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Transportation Legislation And Regulation To Watch In 2022

By **Linda Chiem**

Law360 (January 3, 2022, 12:02 PM EST) -- New infrastructure funding policies, electric and autonomous vehicle rules and travel-related restrictions are some of the transportation industry's top legislative and regulatory priorities to watch in 2022.

Experts say they expect to see a batch of new rules for project funding programs as federal agencies begin implementing the bipartisan Infrastructure Investment and Jobs Act that President Joe Biden signed into law in November. Along with the once-in-a-generation investments in highways, bridges, transit systems, railways, clean water, power grids and broadband, the new law seeks to expand electric vehicle fleets and charging stations nationwide.

Additionally, supply chain congestion and ongoing face mask mandates as the COVID-19 pandemic persists remain a concern that will dominate much of the first half of 2022.

Here, Law360 highlights some transportation legislative and regulatory policies to watch in 2022.

Infrastructure Investment

After the Biden administration and congressional lawmakers passed the $1.2 trillion package to rebuild and modernize the nation's crumbling infrastructure, all eyes are on how the various funding programs will be implemented.

Former New Orleans Mayor Mitch Landrieu, Biden's infrastructure czar; National Economic Council Director Brian Deese; the secretaries of transportation, interior, energy, commerce, agriculture and labor; and the head of the U.S. Environmental Protection Agency are on the president's Infrastructure Implementation Task Force, which is responsible for overseeing how the money is doled out.

With $550 billion in new spending earmarked for modernized highways, roads, bridges, railways, ports, airports and transit, experts say the Infrastructure Investment and Jobs Act will be a boon to end users of the nation's interconnected transportation system. But ensuring that state, local, tribal and territorial governments equitably benefit from the newly allocated funds will depend on how quickly projects are put out to bid, not to mention the availability of skilled labor and materials.

"It's a 10-year-long program, so it's got legs," Roddy Devlin, a partner in Nixon Peabody LLP's project finance and public finance group, told Law360. "There's a fair bit of money in there that can flow out relatively quickly, a fair bit of discretionary trust money that can be put to work relatively fast. But a lot of the more significant changes require regulations to be passed and adopted before the act can be given full implementation, and those just take a while."

The Infrastructure Investment and Jobs Act includes $110 billion to upgrade bridges, highways, roads and main streets that are most in need of repair, $39 billion to modernize and expand public transit and $66 billion for passenger and freight rail that would help Amtrak eliminate its maintenance backlog, modernize the railroad's busy Northeast Corridor along the East Coast and expand rail service to other parts of the U.S. Additionally, there is $25 billion for airport improvements and $17 billion for inland waterways and ports.

The new law also sets aside $55 billion for clean water and $65 billion for broadband, $50 billion for resiliency and water storage, $73 billion for upgraded power grids, $7.5 billion to build up the U.S. electric-vehicle charging infrastructure and $7.5 billion for low- or zero-emission buses and ferries.

Electric Vehicles

Biden issued a series of clean-energy and climate-focused executive orders throughout 2021 that have propelled momentum for electric vehicles. The newly enacted infrastructure act set aside money for more charging stations, while the still-pending Build Back Better Act seeks to expand tax credits for purchases of U.S.-manufactured electric vehicles.

To get things moving, the Federal Highway Administration on Dec. 2 called for public input on guidance the agency is drafting to set up two new programs for electric-vehicle charging stations. There will be a "national electric vehicle formula program" that will allocate money for states to establish an interconnected network of EV charging stations along highway corridors. And there will be a "charging and fueling Infrastructure discretionary grant program" that will award competitive grants to projects that "improve public accessibility to electrical vehicle charging and hydrogen, propane and natural gas fueling stations, along designated alternative fuel corridors or other community locations accessible to drivers," according to the FHWA.

"These programs represent the first-ever national investment in EV-charging infrastructure and reflect the administration's commitment to combating climate change," said FHWA Deputy Administrator Stephanie Pollack in a Dec. 2 statement. "Both programs will make EV charging more convenient and provide current and potential car owners with the confidence that they can get their vehicles charged whenever and wherever it's needed."

It's a top-of-mind issue for 2022 considering that EV-charging infrastructure in the U.S. remains scattered and inadequate, experts say.

"The ability to develop, construct, bring to commercial operation and then operate network chargers, I think everybody who is impacted directly or indirectly by electric vehicles recognizes that as the threshold issue that has to be addressed," Morgan Lewis & Bockius LLP partner Levi McAllister told Law360.

Autonomous Vehicles

The transportation industry is also waiting to see if the federal government will provide additional regulatory clarity on autonomous or self-driving vehicles. The National Highway Traffic Safety Administration, which is in charge of regulating vehicle safety, has in recent years issued mostly voluntary guidelines laying out best practices for the industry to follow. At the same time, state and local governments have implemented a mix of regulations related to testing and operating autonomous vehicles.

But the NHTSA signaled in November 2020 that it may eventually adopt new safety standards for vehicles with automated driving systems, or ADS, a big step that could boost development of passenger-carrying autonomous vehicles while ensuring that new technologies still undergo significant scrutiny. It's unclear what the regulatory framework may look like, but NHTSA is taking a harder look after several high-profile crashes involving cars operating in semi-autonomous mode. In June 2021, the NHTSA issued a standing general order requiring autonomous vehicle makers to report any crashes. That way, the agency said it can access critical data that will help quickly identify safety issues that could emerge in these automated systems.

