

The Infrastructure Investment and Jobs Act: Key Takeaways for Employers

By Stephanie L. Adler-Paindiris, Michael R. Hatcher, Melissa Ostrower, Steven M. Phillips, John J. Porta, James M. Stone & Gregory C. Brown

November 23, 2021

Meet the Authors



Stephanie L. Adler-Paindiris

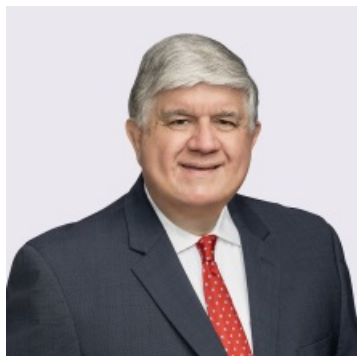
(Pain-DEAR-is • She/Her)

Principal

(407) 246-8409

Stephanie.Adler-

Paindiris@jacksonlewis.com

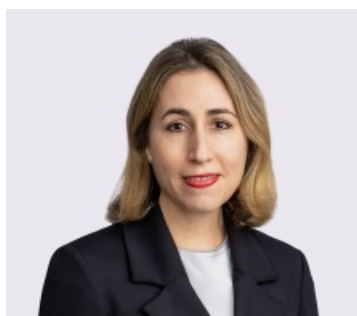


Michael R. Hatcher

Principal

(703) 483-8328

Michael.Hatcher@jacksonlewis.com



On November 15, 2021, President Joe Biden signed the \$1.2 trillion [Infrastructure Investment and Jobs Act \(IIJA\)](#) into law.

According to the White House, the IIJA will play an important role in rebuilding and improving roads, bridges, rails, ports and airports, expanding access to clean drinking water, ensuring every American has access to high-speed internet, tackling the climate crisis, and more. Of particular interest to employers in the construction, transportation, retail, manufacturing, and technology industries, during Fiscal Years 2022-2026, the IIJA will provide \$550 billion in new investments for various transportation, water, power and energy, environmental remediation, cybersecurity, and broadband initiatives. Various important trade groups, including the U.S. Chamber of Commerce and the National Association of Manufacturers, had supported this bill.

The IIJA does not raise corporate tax rates and contains other important revenue-generating provisions that may affect employers negatively, especially regarding certain tax credits. This article flags some of the important provisions in the IIJA for employers to consider.

Revenue-Generating Provisions

Employee Benefits/ERISA

The IIJA retroactively eliminated the Employee Retention Credit (ERC) for employers subject to closure due to COVID-19 with respect to eligible wages paid after September 30, 2021 (other than for an eligible employer that is a recovery start-up business). The ERC was a payroll tax credit created to help businesses partially offset the costs of keeping employees on payroll and on an employer's health insurance plan during the COVID-19 pandemic.

The ERC was first enacted as part of the CARES Act and was later extended, with certain modifications, through December 30, 2021. Ending the ERC on September 30, 2021, means the maximum ERC per employee available to an eligible employer in the tax-year 2021 is \$21,000. This change may affect employers that reduced their fourth quarter tax deposits in anticipation of receiving the ERC. Employers that retained payroll taxes in anticipation of receiving the ERC may want to review whether they should take any corrective action now in light of the elimination of the ERC for the fourth quarter of 2021.

The IIJA extends interest rate stabilization for "pension smoothing" for an additional five years. Defined benefit plans generally require the sponsoring employer to make a certain level of contribution each plan year to fund the plan benefits. The amount of funding required can vary year to year with interest rate fluctuations. To avoid



Melissa Ostrower

(She/Her)

Principal

212-545-4000

Melissa.Ostrower@jacksonlewis.com

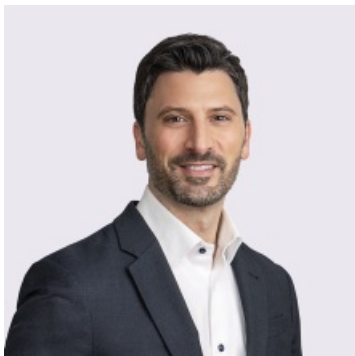


Steven M. Phillips

Principal

612-359-1768

Steven.Phillips@jacksonlewis.com



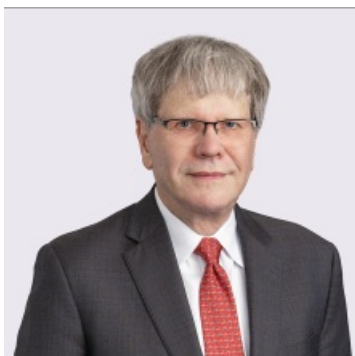
John J. Porta

(He/Him)

Principal

212-545-4043

John.Porta@jacksonlewis.com



James M. Stone

Principal

(216) 750-4307

James.Stone@jacksonlewis.com

fluctuations, many companies engage in pension smoothing, which means using higher future interest rates to establish future pension liability. The temporary provisions in the law that allow for pension smoothing were set to expire in 2025. This change is expected to generate higher tax revenue by reducing current contributions, which also reduce taxable income.

