

Transportation Industry Alert - Labor Law Changes from the Biden Administration on the Horizon

July 16, 2021

Executive Summary: In September 2020, then-presidential candidate Joe Biden promised organized labor that, if elected, he would be the “strongest labor president you’ve ever had.” It, therefore, comes as no surprise that he has already implemented significant labor-related changes ranging from change in leadership, reversal of former administration guidance, the passage of legislation, and creation of agencies — with many more on the horizon that will likely directly impact the transportation industry.

American Jobs Plan: In one of his first sweeping efforts to make good on his pledge, President Biden unveiled his “American Jobs Plan.” The plan, which according to President Biden “is an investment in America that will create millions of good jobs, rebuild our country’s infrastructure, and position the United States to out-compete China,” includes an approximately \$2.2 trillion proposal focused on upgrading and repairing America’s physical infrastructure, investing in manufacturing, research, and development, and expanding long-term health care services.

To offset the nearly \$2.2 trillion of new proposals, the American Jobs Plan includes several tax increases on corporations. Thus, as movement on President Biden’s massive infrastructure package inches along, the price tag on a number of critical provisions remains at the forefront of the conversation. Chief among these is the Protecting the Right to Organize (PRO) Act, a bill included in Biden’s infrastructure plan that would make drastic changes to U.S. labor law.

The PRO Act: The PRO Act includes a wide array of union-friendly provisions that range from expanding the number of workers covered by the National Labor Relations Act (NLRA), to implementing fines against employers deemed to interfere with workers’ efforts to organize, to overriding state right-to-work laws. Among its key provisions, the PRO Act would:

- Override state “right-to-work” laws that currently allow employees to opt out of paying dues in unionized workplaces;

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- Codify the “ABC test” to deem independent contractors “employees” covered by the NLRA;
- Codify the broad *Browning-Ferris* “joint employer” standard, which would expand the circumstances under which a company would be deemed an employer of another company’s employees;
- Prohibit employers from holding mandatory meetings with their employees to discuss organizing activities or union elections (e.g., “captive audience” meetings);
- Compel mediation and arbitration in first contract negotiations where agreement is not reached within 90 days;
- Authorize union elections away from the employer’s premises (e.g., mail or electronic ballots);
- Permit employees to participate in strikes initiated by employees represented by a different labor organization (i.e., secondary strikes);
- Prevent employers from permanently replacing economic strikers;
- Prohibit employers from using mandatory arbitration agreements with employees; and
- Expand penalties for violations of the NLRA.

While the bill was approved on a largely party-line vote of 225-206 by the U.S. House of Representatives on March 9, 2021, it has yet to secure the 60 votes needed in the Senate to overcome a filibuster by opponents. We should have a better gauge of the PRO Act’s status by late October, but employers should note that even if an infrastructure package does not include all elements of the PRO Act, it is likely that funds under the bill would be conditioned on employers agreeing to project labor standards and neutrality agreements with respect to union organizing. With only 13 percent of the private-sector workforce currently unionized, this means that a significant number of non-union employers might be ineligible for infrastructure funds under the bill unless they comply with requirements that will make it easier for unions to organize their workforces.

Infrastructure Bill’s Impact on the Transportation Industry: The proposed infrastructure framework includes \$312 billion in new transportation spending, \$109 billion of which is for “roads, bridges, major projects.” It also provides money for public transit, passenger and freight rail, electric vehicle infrastructure, airports, and ports and waterways. This expansion of infrastructure would provide better travel conditions, improved safety, less driver fatigue and reduced damage to vehicles, and reduced bottlenecks that slow trucking transportation.

Additionally, Congress is drafting a new surface transportation law that would replace the Fixing America’s Surface Transportation (FAST) Act that expires later this year. The FAST Act was passed in 2015 to provide long-term funding certainty for surface transportation infrastructure planning and investment. Although the FAST Act expired in 2020, Congress passed a one-year extension that expires on September 30, 2021. The Senate’s most recent proposal for a new surface transportation law is a \$312.4 billion bill that includes money for roads and bridges, as well as funding for bicycle and pedestrian infrastructure. The Senate Environment and Public Works Committee unanimously approved that bill on May 26, 2021. On June 4, Democrats in the House of Representatives introduced H.R. 7095, the Investing in a New Vision for the Environment and Surface Transportation (INVEST) in America Act. The five-year, \$494 billion surface transportation reauthorization bill contains an extension of the FAST Act through Fiscal Year 2025. It also includes new, five-year reauthorizations for the Federal Railroad Administration and the Pipeline and Hazardous Materials Safety Administration.

Labor Task Force: The president has also issued an [executive order](#) establishing a “Task Force on Worker Organizing and Empowerment,” which seeks to promote his administration’s “policy of support

for worker power, worker organizing, and collective bargaining.” See Executive Order on Worker Organization and Empowerment, April 26, 2021, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/26/executive-order-on-worker-organizing-and-empowerment/>.

Led by Vice President Kamala Harris, the Task Force is charged with identifying policies, practices, and programs that could be used to promote worker power in areas of the country with “hostile labor laws, for marginalized workers ..., and hard-to-organize industries.” *Id.* The Task Force is also directed to identify statutory, regulatory, or other changes that would make policies and programs “a more effective means of supporting worker organizing and collective bargaining.” The Task Force is scheduled to report to the president on October 23, 2021, with recommendations to promote these activities.

Bottom Line: In his first 100 days in office, President Biden has acted quickly and aggressively to make good on his pledge to be the “strongest labor president [we’ve] ever had.” While some of these efforts have quickly come to fruition, the fate of others remains unclear. One thing is clear, however; the new administration is committed to making vast changes in the traditional labor law world. We encourage all employers to consult with their legal counsel to ensure they are up to speed with the coming changes.

On August 20, 2021, FordHarrison will be hosting a complimentary webinar discussing these developments and other labor-related developments impacting the transportation industry. Please click [here](#) for more information.

If you have any questions regarding the American Jobs Plan, the PRO Act, the Labor Task Force, or any other recent or upcoming changes from the Biden Administration, please contact the authors of this Alert, [Jacquelyn L. Thompson](mailto:jthompson@fordharrison.com), jthompson@fordharrison.com, partner in FordHarrison’s Washington, D.C. office, or [Mollie Wildmann](mailto:mwildmann@fordharrison.com), mwildmann@fordharrison.com, associate in FordHarrison’s Memphis office. Of course, you can also contact the FordHarrison attorney with whom you usually work.

This is the first in a ten-month series of Legal Alerts and webinars focusing on important labor and employment law developments in the transportation industry. Each month through April 2022, members of FordHarrison’s [Transportation](#) practice group will present a Legal Alert and corresponding webinar on new developments within specific areas of labor and employment law including, but not limited to, labor relations, wage/hour and misclassification, disability, drugs, and harassment in the workplace geared specifically toward employers in the transportation industry. Formal dates and topics will be released in the coming weeks. If you have not signed up to receive our webinar invitations and would like to do so, please click [here](#).