger of Sive Paget said some of the problems they're facing are less about hard roadblocks associated with technology installation or supply chain woes.

Some building owners, with old buildings that have been reliably powered by traditional systems for

years, aren't convinced the law will ever be enforced, he said. That line of thought has been bolstered at least in part by a lawsuit filed by building owners in May in New York state court, claiming the benchmarks of Local Law 97 are "draconian."

But Preminger said ignoring the law — whether you're in New York, California or any state in between — doesn't just make it disappear. Virtually all of the building emissions laws include near-term benchmarks, and time is running out.

"These statutory time frames seem very long," Preminger said. "But the time frames are definitely something that will creep up on you quickly."

--Editing by Philip Shea and Lakshna Mehta.

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