Reporting of Transactions in Digital Assets

The IIJA amends the anti-money laundering “cash reporting” requirements of 26 U.S.C. Section 60501 to explicitly include “digital assets,” including cryptocurrencies, to require businesses that receive over \$10,000 in digital assets in the course of their trade or business to properly report such transactions to the IRS on Form 8300. Note, however, the amendments do not apply to financial institutions whose reporting obligations are covered by the reporting requirements under the Bank Secrecy Act. The IIJA also expands the definition of “broker” for existing IRS Form 1099 reporting purposes to reflect the reality of how digital assets are traded and sold. These updates will apply to returns required to be filed, and statements required to be furnished, after December 31, 2023.

COVID-19: Unobligated Funds from COVID-19 Relief Provisions

Section 90007(a)-(h) of the IIJA rescinds past COVID-19 appropriations and re-allocates those funds to help pay for the IIJA. Relief funds were set aside as financial support for small businesses impacted by the pandemic. Repurposing these funds represents the current administration’s determination to focus on the future and move beyond the economic challenges of the pandemic. To the extent an employer has applied for but did not receive approval for one of the loans available through the 2020 Covid-19 relief funds, those loan requests will be denied. This reallocation will not impact loans that have already been approved.

Specific Wage/Labor Provisions

Wage and Hour Considerations: Construction and Labor

Under Section 41101 of the IIJA, all “laborers and mechanics” employed by contractors or subcontractors in the performance of construction, alteration or repair work on a project assisted in whole or in part by funding made available under this division or an amendment made by this division must be paid wages at rates not less than those prevailing on similar projects in the locality, as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code (the Davis-Bacon Act). Contractors or subcontractors who plan to work on projects funded even partially by the IIJA must familiarize themselves with the requirements of the Davis-Bacon Act (which includes hourly wages and benefits based on mapping the workforce to job classifications on project Wage Decisions issued by the Department of Labor, weekly payroll, certified payroll, notice and record keeping requirements) and take steps to ensure compliance with these prevailing wage provisions. In addition, to the extent some IIJA projects may also have funding from state or local agencies, contractors should also be aware of any state or local prevailing wage requirements. The funds for these projects will likely be welcome by many employers, and some of this work would have been performed under prevailing wage laws as public projects in any case. However, this provision is an important one, and will almost certainly benefit construction unions.

Related Services

Affirmative Action, OFCCP and
Government Contract Compliance
Class Actions and Complex
Litigation
Construction
Corporate Diversity Counseling
Corporate Governance and
Investigations
Disability, Leave and Health
Management
Employee Benefits
Employment Litigation
Energy and Utilities
ERISA Complex Litigation
Immigration
International Employment
Labor Relations
Manufacturing
National Compliance and Multi-
State Solutions
Privacy, Data and Cybersecurity
Restrictive Covenants, Trade
Secrets and Unfair Competition
Retail
Sports
Technology
Wage and Hour
White Collar and Government
Enforcement
Workplace Safety and Health
Workplace Training

Growing the Necessary Workforce

Construction, Retail/Transportation, and Manufacturing/Energy

As Jackson Lewis previously reported, the IIJA may generate new jobs in industries critical to keeping the nation's public works systems running, such as construction, transportation and energy. But if there is not enough labor to keep up with the demand, efforts to strengthen the nation's highways, bridges and public transit could be stalled. Finding workers to fill the newly created jobs in the construction industry, for example, could be a problem. (There were more than 300,000 unfilled jobs in the construction industry as of July 2021.) Many industry leaders have recognized that one way to recruit new workers to the industry is to intensify efforts to enhance the appeal of construction jobs to groups that are traditionally underrepresented in the industry, including minorities and women. Industry leaders will need to be creative and aggressive in recruiting new workers if they hope to take advantage of the opportunities presented by the IIJA.

Manufacturing will also be impacted. Jackson Lewis has previously reported on this issue at length. Manufacturers struggled to find enough labor, both skilled and semi-skilled labor, before the pandemic, and this bill will only intensify this demand.

Recognizing this significant hurdle, the IIJA creates various taskforces and workgroups to focus on training and recruiting in certain sectors of the economy. These efforts may help create a deeper, more talented infrastructure-focused workforce, but may also result in more government regulation and "red tape." A few significant examples follow.

Transportation Workforce Development

Under Section 25020 of the IIJA, the Secretary of Transportation must work with the Secretaries of Energy and Labor to determine how best to educate, retrain, and recruit technical workers who will focus on the country's intelligent transportation technologies, including installation, maintenance, manufacturing, operations and cybersecurity relating to those technologies. The Secretary must also study ways to increase the diversity of the transportation workforce, including examining the use of pre-apprenticeship programs and local hiring preferences.