The "NHTSA has started taking a closer look at the more advanced forms of ADAS [advanced driver-assistance systems], and I think we can expect that trend to continue," said Todd Benoff, a partner in Alston & Bird LLP's products liability group and co-founder of the firm's connected and autonomous vehicles group.

Another regulatory area that remains murky is cybersecurity and data privacy for connected vehicles, electric vehicles and automated driving systems.

"Every vehicle — in particular, electric vehicles and autonomous vehicles — at this point is basically connected technology," said Laura Baucus, director of Dykema Gossett PLLC's automotive industry group, to Law360. "All the automakers and suppliers are now technology companies, and what potentially covers them is such a web of federal, state and foreign cybersecurity, data privacy and other types of similar regulations, laws and statutes, which are changing as the technology changes. That, from a contractual risk allocation point of view, is a hurdle and challenge that the automakers, suppliers and vendors up and down the supply chain focus on daily."

Supply Chain

The White House announced a number of initiatives in 2021 to blunt the impacts of supply-chain logjams stemming from the COVID-19 pandemic, including asking companies to ramp up staffing and embrace round-the-clock hours to move goods more quickly off cargo ships, onto the docks, into warehouse and distribution centers and onto trucks, railways and beyond.

Business reopenings, manufacturing restarts and skyrocketing consumer demand for goods that sparked the congestion jolted the administration and lawmakers to propose the operational changes to provide a much-needed shot in the arm heading into the holiday season. The kinks haven't all been worked out yet, but lawmakers have floated a few measures to tackle the problem.

On Dec. 8, the U.S. House of Representatives passed the Ocean Shipping Reform Act of 2021, H.R. 4996, which would bolster the Federal Maritime Commission's oversight and enforcement authority to shield American consumers and businesses from unreasonable ocean shipping practices and price-gouging by foreign-flagged ocean carriers. The measure, which would amend the Shipping Act of 1984, calls for the maritime commission to draft new rules prohibiting unjust and unreasonable detention and demurrage fees being assessed on shippers and motor carriers for the time their freight is left sitting, waiting to be loaded or unloaded.

"The overwhelming bipartisan support shown for modernizing the Shipping Act of 1984 is an important step toward addressing systemic issues contributing to congestion at U.S. seaports and unprecedented disruption to the ocean shipping network," said Nancy O'Liddy, executive director of the National Industrial Transportation League, a trade association, in a statement. "The ongoing ocean shipping turmoil has wreaked havoc on U.S. exporters and importers, costing them billions in higher shipping costs, demurrage and detention charges, and lost business."

In addition, a group of Senate Republicans in November unveiled legislation called the FREIGHT Act, or the Facilitating Relief for Efficient Intermodal Gateways to Handle Transportation Act, aimed at easing supply chain issues by establishing new studies for standardizing documents and data, making permanent a commercial driver's license waiver and requiring a collection of public data on dwell time for shipping equipment.

Senate Democrats proposed a separate bill, the Supply Chain Resiliency Act, which would establish an Office of Supply Chain Resiliency within the U.S. Department of Commerce that would monitor supply chain issues and provide loans and grants to small and medium-size manufacturers to allow them to expand operations to address bottlenecks.

Air Travel Regulations

Face mask mandates implemented at the height of the pandemic are still in effect for public transportation. The U.S. Centers for Disease Control and Prevention still recommends that all travelers, regardless of vaccination status, continue to wear a face mask on planes, buses, trains and other forms of public transportation throughout the U.S. And the Transportation Security Administration's face mask mandate has been extended several times and is currently in place through March. Most airlines and other public transportation operators continue to follow the requirement.

But the mandate has been a source of tension, sparking what experts have described as a troubling spike in "air rage" incidents involving unruly passengers. Of the more than 5,500 reports of unruly passenger behavior and in-flight disturbances the Federal Aviation Administration logged in 2021, roughly 4,000 of them involved passengers refusing to comply with flight crew instructions to wear face masks, according to the agency. The FAA has strictly enforced its zero-tolerance policy, assessing fines of up to $37,000 per violation and referring dozens of the most egregious cases to the U.S. Department of Justice for criminal prosecution.

"The vitriol, verbal and physical abuse from a small group of passengers — yet at a steady rate — is unacceptable and puts everyone onboard at risk," Sara Nelson, international president of the Association of Flight Attendants-CWA, said in a statement. "This is not a new normal we are willing to accept. The federal government, airlines and airports must redouble efforts to hold every disruptive passenger accountable. While the Federal Aviation Administration has moved to zero-tolerance policies and leveled an unprecedented number of civil penalties, the DOJ publicly prosecuting is the only way to truly get the attention of bad actors."

On the consumer protection front, Biden issued a July 2021 executive order aimed at making it easier for travelers to get refunds from airlines and to comparison shop for flights by requiring airlines to clearly disclose add-on fees upfront. The order directed the U.S. Department of Transportation to consider drafting clearer rules requiring airlines to refund passengers for fees when baggage is delayed or when a service isn't actually provided, such as when a plane's Wi-Fi or in-flight entertainment system is broken. It also directed the DOT to consider issuing rules that require baggage, change and cancellation fees to be clearly disclosed to the customer.

In December, Sens. Edward J. Markey of Massachusetts and Richard Blumenthal of Connecticut and Reps. Steve Cohen of Tennessee and Jesús "Chuy" García of Illinois, all Democrats, introduced the Forbidding Airlines from Imposing Ridiculous, or FAIR, Fees Act, which would prohibit airlines from charging fees — including bag, seating, cancellation and change fees — that are unreasonable or disproportionate to the costs of the services actually provided.

--Editing by Jill Coffey.