CURRENT ISSUES IN PROJECT LABOR AGREEMENTS

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A project labor agreement, or "PLA," is a pre-hire collective bargaining agreement negotiated between a construction project owner and building trade unions that will be imposed upon and signed by the contractors that will perform work on the project. The purpose of a PLA is to define the terms and conditions of employment governing work on the project, and impose signatory subcontracting and trade jurisdiction provisions on those construction contractors that will perform work on the project in exchange for expedited dispute resolution procedures and labor harmony.[1] PLAs prohibit signatory contractors from subcontracting work covered by the PLA to employers that have not signed the PLA. Therefore, under Section 8(e) of the National Labor Relations Act, PLAs are only permissible with respect to construction industry employers and only with respect to work to be performed at the site of construction. See *Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts (Boston Harbor), 507 U.S. 218, 230 (1993)* (holding that project labor agreements are lawful but only within the narrow confines of Sections 8(e) and 8(f) of the NLRA).

A. PLA's Must Be Limited In Scope

Under the National Labor Relations Act, an employer cannot agree to be bound by the terms and conditions of a collective bargaining agreement before a majority of the employer's employees affirmatively designate the union as their exclusive representative for purposes of collective bargaining.[2] "A union can achieve the status of a majority collective bargaining

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[1] See *Johnson v. Rancho Santiago Comm. College Dist., 623 F.3d 1011, 1017 n. 1 (9th Cir. 2010)*; *Associated Gen. Contractors v. Metro. Water Dist. of S. Cal., 159 F.3d 1178, 1180 (9th Cir. 1998)*; *Mich. Building and Construction Trades Council v. Snyder, 846 F.Supp.2d 766, 772 (E.D. Mich. 2012)*.

[2] See *Raymond Interior Systems, Inc. v. N.L.R.B., 812 F.3d 168 (D.C. Cir. 2016)* (employer violated Sections 8(a)(1) and 8(a)(2) of the NLRA by recognizing the union when the union did not represent an uncoerced majority of its employees). While federal antitrust laws do not explicitly exempt agreements between unions and nonlabor parties, the U.S. Supreme Court has adopted a limited nonstatutory exemption from antitrust sanctions for collective bargaining agreements authorized under the National Labor Relations Act. See *Connell Construction, 421 U.S. 616, 622, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975)*. The Court explained that "[u]nion success in organizing workers and

representative through either Board certification or voluntary recognition by the employer [based upon objective evidence that a majority of the employees designated the union as their exclusive bargaining representative]."[3]

Section 8(f) of the NLRA creates a narrow exception to the representational process described above by allowing construction industry employers to enter into a collective bargaining agreement with a union before any employees are hired. Section 8(f) states in pertinent part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such an agreement … .[4]

"Congress enacted this limited exception because construction employers must know their labor costs up front in order to generate accurate bids and must have available a supply of skilled craftsmen ready for quick referral."[5] Section 8(f) contracts are often referred to as "pre-hire agreements."

A pre-hire collective bargaining agreement can only be entered into by employers "engaged primarily in the building and construction industry" and the agreement must cover employees "engaged in the building and construction industry." See 29 U.S.C.A. § 158. Otherwise, "an agreement between an employer and its union is void and unenforceable . . . if it

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standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws." *Id.* However, collective bargaining agreements (or PLAs) that are not authorized under the NLRA do not qualify for the nonstatutory exemption and may violate federal antitrust laws as price fixing.

[3] See *Raymond F. Kravis Ctr. For Performing Arts, Inc. v. N.L.R.B., 550 F.3d 1183, 1188 (D.C.Cir. 2008).*

[4] 29 U.S.C. §158(f).

[5] See *Raymond Interior Systems, Inc. v. N.L.R.B., 812 F.3d at 176.*

purports to recognize a union that actually lacks majority support as the employees' exclusive representative."[6]

The Section 8(f) exemption has applied based on an appraisal of the employer's entire operation as well as an appraisal of its operation on a specific project.[7] However, the exemption has been denied to employers whose business involved the manufacture of construction materials which are installed by employees of a different employer, and to employers who have only a minimal involvement in the construction process, such as ready-mix concrete suppliers and material haulers.[8]

Given that PLAs also impose signatory subcontracting restrictions on its signatory employers, the PLA must also be drafted within the narrow confines of Section 8(e) of the National Labor Relations Act. Section 8(e) makes it unlawful for any labor organization or employer to enter into a contract in which the employer agrees to refrain from dealing in the product of another employer or to cease doing business with any other person. Section 8(e) states in pertinent part:

