

## Traditional Labor Practice Effects of the New Infrastructure Law

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Traditional labor law will face significant change in the wake of the new \$1.2 trillion Infrastructure Investment and Jobs Act recently signed into law. Prioritization of project labor and community workforce agreements is one such noteworthy change. For additional information, please read the [Project Labor Agreements Coming to an Infrastructure Project Near You](#) article published on December 30, 2021.

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### Transcript

Alitia (00:06):

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate a workforce that is engaged, stable and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution, and helps answer the question on every employer's mind, "How will my business be impacted?" Traditional labor law will face significant change in the wake of the new 1.2 trillion Infrastructure Investment and Jobs Act, recently signed into law. Prioritization of Project Labor and Community Workforce Agreements is one such noteworthy change.

On this episode of We get work™, we discuss what Project Labor Agreements mean for construction contractors and subcontractors. Our hosts today are Brian Lundgren and Dion Kohler, Principals in the Seattle and Atlanta offices of Jackson Lewis respectively. Traditional labor lawyers, Brian and Dion are finding that their role in advising clients has become anything but traditional, and includes providing guidance on a whole host of evolving regulatory challenges. Dion also serves as co-leader of the firm's construction group. Brian and Dion, the question on everyone's mind today is, "How do construction contractors and subcontractors simultaneously maintain compliance and thrive in the wake of increased regulation like the Infrastructure Investment and Jobs Act, and how does that impact my business?"

Dion Kohler (01:47):

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Thank you for joining us. Brian and I are very excited to talk to you today about the most significant piece of infrastructure legislation passed since World War II. It's called the Infrastructure Investment and Jobs Act or the IIJA. It was signed into law on November 15th, 2021. Brian and I are going to tell you a little background about this bill, and we're going to explain to you how the traditional labor laws, which have been around for quite some time, will impact the opportunities that clients and others will have, or may have to perform work under this \$1.2 trillion expenditure of new government funds.

The primary purpose of the bill is to enhance and update traditional transportation means throughout the United States. That would include things we all think about when we think of infrastructure, which are roads, bridges, passenger and freight rail, broadband, utilities, airports and similar types of things, but there is actually a lot of dollars that have been allocated to cover things and to buy things that we don't always think about as infrastructure, and that would include \$50 billion for climate resiliency projects, whatever that is, \$21 billion for environmental remediation, ports and waterways, \$7 billion for low emission buses and ferries, and seven and a half billion dollars to construct EV charging stations throughout the United States. What we expect to see from all this new money, and as a significant requirement of this law is it will require contractors and other suppliers who want to perform work and take advantage of this huge expenditure of federal dollars to sign what's called a Project Labor Agreement. A Project Labor Agreement essentially would require the employer to become a unionized employer on that particular project. It does not expand the Davis-Bacon requirements, but the Davis-Bacon requirements will apply, and the Davis-Bacon requirements under federal law, as they exist today, require federal contractors to pay what's called prevailing wage rates and provide certain benefits to their employees who work on federal projects, so if you're used to doing federal contracts, those same rules will apply.

If federal contracts are new to you, you will need to become familiar with the Davis-Bacon Act so that you ensure that you keep proper payroll records and that the wage rates you pay and the fringe benefit you provide to your employees meet the required minimums. There is also included in this bill an increase in domestic content requirements for steel and other items that are made in the U.S. that are used on these infrastructure projects. Now, one other feature I want to talk about is the 2009 Executive Order 13502, that was signed by President Obama. It's still in effect, and it requires that federal agencies and all parts of the federal government encourage the use of Project Labor Agreements in connection with large scale construction projects. Now, we talked about that for a moment, but it is significant, Brian is going to talk about that in more detail, because especially those contractors and employers who are not used to working union, it's a completely different way of doing business.

It impacts all aspects of your relationship with your workforce and how you deal with your workforce. Another portion of this mandate is what's called the Community Workforce Agreements, and those are agreements that require you to give priority in hiring to local workers in the community where the particular project is being performed.

