

Bipartisan Infrastructure Law – Section 25019(a) “Local Hiring Preference for Construction Jobs”

Questions and Answers

Updated June 8, 2022

On February 11, 2022 (87 FR 8081), the Federal Highway Administration (FHWA) published a Notice in the Federal Register announcing the transition from its experimental pilot initiative, the “Enhancing Highway Workforce Development Opportunities Contracting Initiative (EHWDO),” to reliance on Section 25019 of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (Pub. L. 117-58, November 15, 2021), for use of hiring preferences on FHWA projects. This guidance is intended to replace Questions and Answers on the pilot initiative (Updated October 20, 2021).

Except for any statutes and regulations cited, the contents of this document do not have the force and effect of law and are not meant to bind States or the public in any way. This document is intended only to provide clarity regarding existing requirements under the law or agency policies.

1. What does Section 25019(a) of the BIL allow?

BIL Section 25019(a)(1) allows States and other recipients and subrecipients to utilize local or other geographic and economic hiring preferences on their Federal-aid highway projects. Specifically, Section 25019(a) provides that a “recipient or subrecipient of a grant provided by the Secretary [of Transportation] under title 23 or 49, United States Code, may implement a local or other geographical or economic hiring preference relating to the use of labor for construction of a project funded by the grant, including prehire agreements, subject to any applicable State and local laws, policies, and procedures.”

2. Does a recipient or subrecipient need FHWA’s approval to utilize a local or other geographic or economic hiring preference on a Federal-aid project?

No. FHWA has no authority to approve or disapprove a recipient’s or subrecipient’s decision to use such preferences, provided that proposed hiring preferences are geographic or economic. BIL Section 25019(a)(1) expressly says that a recipient or subrecipient may use such preferences subject to any applicable State and local laws, policies, and procedures.

3. Does the FHWA have any oversight role concerning whether a recipient’s or subrecipient’s use of a local or other geographic or economic hiring preference is consistent with State and local laws, policies, and procedures?

No. FHWA has no oversight role to ensure that such preferences are consistent with State and local laws, policies, and procedures. Such determinations are most appropriately made by the relevant State or local agency administering such provisions.

4. Does FHWA have authority to approve or disapprove a local or other geographic or economic hiring preference on the basis that it may adversely affect competition under 23 U.S.C. 112?

No. BIL Section 25019(a)(2) states that the “use of a local or other geographical or economic hiring preference pursuant to [BIL Section 25019(a)(1)] in any bid for a contract for the construction of a project funded by a grant described in [BIL Section 25019(a)(1)] shall not be considered to unduly limit competition.” This makes clear that 23 U.S.C. 112 does not apply to the use of local or other geographic or economic hiring preferences.

5. Do the FHWA regulations specifically prohibiting the use of local or other geographic hiring preferences relating to labor on a construction project remain valid?

No. BIL Section 25019(a)(1), enacted by Congress, invalidates any such regulations to the extent such regulations are inconsistent with the statute. This includes 23 CFR 635.117(b) and 636.107, but only with respect to the use of local or other geographic hiring preferences relating to labor on a construction project. The FHWA will update these regulations in the future to reflect current statutory requirements.

6. What is a hiring preference?

FHWA considers a hiring preference to be a contract provision requiring a contractor on a project to employ workers or apprentices/trainees from a specified target group or population, as consistent with 25019(a) of the BIL, which is not otherwise allowed by law. When using the term hiring preferences, FHWA is not referring to the equal employment opportunity (EEO) goals established at 23 CFR Part 230, which are unchanged and unaffected by Section 25019(a) of the BIL.

7. What types of hiring preferences are allowed under Section 25019(a) of the BIL?

Section 25019(a) authorizes the use of hiring preferences that require the employment of workers from a defined local or other geographic area. Also, Section 25019(a) authorizes the use of hiring preferences that require the employment of workers based on specified economic conditions of the worker, such as worker’s annual income being below a certain threshold.

8. What are some examples of local or other geographical or economic criteria for hiring preferences relating to the use of labor for construction?

BIL Section 25019(a) authorizes geographical or economic hiring preferences relating to the use of labor for construction of a project. FHWA considers the following a non-exclusive list of examples:

- Geographic boundaries based on non-economic factors such as:
 - State, county, or other public boundaries;
 - Zip code limits;
 - Census tracts;
 - Other geographically defined boundaries;
- The selection of geographic areas (zip codes, census tracts, etc.) based on economic factors including:
 - Per capita income levels
 - Unemployment rates
 - Poverty rates; or

- Economic conditions of the worker, such as:
 - Income level in the prior calendar year;
 - Participation in public assistance programs where income is a defining criterion, such as Supplemental Security Income (SSI) or Supplemental Nutrition Assistance Program (SNAP);
 - Being part of a group that has known barriers to employment and higher income jobs such as people with criminal records and people with no more than a high school education (except as provided below); or
 - Other factors defined by economic criteria.

Any hiring preference for a class or groups of persons based on race, religion, sex, sexual orientation, gender identity, color, national origin, age, or disability would be permissible under BIL Section 20519(a) only to the extent that: (i) it is a local or other geographical or economic hiring preference; and (ii) it is consistent with the equal protection requirement of the U.S. Constitution.

9. Why would a recipient or subrecipient want to utilize a local or other geographic or economic hiring preference as part of a Federal-aid project?

Recipients or subrecipients may wish to utilize such hiring preferences in order to ensure that individuals residing where construction projects are being undertaken or who are economically disadvantaged can gain access to jobs and training opportunities presented by such projects. The decision to use such hiring preferences rests solely with the recipient and subrecipient, and there may be other reasons deemed appropriate by the recipient and subrecipient.

To encourage the use of hiring preferences by recipients and subrecipients following enactment of BIL, the U.S. Department of Transportation has incorporated the use of such hiring preferences among the selection or merit criteria for most discretionary grant programs. For example, see the [frequently asked questions \(FAQs\)](#) regarding hiring preferences for the 2022 Rebuilding American Infrastructure with Sustainability and Equity (RAISE) discretionary grant program, which include discussion of how such preferences may be evaluated.

10. Does Section 25019(a) of the BIL impact the applicability of the Indian employment preference under 23 U.S.C. 140(d)?

No. The authorization for the use of Indian employment preferences under 23 U.S.C. 140(d) and corresponding regulations at 23 CFR 635.117(d) and 25 CFR 170.911 remain unchanged and unaffected by Section 25019(a) of the BIL. Guidance on the use of the Indian employment preference can be found at <https://www.fhwa.dot.gov/construction/cqit/indian.cfm>.

11. Can a hiring preference be incentivized through performance-based specifications?

Yes. A hiring preference can be incentivized through performance-based specifications.

12. Does BIL Section 25019(a) permit local or other geographical or economic preferences relating to the procurement of firms or contractors?

No. BIL Section 20519(a) only applies to the employment of labor for construction of a project.

13. How does this impact experimental pilot projects authorized under FHWA’s EHWDO initiative?

State and local recipients and subrecipients may continue to administer any contracts authorized under the EHWDO initiative for the duration of these contracts per the requirements of their approved workplans.

14. How does this affect Project Labor Agreements (PLAs)?

BIL Section 25019(a) expressly provides that a local or other geographic or economic hiring preference may be utilized in “prehire agreements.” Accordingly, FHWA will not question the inclusion of any such hiring preference included in a PLA. However, requests to use a PLA on a Federal-aid construction project will be in accordance with current FHWA guidance on the use of PLAs at <https://www.fhwa.dot.gov/construction/cqit/pla.cfm>.