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[6] See *Nova Plumbing, Inc. v. N.L.R.B., 330 F.3d 531, 537 (D.C. Cir. 2003)* (citing *International Ladies' Garment Workers' Union, AFL-CIO v. N.L.R.B.*, 366 U.S. 731, 737 (1961) (a collective bargaining agreement fails in its entirety when it "was obtained under the erroneous claim of majority representation"); *Building and Construction Trades Council of Metro. Dist. v. Associated Builders and Contractors of Mass. (Boston Harbor), 507 U.S. 218, 113 S.Ct. 1190, 142 L.R.R.M. 2659 (1993)* (holding that project labor agreements are lawful but only within the narrow confines of Sections 8(e) and 8(f) of the NLRA).

[7] See *Frick Co., 141 NLRB 1204 (1963)* (finding employer not primarily engaged in construction industry where only one percent of its revenue came from installation work that could be deemed construction industry work); *Expo Group, 327 NLRB 413 (1999)* (assessing employer's overall operation rather than specific project); *Custom Sheet Metal & Service Co., 243 NLRB 1102 (1979)* (company whose business was 95 percent manufacturing not primarily engaged in the construction industry); *Central Arizona Dist. Council of Carpenters (Wood Surgeons, Inc.), 175 NLRB 390 (1969)* (employer whose on-site installation work constituted 31 percent of sales not primarily engaged in the construction industry); *Zidell Explorations, 175 NLRB 887 (1969)* (employer engaged in building and construction industry within meaning of Section 8(f), despite fact that primary business was shipbuilding, because its entirely separate operation of dismantling a ballistic missile complex was identical to work performed in the construction industry); *A.L. Adams Constr. Co. v. Georgia Power Co., 733 F.2d 853 (11th Cir. 1984)* (power plant primarily engaged in non-construction type industry was entitled to Section 8(f) exemption when engaged as a contractor in the building of its own plant).

[8] See *Forest City/Dillon-Tecon Pacific, 209 NLRB 867 (1974)*; *J.P. Sturrus Corp., 288 NLRB 668 (1988)* (employer, which operated quarry, batch plant, and delivery service for ready-mix concrete was not in the building and construction industry within the meaning of Section 8(f), even though its drivers occasionally performed incidental tasks at the construction site.); *Connecticut Sand and Stone Corporation, 138 NLRB 532 (1962); Irving Ready Mix, 2011 NLRB LEXIS 609 (2011)* (Ready mix suppliers cannot enter into section 8(f) pre-hire agreements).

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of construction, alteration, painting, or repair of a building, structure, or other work…

See 29 U.S.C. §158(e).

With the Landrum-Griffin Amendments, Congress intended Section 8(e) to close a loophole in the Taft-Hartley Act's general prohibition against secondary activities by broadly proscribing the use of so-called "hot cargo" clauses in collective bargaining agreements by which unions would secure agreements from employers to boycott the goods and services of other employers that did not comply with union standards or recognize a union.[9]

A contract clause may fall within the literal proscription of Section 8(e) but nonetheless be valid if it is primary in nature.[10] A clause is primary if it seeks to preserve or protect the work of a specifically identifiable bargaining unit currently employed by the primary employer.[11] Thus, it is lawful for an employer to agree with a union that represents its bargaining unit employees that the employer will not subcontract any of that bargaining unit work to another business (i.e., it will refrain from doing business with those companies) in order to preserve the bargaining unit work

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[9] See *National Woodwork Manufacturers Ass'n v. NLRB*, *386 U.S. 612, 634-37, 87 S.Ct. 1250, 1262-64, 18 L.Ed.2d 357 (1967)*; *NLRB v. International Longshoremen's Ass'n*, *473 U.S. 61, 74-75, 105 S.Ct. 3045, 3053, 87 L.Ed.2d 47 (1985)*; *Local 210, Laborers International Union of North America v. Associated General Contractors of America*, *844 F.2d 69, 72 (2d Cir. 1988)*.

[10] See *National Woodwork Manufacturers Ass'n v. NLRB*, *386 U.S. 612, 634-37, 87 S.Ct. 1250, 1262-64, 18 L.Ed.2d 357 (1967)*.

[11] *Id.*

for the bargaining unit employees.[12] On the other hand, signatory subcontracting restrictions are facially unlawful and unenforceable as a matter of law, unless the subcontracting restriction falls within the construction industry proviso to Section 8(e).[13] The construction industry proviso states:

> Nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of construction, alteration, painting, or repair of a building, structure, or other work: …

See 29 U.S.C. §158(e).

