



Labor & Employment Issues In Focus

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For Clients and Friends
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PROMISES MADE, PROMISES KEPT – PRESIDENT BIDEN TO SIGN BI-PARTISAN, LABOR FRIENDLY \$1.2 TRILLION NATIONAL INFRASTRUCTURE BILL

On November 7, 2021, the United States House of Representatives passed the Bipartisan Infrastructure Frame (“BIF”), fulfilling an important campaign promise by President Joe Biden to finally address the country’s aging and crumbling infrastructure while simultaneously adding jobs and worker protections long sought by labor. President Biden announced that he will sign BIF into law.

For workers, BIF provides employment opportunities to rebuild the country’s infrastructure, as well as important labor law provisions to protect them from wage theft and ensure safe working conditions. BIF includes provisions that fine bad employers up to \$50,000 for existing violations of the National Labor Relations Act. Penalties may reach up to \$100,000 for some cases. Further, BIF expands the enforcement powers of the United States Department of Labor’s (“DOL”) Wage and Hour Division and the Occupational Safety and Health Administration for violations of overtime, child labor and safety laws. The DOL’s workforce development programs will receive a 50% increase in annual funding through September 2026 to help train new workers.

Organized labor played a key role in the passage of BIF and remains committed to social spending as well since it will also provide additional opportunities for workers. Russ Breckenridge, legislative and political director for the United Association of Union Plumbers and Pipefitters observed that, “we’re on the cusp of a truly historic investment in infrastructure, but we need to make sure that the jobs created are family-sustaining jobs that give all workers a shot at the middle class.”

BIF passed by a margin of 228 to 206, with 13 Republicans joining 215 Democrats to pass the legislation. The bill passed the House, 87 days after it passed the United States Senate. For decades, Presidential candidates have campaigned on the promise of passing an infrastructure package with little success. Former President Donald Trump famously held numerous infrastructure weeks at the White House but was never able to pass a bill.

The legislation was not without controversy. The Democratic Majority in the House of Representatives originally wanted to pass BIF with a \$1.75 trillion companion bill that addresses social spending, the Build Back Better Act (“BBB”) but agreed to decouple the bills after receiving assurances from moderate Democrats in the Senate and the House that they will vote for the measure once it receives a score from the Congressional Budget Office (“CBO”) on its impact on the federal deficit. The CBO is expected to conclude its analysis by the middle of the month.

BIF will provide the necessary funds to address long-stalled infrastructure projects such as the Gateway Project that will establish a new connection between New York and New Jersey under the Hudson River. Construction is scheduled to start in August 2023, according to the bi-state Gateway Development Corporation. It will be the largest infrastructure project in the United States. The legislation also contains \$66 billion for Amtrak to help repair and modernize Amtrak's Northeast Corridor. BIF sets aside \$20 billion in brand new transit funding for the New York area, including \$3.5 billion in federal formula funding over five years. United States Senate Majority Leader Chuck Schumer said that the new funding will be used to extend the Second Avenue subway into East Harlem, complete the Penn Access Plan which will add four new Metro-North commuter rail stations in the East Bronx and finally repair two East River rail tunnels that were damaged during Superstorm Sandy in 2012. BIF also contains \$65 billion to repair public housing across the country. It is expected that the New York City Housing Authority ("NYCHA"), with more than \$40 billion in repair backlog, will get a significant portion of those funds.

In addition to long-stalled infrastructure projects, BIF will make investments into sustainable energy projects to help reduce carbon emissions and improve safety to the nation's drinking water. President Joe Biden said, "my Bipartisan Infrastructure Deal will build a national network of charging stations for electric vehicles and thousands of miles of new, resilient transmission lines for a clean energy grid. Together with the Build Back Better Framework, it will tackle the climate crisis." President Biden added that, "we're finally going to get rid of our nation's dangerous lead pipes thanks to this infrastructure deal. Every kid in this country will be able to turn on the tap and drink clean water."

DOL ANNOUNCES ADDITIONAL TRANSITION RELIEF FOR PROHIBITED TRANSACTION EXEMPTION 2020-02

On October 25, 2021, the U.S. Department of Labor ("DOL") published Field Assistance Bulletin No. 2021-02, titled "Temporary Enforcement Policy on Prohibited Transaction Rules Applicable to Investment Advice Fiduciaries" ("FAB 2021-02"), granting a new extension to the transitional relief relating to prohibited transaction exemption 2020-02 ("PTE 2020-02") which is set to expire on December 20, 2021. The recently adopted FAB 2021-02, now extends the effective date of PTE 2020-02 through February 1, 2022, except that specific documentation and disclosure requirements for plan rollovers will extend through June 30, 2022. Taken together, these bulletins offer important shelters to fiduciaries providing advice on asset investments under specified circumstances.