Brian Lundgren (06:22):

That's right, Dion, and while the new Infrastructure Investment and Jobs Act, the IIJA doesn't mandate Project Labor Agreements or PLAs, or Community Workforce Agreements or CWAs, it's the policy of the federal government and the current administration to both prioritize and encourage the use of those with this government funding. Also, at the state level, you'll see a strong movement in certain areas of the country towards government-mandated Project Labor Agreements and government-mandated Community Workforce Agreements, and oftentimes, you'll see them put into the bid specifications for a project. As you were saying, Dion, for companies, contractors and subcontractors who are non-union, this can be a very foreign thing for them to encounter. Project Labor Agreements are a special type of labor agreement used in the construction trades. There are what's also called National Labor Relation Act Section 8(f) agreements.

They allow contractors and unions in the construction trade to bargain a labor agreement for a specific project before any employees have even been hired. Because they're often used in taxpayer-funded public construction projects, it affects the bidding process and the work performed by non-union subcontractors and contractors. These laws date back a long time. In 1947, when the Taft-Hartley Act, one of the major labor pieces to the National Labor Relations Act was enacted, about 87% of the construction trades were unionized. Today, it's almost exactly the opposite.

About 80% of the construction industry, employers are non-unionized, so what is the practical effect of having a mandated or required Project Labor Agreement on a public works project? There are many. Some effects are that they could require all contractors and subcontractors performing work on the project, whether unionized or not, to sign onto the Project Labor Agreement and be bound by its terms during the project. Typical terms include a requirement that all workers be dispatched through the union hiring halls. Usually, there's an exception for a certain amount of core workers, one to three, something like that, but generally, they can require that these non-union contractors and subcontractors take their workers for the project from the union hiring halls, and that can be administratively and operationally disruptive because being a non-union contractor, you may have employees who have mixed skills or perform multi-specialized types of work for your construction that now fit into several different trades under a PLA.

It can also require adherence to union rules for the contractors. The difference with the Section 8(f) agreement is the workers don't vote for union representation, so the Project Labor Agreement will require

the workers to accept union representation and pay union dues for the time spent working on the project. They typically also, and most often require the contractors to contribute to union pension and healthcare, trust funds for the time spent working on the project, and this can create an issue because oftentimes, the workers themselves may never qualify for those benefits because they don't meet the vesting requirements under the various plans. There's several other things that contractors have to be wary of, is they need to be aware that they aren't signing a labor agreement that goes beyond the specific project. It's not uncommon to encounter a Project Labor Agreement that has loose language, attempting to bind employers beyond the specific project.

Project Labor Agreement should end and terminate when the project terminates, and there's different types of documents contractors need to be aware of. Some are called single assent agreements or me-too agreements. This is a one-page form that will adhere you to another document or another labor agreement. There's language that could bind an employer to a national territorial or other agreement, and then there's clauses within the document, such as travelers' provisions and so forth, that could affect the employer's non-union operations elsewhere. There's lots of issues here for contractors generally, and especially for contractors who do not typically encounter Project Labor Agreements or Union Labor Agreements in general in the course of their duties.

Dion Kohler (11:47):

Brian, if I may, I just wanted to speak to one of the issues you raised about these union rules, that some of our listeners may not be familiar with who haven't worked on a union project. These are, if you haven't seen a Union Collective Bargaining Agreement, they're normally anywhere from 30 to 50 pages, and there's lots of rules in there that govern how you perform work. For example, in the construction industry, they will dictate the ratio of journeymen you can have to apprentices, and even though that's not the way you normally do work or you find to be inefficient, it will require you to likely have more journeymen or journeypersons than you're used to having on a project. Some other examples are requiring you to have stewards who are paid for their time doing union work throughout the course of the job. There's usually multiple stewards depending on the size of the workforce, and they can perform their steward duties, such as making sure you're complying with the agreement while they are on the clock.

A few other examples are supervisors are not allowed to perform work typically. They must just supervise, so even if they're needed or you're shorthanded, they would not be permitted to perform the work that is supposed to be performed by the bargaining unit employees. Couple of other examples, almost all union agreements have a very formalized grievance and arbitration procedure. The way you normally resolve disputes with your employees is talking to them and working it out between management and the employee directly. In the union environment, it has to be done through the union and through this formal process, which usually involves multiple steps and written responses, and if you can't come to an agreement, the dispute is referred to an outside third-person, and that you will have a mini trial where that person will decide whether or not you violated the Collective Bargaining Agreement.

It's a very unusual process for employers who are not used to working in the union environment. Brian, did you have anything you wanted to add to that?