In *Painters Labor 1247 (Indio Paint), 156 NLRB 951, 959 (1966),* the National Labor Relations Board defined construction industry work as "the provision of labor whereby materials and constituent parts may be combined at the building site to form, make, or build a structure." The Board principally relied upon the Standard Industrial Classification Manual's (1957) definition of construction because, "Congress sought only to preserve the status quo and the pattern of bargaining in the construction industry at the time the legislation was passed."[14] The Standard Industrial Classification Manual (1957) defined "construction" as follows:

> New work, additions, and repairs. Three broad types of contract construction activity are covered: namely, (1) building and construction by general contractors, (2) other construction by general contractors, and (3) construction by special trade contractors. … General building contractors are primarily engaged in the construction of dwellings, office buildings, stores, farm buildings, and other projects of a similar character. General contractors in fields other than buildings, often referred to as heavy construction contractors, are primarily engaged in the construction of highways, streets, bridges and tunnels, docks and piers, dams and water projects, sewage collection, treatment, and disposal facilities, and storm systems, air fields, and other heavy construction which

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[12] *Id.*

[13] See *Building and Construction Trades Council of Metro. Dist. v. Associated Builders and Contractors of Mass. (Boston Harbor), 507 U.S. 218, 113 S.Ct. 1190, 142 L.R.R.M. 2659 (1993)*; *Southwestern Materials Supply, 328 NLRB 934 (1999)*; *Hoffman Construction, 292 NLRB 562 (1989); Utilities Services Engineering, Inc., 239 NLRB 253 (1978).*

[14] See *Carpenters District Council (Alessio Construction), 310 NLRB 1023, 1027 (1993)*; *South Jersey regional Council of Carpenters, Local 623 (Atlantic Exposition Services), 335 NLRB 586, 590 (NLRB 2001).*

> involves either earth moving or the erection of structures and appurtenances, other than building. … Special trade contractors are primarily engaged in specialized construction activities such as plumbing, painting, electrical work, and carpentry. General contractors in both the building and the heavy construction field usually assume responsibility for an entire construction project, but may subcontract to others those portions of the project requiring special skills or equipment. Special trade contractors may work for general contractors under subcontracts or may work directly for the owner of the property.

See *Bureau of the Budget, Executive Office of the President, Standard Industrial Classification Manual (1957)*; see also *Painters Labor 1247 (Indio Paint), 156 NLRB at 959.*

The legislative history of Section 8(e), set forth in the House Conference Report on the 1959 amendments to the Act, further delineated the limits of the construction industry proviso by explaining that "*the construction industry proviso does not exempt from Section 8(e), agreements relating to supplies and materials or other products shipped or otherwise transported to and delivered on the site of the construction*."[15]

In light of the above, the NLRB has consistently held that employees who deliver materials, products, and/or supplies to a jobsite are not performing work at the site of construction within the meaning of Section 8(e).[16] Therefore, a construction employer performing jobsite work covered by a PLA would violate Section 8(e) if it entered into an agreement with a union whereby it agreed to only purchase materials, supplies, equipment, or concrete from a supplier that has signed the

[15] See *Inland Concrete Enterprises, 225 NLRB 209, 216 (1976).*

[16] See *Material Sand & Stone Corp., 356 NLRB No. 135 (2011)* ("the delivery of ready-mix concrete and asphalt to a construction site is not 'work to be done at the site of the construction' within the meaning of that term in the construction industry proviso to Section 8(e) of the Act"); *Teamsters Local 282 (D.Fortunato, Inc.), 197 NLRB 673 (1972)* (delivering materials, tools, and personnel to jobsite not covered by Section 8(e)'s construction industry proviso); *Inland Concrete Enterprises, Inc., 225 NLRB 209 (1976)* (delivery of precast concrete pipe not covered by Section 8(e)'s construction industry proviso); *Joint Council of Teamsters No. 42, (AGC of California), 248 NLRB 808 (1980)* (haulage of waste not covered by Section 8(e)'s construction industry proviso); *Shank/Belfour Beatty, 327 NLRB 449 (1999)* (invalidating PLA provision requiring use of signatory material haulers because not covered by Section 8(e)'s construction industry proviso); *Island Dock Lumber, 145 NLRB 484 (1963),* enfd. *342 F.2d 18 (2nd Cir. 1965)*; *Connecticut Sand and Stone Corporation, 138 NLRB 532 (1962); J.P. Sturrus, 288 NLRB 668 (1988).*

PLA. Moreover, in the event a supplier signs the PLA, its employees could file an unfair labor practice against the employer if the employees never voted to be represented by the signatory union in accordance with Section 9(a) of the Act.