Under the DOL scheme, a prohibited transaction is a transaction between a plan and a party-in-interest that represents a conflict of interest in violation of the Employee Retirement Income Security Act of 1974, as amended. Under ERISA, a party in interest means a person, corporation or partnership providing services to a plan. Examples of prohibited transactions are transactions that result in the transferring of plan assets to or for the benefit of a party-in-interest, using plan assets for the interest of a fiduciary and/or

furnishing goods between a plan and a party-in-interest. Certain transactions, however, are exempted by the DOL from being treated as prohibited transactions, provided they meet certain conditions. PTE 2020-02 is one such class exemption whereby the DOL specifically exempted prohibited transactions that are the result of advice on how to invest assets within a plan or individual retirement account (“IRA”) as well as advice in connection with rollovers. Further, under the exemption, should an investment fiduciary collect compensation such as commissions, 12b-1 fees, revenue sharing, mark ups, and mark downs in certain principal transactions that would otherwise be prohibited without an exemption, the investment fiduciary is obligated to render advice that is in the best interest of the plan and/or IRA customer.

The adoption of PTE 2020-02 represents one more recent attempt by the DOL to regulate investment advice. For instance, in 2016, the DOL issued regulations updating a 1975 rule defining “investment advice fiduciary” and granting new and amending prohibited transaction exemptions thereto. After the 2016 fiduciary rule update and amended exemptions were vacated by the Fifth Circuit in 2018, the DOL published FAB 2018-02 announcing temporary nonenforcement relief to investment advice fiduciaries who made good faith efforts to comply with the Impartial Conduct Standards originally set forth in one of the vacated exemptions. Subsequently, in adopting PTE 2020-02, the DOL restored the 1975 investment advice fiduciary rule as well as the Impartial Conduct Standards.

The delay of the PTE 2020-02 effective date appears to respond to concerns by the industry over the additional distribution costs and inability to fully automate the process of rollover documentation and disclosure requirements in time. Thus, under FAB 2021-02, the DOL is delaying pursuing prohibited transactions claims against those fiduciaries who are working diligently and in good faith to comply with the Impartial Conduct Standards requiring financial institutions and investment professionals to give advice that is prudent and loyal.

This temporary and limited enforcement relief gives financial institutions the opportunity to add the required disclosure data to their planned scheduled quarterly reports without incurring additional costs. Furthermore, the enforcement relief gives financial institutions and investment professionals more time to ensure that they have the proper processes and procedures in place by the new PTE 2020-02 effective date.

EEOC PROVIDES COVID RELIGIOUS EXEMPTION SAFE HARBOR FORM

With the rise of employer mandates for employees to be vaccinated against COVID-19 and many employee responses claiming religion-based exceptions, the U.S. Equal Employment Opportunity Commission (“EEOC”) has released its own accommodation request and processing Form for general use.

Generally, the Form requires from the employee a statement of the policy to which the employee objects, the religious basis for the objection and a description of the requested accommodation with alternatives. The employer must then grant, modify, or

deny the request with reason stated and provide an internal appeal process. The EEOC Form also advises how to file a complaint against the agency. While not breaking new ground, the EEOC Form provides a safe harbor for employers to avoid employee charges that the employer did not offer a bona fide religious accommodation process to COVID vaccination. However, the Form does not insulate employers from a charge that the employer's choice to deny or modify the request violates the employee's rights.

A copy of the EEOC Form is available at:

<https://www.eeoc.gov/sites/default/files/2021-10/EEOC%20Religious%20Accommodation%20Request%20Form%20-%20for%20web.pdf>

**GOVERNOR HOCHUL SIGNS LAW THAT REQUIRES
NY PRIVATE EMPLOYERS TO
NOTIFY WORKERS OF EMAIL & TELEPHONE MONITORING**

On November 8, 2021, New York State Governor Kathy Hochul signed into law A.430/S.2628 by Assemblywoman Linda Rosenthal and Senator James Sanders that will require private employers to notify their workers if they plan to monitor workers' telephones or email.

Under the terms of the legislation, private employers will be required to disclose to newly hired workers of their plan to monitor or intercept telephonic, email or other electronic transmissions at the workplace. In addition, employers will be required to post in a visible area at the workplace a notice that their emails and telephone calls are being monitored. The legislation includes fines for non-compliance of \$500 for the first offense, \$1,000 for the second offense, and \$3,000 for the third and each subsequent offense. The law will go into effect in 180 days.

**HAPPY VETERANS DAY, ESPECIALLY TO
ALL THOSE WHO SERVED OUR COUNTRY**

We would like to extend our appreciation for all those who served in our armed forces to guarantee our freedom. "Our debt to the heroic men and valiant women in the service of our country can never be repaid. They have earned our undying gratitude." President Harry Truman.



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