Consistent with the focus on apprenticeship and pre-apprenticeship programs, Section 23022 of the IIJA sets out an apprentice pilot program intended to increase the number of truck drivers in the U.S. Under that program, after completing a 120-hour probationary period, an apprentice must complete 280 hours of on-duty time, of which not less than 160 hours must be driving time in a commercial motor vehicle. To complete the 280-hour probationary period, the employer of an apprentice must determine that the apprentice is competent in each of the following areas: (1) backing and maneuvering in close quarters; (2) pre-trip inspections; (3) fueling procedures; (4) weighing loads, weight distribution, and sliding tandems; (5) coupling and uncoupling procedures; and (6) trip planning, truck routes, map reading, navigation, and permits. The apprentice pilot program is limited in size for now, but clearly responds to the driver shortage in the U.S., and the ripple effect that shortage is having throughout the economy.

Limited Manufacturing Workforce Development Included

The IIJA also includes money for manufacturing apprenticeship programs, especially if

tied to the energy sector.

Section 40521 of the IIJA pertains to industrial energy efficiency. It includes a section on workforce training. That section provides, among other things, that the Secretary must pay a “Federal share” of associated internship and apprenticeship programs under which students work with or for industries, manufacturers, and energy service providers. The “Federal share” must be 50 percent. The section also includes grants of up to \$300,000 to eligible entities to implement covered projects. Additionally, the section authorizes \$150,000,000 to be appropriated to the Secretary for fiscal years 2022–2026 to carry out future development including the apprenticeship programs.

Notably, substantial money was also set aside in the earlier American Rescue Plan, passed by Congress, and signed by President Biden in March 2021. That Plan contains three billion dollars for job training and community investment, much of which manufacturers are eligible to receive. The application for many of these funds extends into January 2022. It is administered by the federal Economic Development Administration. Most states also offer funding for apprenticeship programs, often working with local community colleges, which should address this gap.

Cybersecurity: Testing and Training

The IIJA repeatedly stresses the need to evaluate and improve cybersecurity with regard to transportation and infrastructure. The IIJA charges the Departments of Energy and Homeland Security in particular with establishing testing and training programs. For example, for cybersecurity of electric utilities, under Section 40121, the Secretaries of Energy and Homeland Security are instructed “(A) to develop, and provide for voluntary implementation of, maturity models, self-assessments, and auditing methods for assessing the physical security and cybersecurity of electric utilities; (B) to assist with threat assessment and cybersecurity training for electric utilities; (C) to provide technical assistance for electric utilities subject to the program; (D) to provide training to electric utilities to address and mitigate cybersecurity supply chain management risks; (E) to advance, in partnership with electric utilities, the cybersecurity of third-party vendors that manufacture components of the electric grid; (F) to increase opportunities for sharing best practices and data collection within the electric sector; and (G) to assist, in the case of electric utilities that own defense critical electric infrastructure (as defined in section 215A(a) of the Federal Power Act (16 U.S.C. 824o-1(a))), with full engineering reviews of critical functions and operations at both the utility and defense infrastructure levels.”

Jackson Lewis [previously reported](#) on the federal government’s heightened focus on cybersecurity.

Manufacturing/Retail: Energy Workforce Advisory Board

Pursuant to Section 40211 of the IIJA, the Secretary of Energy must establish the “21st Century Energy Workforce Advisory Board,” to develop a strategy for supporting and developing a skilled energy workforce. Notably, the Board will be composed of not fewer than 10 and not more than 15 members, with the initial members of the Board to be appointed by the Secretary not later than one year after the date of enactment of this Act. The Board must include not fewer than one representative of a labor organization with significant energy experience who has been nominated by a national labor

federation. Each individual appointed to the Board must have expertise in (A) the field of economics or workforce development; (B) relevant traditional energy industries or emerging energy industries, including energy efficiency; (C) secondary or postsecondary education; (D) energy workforce development or apprenticeship programs of States or units of local government; (E) relevant organized labor organizations; or (F) bringing underrepresented groups – including racial and ethnic minorities, women, veterans, and socioeconomically disadvantaged individuals – into the workforce.

Technology: Telecommunications Workforce Guidance for States

Pursuant to Section 60603 of the IIJA, not later than one year after the date of enactment of this Act, the Secretary of Labor, in partnership with the Chairman of the Federal Communications Commission, must establish and issue guidance on how States can address the workforce needs and safety of the telecommunications industry, including guidance on how a State workforce development board established under section 101 of the Workforce Innovation and Opportunity Act (29 U.S.C. 3111) can: (1) utilize Federal resources available to States to meet the workforce needs of the telecommunications industry; (2) promote and improve recruitment in workforce development programs in the telecommunications industry; and (3) ensure the safety of the telecommunications workforce, including tower climbers. This guidance may play a critical role in the success or failure of dramatic attempts to expand broadband internet through the U.S., which is a major IIJA initiative.

Please contact a Jackson Lewis attorney if you have any questions about the IIJA.

©2021 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.