While the use of PLAs to secure non-jobsite work is not a novel issue, building trade councils have become more brazen with the type of work they seek to secure under a PLA. For instance, in 2017, the International Brotherhood of Electrical Workers ("IBEW") attempted to enforce a PLA's signatory subcontracting restriction that applied to "all construction, production, and decorating work" respecting a national convention.[17] In that case, the IBEW alleged the defendants violated the PLA's signatory subcontracting clause by failing to subcontract the unpacking and installation of audio and video equipment to a contractor who signed the PLA. The defendants filed a motion for summary judgment arguing, in part, that the signatory subcontracting provision, as applied, is unenforceable and void under Section 8(e) given the NLRB's decision in *South Jersey Regional Council of Carpenters, Local 623 (Atlantic Exposition Services), 335 NLRB 586 (NLRB 2001)*. The *Atlantic Exposition Services* Board held that the set-up, assembly, and dismantling of exhibits and equipment at trade shows does not qualify as work covered by Section 8(e)'s construction industry proviso. The Board reached this conclusion because the Standard Industrial Classification Manual for 1957 and 1987 did not reference "trade show or convention services" in its enumerated description of the construction industry. Rather, the Manual listed "convention decorators," "convention bureaus," "exhibits, building of: by industrial contractors," and "trade show arrangement" under the separate category "Miscellaneous Business Services, Business Services, Not Elsewhere Classified." *Id.* at 592, 594 ("The primary purpose of the proviso

[17] See *International Brotherhood of Electrical Workers, Local 98 v. Democratic National Committee, et. al., Civil Action No. 17-1703 (E.D.Pa 2017).*

was to preserve the status quo in the construction industry, not the trade show or exhibition industry."). A decision is currently pending.

In addition to the scope of a PLA's work jurisdiction, federal courts and the NLRB have explained that a PLA's signatory subcontracting restriction is only permissible if it is entered into by an employer in the construction industry, and entered into pursuant to a bona fide collective bargaining relationship or, possibly, is negotiated and executed to resolve the problems involved in permitting union and nonunion employees to work side by side at a common construction site. The first condition relates to the express statutory requirement limiting Section 8(e)'s construction industry proviso to agreements "between a labor organization and an employer in the construction industry." Depending on the circumstances, an employer can be in the construction industry for a particular project even if it is not "primarily engaged in the construction industry."[18]

The second and third condition relate to the non-statutory test for proviso coverage set forth in *Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 635, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975)*. In *Connell*, Local 100 attempted to force Connell to sign an agreement prohibiting it from subcontracting work performed at the site of construction to a contractor that was not party to a collective bargaining agreement with the union; however, Local 100 never sought to represent Connell's employees or bargain with Connell on their behalf. In response, Connell filed an antitrust suit against the union. Local 100 argued its subcontracting restriction was exempt from antitrust scrutiny because it complied with the express language of Section 8(e)'s construction industry proviso. Recognizing that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intent of its

[18] See *Carpenters Local 743 (Longs Drug), 278 NLRB 440 (1986)*. In addition, if the PLA sets forth terms and conditions for an employer's employees, the employer must be "primarily engaged in the construction industry" in order to satisfy Section 8(f)'s statutory requirements.

makers," the U.S. Supreme Court rejected the union's argument and held that Section 8(e)'s construction industry proviso extends only to agreements entered into in the context of a bona fide collective bargaining relationship. The Court further held that Section 8(e) created a statutory exception to federal antitrust laws and, therefore, a violation of Section 8(e) may form the basis for a federal antitrust lawsuit because "it has the potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions."

The Supreme Court noted that a signatory subcontracting restriction may be permissible under Section 8(e) if it is negotiated and executed to resolve the problems involved in permitting union and nonunion employees to work side by side at a common construction site; however, the Court did not pass judgment on whether such an exception actually existed or formulate a standard for the application of such an exception.[19]

The NLRB thereafter discussed the requirement that signatory subcontracting restrictions must be entered into pursuant to a bona fide collective bargaining relationship in *Glen Falls Building and Construction Trades Council (Indeck Energy Services), 350 NLRB No. 42 (NLRB 2007).* In *Glen Falls*, the NLRB invalidated an agreement under Section 8(e) of the NLRA between Indeck Energy Services, Inc. ("Indeck"), an owner and operator of power cogeneration facilities, and the Glen Falls Building and Construction Trades Council relating to the construction of a power cogeneration facility in Corinth, New York. The agreement did not regulate the terms and