Brian Lundgren (14:04):

Yeah, that's exactly right, Dion, and tracking along with you is one of the things that contractors who aren't used to these types of agreements run into is the loss of flexibility to employ personnel, because the Project Labor Agreement will change the way a union-free employer assigns work, because it will require adherence to craft jurisdictional boundaries and the requirements you just spoke about, Dion, so often, that's something that's not thought of until you arrive with a Project Labor Agreement and are wondering how you're going to staff and man this because you learn now that you can't do it the way you've always done it.

Dion Kohler (14:46):

Brian, why don't you speak to how seniority systems typically work under a union contract in terms of layoffs and promotions?

Brian Lundgren (14:55):

Sure. That's another key issue, is some of the workers just to get put on to the job have to meet certain qualifications under the union hiring hall priorities, and in a unionized environment under a labor agreement, seniority often and almost always dictates who gets what work and who gets the work that's more preferable, and so you could now be in a situation where you'd want to and need to man certain tasks and projects that require specialized skill, but you're forced to follow a seniority system and use workers who don't meet that specific skill that you had previously done in non-union jobs with specific key core people that you've identified for your operations.

Dion Kohler (15:49):

That's very helpful. Thank you, Brian. One thing I wanted to touch on that Brian mentioned was this idea

of these union pension funds. Well, how do those work and what are the risk of those things? Well, almost all major unions have what's called a multiemployer pension fund, and that is a vehicle that they use to fund pensions for their members, which are funded by contributions from multiple different employers who have signed agreements with the union.

These types of funds typically guarantee a specific level of benefit to employees when they retire based on years of service and other factors. The problem with these funds has been over the years, they haven't had sufficient funds to pay future anticipated benefits, so every year, these funds are required to do a very in-depth accounting of what they're likely to owe to future and current beneficiaries versus, "What are the assets they have on hand?" and if you are a contributing employer even for a brief period of time, there is a possibility that if you cease making contributions to the fund and continue to perform work of the type that was covered by your Collective Bargaining Agreement, you can trigger what's called a withdrawal, which means you can become financially responsible for your share of the underfunding in the pension fund. It's a very complicated issue. It's governed by numerous IRS code provisions, and we strongly encourage you to make sure you get advice and you go in with eyes wide open about the potential risks involved in these multiemployer pension funds.

Brian Lundgren (17:43):

That's exactly right, Dion, and tracking on this, another significant effect of a PLA for a contractor who's not used to these types of agreements is there's almost always a requirement or limitation on the contractor's freedom or abilities to select subcontractors to perform various jobs. These agreements will usually have a signatory provision requiring that work may only be subcontracted to a subcontractor who's willing to sign on to the Project Labor Agreement and be bound by all its terms, so when a non-union contractor or a contractor who's just not used to these types of agreements is contemplating how they're going to get this work done when they're making the bid, they need to be cognizant that they may not be able to subcontract to the subcontractor they typically use and they may be forced under the agreement to subcontract to another subcontractor who's willing to sign on to the PLA. These types of agreements really require planning and thinking ahead and understanding the administrative costs, changes and burdens that can come with this from the moment you start thinking about bidding one of these projects to ensure that you're doing what you need to do to operationally meet the work and get it done.

Dion Kohler (19:07):

That's a very good point, Brian. Speaking to our non-union friends out there, when you're pricing your bids for contracts, you need to take into consideration that performing union work when you're not used to performing union work is likely to have some inefficiencies and some costs that you normally don't price into your bids, and that's something you're going to need to think about. You're going to need to look at the rules carefully that are contained in the PLA, and you're going to need to cost those out as a practical matter, "Are they going to increase your labor hours by how much?" and so you can include all of those contingencies in your pricing when you get ready to submit your bids. Another thing that we didn't touch on, but that also is a factor is in many union agreements, what you consider to be part of your management team may actually come from the union. In the construction industry, it's very common for foreman level, or forepersons, I should say, and superintendents to be members of the union and to be sent to you from the union's hiring hall.

Some agreements may give you the flexibility to have your own superintendents and you get to select them, but they're very often members of the union and under the union's control and authority, and that's something most non-union contractors are just not used to dealing with.