[19] See *Connell, 421 U.S. at 628-30*. The NLRB's decision in *Colorado Building & Construction Trades (Utilities Services), 239 NLRB 253, 256 (1978)*, provides some guidance regarding what circumstances may justify a union signatory subcontracting clause negotiated outside the context of a collective bargaining relationship. In *Utilities Services*, the Board rejected the argument that a signatory subcontracting agreement negotiated outside the context of a collective bargaining was nevertheless permissible because it sought to reduce friction between union and nonunion employees at a jobsite, because the agreement "did not restrict subcontracting of other types of work at the jobsite, … Thus, the clause allows for the possibility of union and nonunion employees working side by side at a jobsite." See also *Pacific Northwest Council (Hoffman Construction), 292 NLRB 562 (1989)* (agreeing with *Utilities Services*).

conditions of employment of Indeck's employees. Rather, the agreement was solely intended to prohibit Indeck from subcontracting or permitting the subcontracting of any work on the Corinth project to a company that was not a party to a PLA with Glen Falls Building and Construction Trades Council and that did not agree to perform all work on the project under the terms of the PLA.

The NLRB held that, even though the PLA was technically limited to work to be performed at the site of construction and, therefore, fell within the literal language of Section 8(e)'s construction industry proviso, the agreement violated Section 8(e) because it did not arise in the context of a bona-fide collective bargaining relationship between the union and Indeck. The NLRB explained:

> Nothing in either agreement purported to relate to terms and conditions of employment for any Indeck … employees. The sole purpose of those agreements was to bind Indeck to select a contractor who, in turn, would subcontract work only to employers who signed the Corinth PLA. Indeck ... [was] not signatory to the PLA. Accordingly, the Respondents have failed to prove that the challenged agreements and the lawsuit to enforce them are entitled to protection under the Section 8(e) proviso based on the collective-bargaining relationship prong of the *Connell* test.

See *Glen Falls Building and Construction Trades Council*, *350 NLRB at 46.*

In light of *Connell* and *Indeck*, a party who enters into a PLA that does not cover work performed by that entities' employees and thereafter abides by the PLA's subcontracting restriction could be subjected to an unfair labor practice charge and/or be exposed to federal antitrust liability, even if the subcontracting restriction only applied to jobsite construction work.

B. Public Entities Imposing PLAs On Public And/or Private Projects

Public entities are increasingly passing legislation and/or issuing executive orders requiring successful bidders on public construction projects to agree and abide by terms of project labor

agreements designed to assure labor stability over the length of the project. In addition to requirements that signatory contractors exclusively utilize the signatory labor unions as their source of labor, these PLAs also typically include obligations to ensure a certain percentage of the contractor's workforce are local residents, minorities, female, and/or apprentices. Public entities also have started passing legislation and/or issuing executive orders requiring PLAs on private construction projects. The legality of these PLAs, as well as their hiring requirements, have been challenged with varying degrees of success as preempted by the NLRA and/or as violating the United States Constitution.

i. Preemption

In *Metropolitan Life Ins. Co. v. Massachusetts*, *471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985)*, the United States Supreme Court articulated two distinct NLRA preemption principles. The first, often called *Garmon* preemption, forbids state and local regulation of activities protected by Section 7 of the NLRA, or activities that would constitute an unfair labor practice under Section 8 of the NLRA.[20] *Garmon* preemption also prohibits regulation of activities that the NLRA only *arguably* protects or prohibits.[21] In this respect, *Garmon* preemption is intended to prevent conflict between state and local regulation, and Congress's "integrated scheme of regulation" embodied in Sections 7 and 8 of the NLRA.[22]

The second preemption principle, often called *Machinists* preemption, prohibits state and municipal regulation of areas that have been left "to be controlled by the free play of economic forces."[23] *Machinists* preemption "protects against state interference with the policies implicated

[20] See *San Diego Building Trades Council v. Garmon*, *359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959).*
[21] See *Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. (Boston Harbor)*, *507, U.S. 218, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993).*
[22] *Id.*
[23] See *Machinists v. Wisconsin Employment Relations Comm'n*, *427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976)*.

by the structure of the [NLRA] itself, by preempting state law and state causes of action concerning conduct Congress intended to be unregulated."[24] In *Machinists*, the Supreme Court held that the Wisconsin Employment Relations Commission could not designate the concerted refusal to work overtime by a union and its members as an unfair labor practice under state law because Congress did not intend such self-help activity to be regulable by the States.[25]

The threshold question to preemption under either analysis is whether the state and local government acted as a market regulator or as a market participant, because state actions as a market participant are not preempted by the NLRA.[26] In this regard, the Supreme Court noted:

> When we say the NLRA preempts state law, we mean that the NLRA prevents a State from regulating within a protected zone, whether it be a zone protected and reserved for market freedom, see Machinists, or for NLRA jurisdiction, see Garmon. A State does not regulate, however, simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to preemption by the NLRA, because preemption doctrines apply only to state *regulation*.

Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. at 226-27.

The market participant exception to NLRA preemption is rooted in the principle that a government, just like any other party participating in an economic market, is free to engage in the efficient procurement and sale of goods and services.[27]

Circuit Courts have developed different standards for determining whether a State or locality acts as a market participant. The Third and Fifth Circuit Courts of Appeals utilize the following two-part framework: (1) whether the challenged funding condition serves to advance or

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[24] See *Metropolitan Life Ins. Co., 471 U.S. at 749*.
[25] See *Machinists, 427 U.S.at 148-150*.
[26] See *Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. at 226-27*.
[27] See *Associated Builders and Contractors, Inc., New Jersey Chapter v. City of Jersey City, New Jersey, 836 F.3d 412, 417-18 (3d Cir. 2016).*

preserve the state's proprietary interest in a project or transaction, as an investor, owner, or financier; and (2) whether the scope of the funding condition is specifically tailored to the proprietary interest.[28]

The Seventh Circuit Court of Appeals has alternatively held that a governmental action need not be either proprietary or regulatory in order to be subject to NLRA preemption.[29] The NLRA forbids only actions that are regulatory.[30] For instance, in *Northern Illinois Chapters of Associated Builders and Contractors, Inc., 431 F.3d 1004 (7th Cir 2005)*, the Seventh Circuit held that the fact Illinois was not acting as a proprietor did not resolve the question of whether it was acting as a regulator, and its conditioning of State subsidies on entering into a project labor agreement was not tantamount to regulation because the State did not seek to affect labor relations generally.[31] The Seventh Circuit explained that "both labor and management are free to make independent decisions with respect to all activities other than those for which the State pays."[32]

The Sixth and Ninth Circuit Courts of Appeals have adopted yet another standard, which provides that a State or local government acts as a market participant so long as it satisfies one of the two prongs utilized by the Third and Fifth Circuits – i.e., the State acts with a proprietary interest *or* its act is narrowly tailored to address a specific proprietary problem. [33]

Preemption challenges to governmental action that conditions receiving public funding or being qualified to contract with public entity on entering into a PLA have widely failed based on the market participant exception. However, not every challenge to a local ordinance requiring the

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[28] See *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hosp. Res., LLC, 390 F.3d 206, 216 (3d Cir. 2004)*; *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686 (5th Cir. 1999).*

[29] See *Northern Illinois Chapter of Associated Builders and Contractors, Inc. v. Lavin, 431 F.3d 1004, 1006 (7th Cir. 2005).*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] See *Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1023 (9th Cir. 2010)*; *Allied Construction Industries v. City of Cincinnati, 879 F.3d 215 (6th Cir. 2018).*

use of a PLA has been unsuccessful. In 2016, the Third Circuit Court of Appeals held that a city acted as a market regulator when it passed a city ordinance that conditioned tax exemptions to private developers on the developer's agreement to enter into and abide by a PLA. See *Associated Builders and Contractors, Inc., New Jersey Chapter v. City of Jersey City, New Jersey, 836 F.3d 412 (3d Cir. 2016).* In that case, Jersey City passed an Ordinance imposing certain requirements on developers of "public construction projects costing at least $5,000,000 and entered into by the City using public funds," and "tax abated projects," which are projects costing at least $25,000,000 and funded only with private investment.[34] Specifically, the Ordinance required that, prior to commencing work on the subject project, the developer had to execute a PLA binding the developer's contractors and subcontractors.[35]

The Associated Builders and Contractors, Jersey City Chapter, challenged the Ordinance as applied to tax-abated projects was preempted by the NLRA.[36] Jersey City argued it has a proprietary interest in enforcing the Ordinance because "the tax abatement functions as a subsidy that finances or invests in each Project."[37] The Third Circuit rejected this argument, and held that Jersey City "does not purchase or otherwise fund the services of private developers or contractors who are constructing Tax Abated Projects, or the goods used in those projects; nor does it sell those services or goods or invest, own, or finance the projects. Instead, the City simply reduces the developer's tax burden for a period of time – an endeavor [the U.S. Supreme Court] made crystal clear is not 'direct state involvement in the market."[38]