Brian Lundgren (20:32):

That's right, Dion, and a key takeaway from a structural standpoint for a Project Labor Agreement is make sure that under the language of that Project Labor Agreement, that the labor agreement itself and the obligations and when the project ends. That's a key factor for employers to make sure that they're not signing onto an agreement that binds them to more they intended. Tracking back to your pricing and cost, Dion, that was a great point, many of these Project Labor Agreements include higher wages and special pay as compared to the standard Local Area Agreement. For example, there may be parking reimbursement, travel pay, holiday pay, show pay and other kinds of premiums that aren't anticipated when making the bid, so Dion's right, you need to really understand the nature and the terms of that Project Labor Agreement when you're costing out and constructing your bid.

Dion Kohler (21:34):

Brian, would you clarify or explain to our listeners just how likely it is, if at all, are they going to be able to negotiate different terms if they don't like some things that are in the PLA?

Brian Lundgren (21:48):

It's very unlikely, especially on the government-mandated Project Labor Agreements. The purpose of them or the intent is to force the terms and provisions upon all the contractors and subcontractors in all the various trades at the same wage's terms and conditions set for everybody. A standard requirement will be

that to perform work on the project, you must sign on to this Project Labor Agreement, and to subcontract any work, the subcontractor must sign on to this Project Labor Agreement. Unlike a traditional bargaining situation, the options to bargain, government-mandated especially, but a Project Labor Agreement generally is very limited. The general contractor and the union can bargain the terms prior to commencement of the project.

On government-mandated, we're seeing sometimes where the government is setting the terms as the owner, there's quirky, little NRA issues about whether that's lawful or not, but you are seeing that across the country in government-mandated PLAs, so this is a situation where you sign onto it as a contractor and you don't have the ability to carve out terms in a general basis like you would in typical bargaining.

Dion Kohler (23:06):

Well, that's a good point, and that makes it especially important that you double-check that you are not agreeing to anything that would cause you concerns, such as the agreement being broader than the one job you think it's supposed to apply to, or the agreement lasting beyond the completion of the job. You want to make sure that those are clearly spelled out in the agreement and that they reflect your understanding about how long and how broad your obligations are.

Brian Lundgren (23:39):

That's exactly right, Dion, and tracking on that, here's an example of where this could go wrong. If you were, as Dion just pointed out, to sign an agreement that bounds you beyond the Project Labor Agreement, and you were a non-union employer, that could trigger the ability for a union to pick it or strike your other facilities elsewhere because you would be a primary employer if the language isn't right in the PLA you signed.

Dion Kohler (24:08):

Right. One last point I wanted to make, Brian, was you are technically a unionized employer during the course of a project where you have a Project Labor Agreement, and the union represents and speaks for your employees. They have the exclusive right to present your employees. Now, because this is what's called an 8(f) agreement, as Brian mentioned, it only lasts for the duration of the project or the contract, if that's the duration of the contract, and you're free to walk away at the end of that contract. Now, one significant thing that can change that is the union at any time can file for an election, and if they succeed in that election, you would become what's known as a Section 9 employer, where your obligation with the union lasts indefinitely and does not end at the end of the project.

If the union decides that they want to try and come convert you from a non-union to a union contractor for all time going forward, they have the ability to attempt to do that, and that makes it especially important if you want to remain non-union, that you have a positive relationship with your employees and communicate with them readily about your particular philosophy about working non-union and why you think that's in the best interest of you as an employer and as employees. Now, for unionized contractors, that's not an issue. They're used to working that way, their workforce is used to working that way, it works fine for them, and this will be just business as usual. Brian, did you have anything to add to that?

Brian Lundgren (25:49):

No. I think that covers it, Dion. I mean, some of the key takeaways, if you don't have exposure to these types of agreements and don't typically work with them is, do you need specialized skills to perform your work and can the local area, through the union hiring hall, supply those specialized skills, and are you going to be able to use your non-union foremen and superintendents, or are your superintendents and foremen going to be unionized and come out of the hiring hall, and if you are a contractor who relies on a lot of subcontracting, are you going to be able to subcontract your work in this project like you have in the past? These are some of the key takeaways for these types of agreements.

Dion Kohler (26:36):

Thank you, Brian. Well, that is all our thoughts we have for today on this new exciting law, which will potentially bring a lot of new business to those of you out there who work in the government contracting sphere. Thank you for joining us today.

Alitia (26:52):

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