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[34] See *Associated Builders and Contractors, Inc., New Jersey Chapter v. City of Jersey City, New Jersey, 836 F.3d at 414.*
[35] *Id.*
[36] *Id. at 415-16.*
[37] *Id. at 419.*
[38] *Id.*

The Third Circuit's decision was limited to whether Jersey City acted as a market participant or a market regulator. It did not pass judgment on whether the Ordinance was in fact preempted by the NLRA.[39] Instead, it remanded the case to the U.S. District Court for the District of New Jersey, which, in June 2017, held that the Ordinance fell squarely within the two NLRA preemption doctrines.[40] The Court explained, "mandating that tax abatement recipients enter into a PLA with certain required terms, such as a no strikes or lockouts provision, directly intrudes on Section 7 and Section 8 of the NLRA. These sections of the NLRA 'safeguard an employee's right to join, or refrain from joining a labor union' and preempt 'state and local laws that strip employees of certain self-help economic tools like strikes and lockouts.'"[41]

ii. Constitutional Concerns

PLAs implemented by State or local governmental entities that require contractors and subcontractors to enter into and abide by minority, female, and/or local residency hiring goals may violate the Privileges and Immunities Clause and/or the Equal Protection Clause of the U.S. Constitution.

Privileges and Immunities Clause

Article IV, Section 2 of the Constitution (the Privileges and Immunities Clause) provides that, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[42] The U.S. Supreme Court has stated that the primary purpose of the Privileges and Immunities Clause was:

> … to help fuse into one Nation a collective of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of

[39] *Id. at 421*.
[40] See *Associated Builders and Contractors, Inc. v. City of Jersey City, New Jersey, 2017 WL 2616889 (D.N.J. 2017).*
[41] *Id. at 2.* The City of Jersey City has subsequently amended the contested Ordinance so that it applies to private construction projects that receive tax abatement ***and*** are subsidized by public bonds.
[42] U.S. CONST. art IV, §2.

> State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation.[43]

The Privileges and Immunities Clause prevents a state from discriminating against noncitizens through economic means.[44]

Courts utilize a two-step process when evaluating state action under the Privileges and Immunities Clause.[45] First, the court must determine if the state action burdens one of the privileges and immunities "bearing upon the vitality of the Nation as a single entity."[46] With respect to this prong, the Supreme Court has held that the right of a citizen in one state to pass into any other state of the Union for the purpose of engaging in lawful commerce or business " is one of the most fundamental of those privileges protected by the Clause."[47]

Once a fundamental privilege protected by the clause has been identified, the court must then determine whether there are substantial reasons for the difference in treatment and, if such reasons exist, whether the degree of discrimination bears a close relation to them.[48] In this respect, the government must show that the discriminated nonresidents "constitute a peculiar source of the evil at which the statute is aimed."[49]

Most state and local government hiring preference programs that have been challenged, including programs set forth in public PLAs, purport to alleviate rising local unemployment rates.[50] If the state or local government cannot substantiate that nonresidents are a peculiar source of local

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[43] *Toomer v. Witsell, 334 U.S. 385, 395, 68, S.Ct. 1156, 92 L.Ed. 1460 (1948).*
[44] *Id.*
[45] *United Bldg. and Constr. Trades Council of Camden County and Vicinity v. Mayor of the City of Camden, 465 U.S. 208, 218, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984).*
[46] *Baldwin v. Fish and Game Comm'n of Montana, 436 U.S. 371, 383, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978).*
[47] *City of Camden, 465 U.S. at 218-21.*
[48] *Toomer, 334 U.S. at 396.*
[49] *Toomer, 334 U.S. at 398*; see also *Associated Builders and Contractors, Inc. v. City of Jersey City, 2015 WL 4640600 (D.N.J. 2015)* (challenging public PLA's local hiring preference under Privileges and Immunities Clause).
[50] See *City of Camden, 465 U.S. at 223*; *W.C.M Window Company v. Bernardi, 730 F.2d 486 (7th Cir. 1984); Hudson County Building & Construction Trades Council v. City of Jersey City, 960 F.Supp. 823 (D.N.J. 1996).*

unemployment or show that the ordinance bears a close relation to combating this peculiar evil, the local hiring program violates the Privileges and Immunities Clause.[51] Government entities have historically been unsuccessful in arguing that local unemployment constitutes a substantial reason for discriminating against nonresidents in a local hiring program. As a result, state and governmental entities have increasingly carved out nonresidents from consideration in their local hiring programs – i.e., only requiring that a certain percentage of the employees who are State residents also be residents of a particular city/municipality – in order to avoid constitutional challenges under the Privileges and Immunities Clause.

Equal Protection Clause

Minority and Gender hiring goals in public PLAs may be subject to challenge under the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws."[52]

Local governmental, race-based affirmative action programs are subject to strict scrutiny.[53] A race-based preference program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest.[54] Race-based hiring goals can only be used to remedy ongoing and demonstrated discrimination against discrete minority groups who have applied for employment on State or local government sponsored or funded projects, and only after the State or local government has exhausted all other methods of combating that discrimination.[55] The exercise of this "remedial jurisdiction" is extraordinary and must be supported by a strong basis in evidence of past and continuing discrimination that is resistant to all other race-neutral efforts to eliminate

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[51] See *City of Camden, 465 U.S. at 223*; *W.C.M Window Company v. Bernardi, 730 F.2d 486 (7th Cir. 1984); Hudson County Building & Construction Trades Council v. City of Jersey City, 960 F.Supp. 823 (D.N.J. 1996)*.
[52] U.S. CONST., 14th Amendment.
[53] See *City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989)*.
[54] See *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 91 F.3d 586, 597 (3d Cir. 1996)*.
[55] *Id.*

the practice.[56] "A generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."[57] Thus, a public PLA that contains a race-based hiring preference may violate the 14th Amendments Equal Protection Clause if the local government did not ensure the inclusion of the race-based hiring goal meets the strict scrutiny standard.

Gender-based affirmative action programs are subject to intermediate scrutiny.[58] Under intermediate scrutiny, a State or local government must demonstrate that the gender preference program is substantially related to an important government interest.[59] The local government must demonstrate some past discrimination against women, but not necessarily discrimination by the government itself. One of the distinguishing features of intermediate scrutiny is that, unlike strict scrutiny, the government interest prong can be satisfied by a showing of societal discrimination in the relevant economic sector.[60] "The principal purpose of intermediate scrutiny is not so much to make sure that gender-based classifications are used only as a 'last resort,' as it is to ensure that gender classifications are based on reasoned analysis rather than archaic stereotypes."[61]

At least one federal court has held that a gender-based hiring preference did not substantially relate to the goal of eliminating gender discrimination in public employment because the goal, at a minimum, must include the development of gender-neutral selection procedures. Otherwise, both discriminatory selection procedures and remedial gender-based appointments would likely continue forever.[62] In light thereof, public PLAs that contain gender-based hiring

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[56] *Id.*
[57] See *J.A. Croson, 488 U.S. at 498.*
[58] See *Craig v. Boren, 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).*
[59] See *Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982).*
[60] See *Hogan, 458 U.S. at 728-29; Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1580 (11th Cir. 1994).*
[61] *Seibels, 31 F.3d at 1581.*
[62] *Id.*

preferences may violate the 14th Amendments Equal Protection Clause if the program is strictly limited to gender-based hiring goals.

C. Withdrawal Liability Implications

Contractors and suppliers that agree to be bound by a PLA covering non-jobsite work (i.e., off-site deliveries or prefabrication of materials) and/or requiring contributions to a non-construction industry multiemployer defined benefit pension plan ("DB Plan") are being subjected to withdrawal liability assessments following the completion of the project.

In general, an employer who contributes to a DB Plan may be subject to withdrawal liability (the employer's *pro rata* share of the plan's unfunded vested benefits) when the employer either ceases to have an obligation to contribute to the plan, or permanently ceases all covered operations under the plan.[63] In this respect, DB Plans have recently argued that an employer who performs work under a PLA effectuates a complete withdrawal from a DB Plan if its obligation to contribute to the DB Plan ceases upon the completion of a project. The strength of this argument appears dependent on the type of work performed under the PLA and/or the nature of the DB Plan at issue.

ERISA contains a partial exemption from withdrawal liability for employers who contribute to a DB plan for work performed in the building and construction industry.[64] The construction industry exemption provides that no withdrawal occurs, and no liability is assessed, if, upon ceasing to have an obligation to contribute to a construction industry DB plan, a construction industry employer ceases to perform work within the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required and does not resume such work for a period of five years.[65] Withdrawal liability could be assessed, however, if

[63] 29 U.S.C. §1383(a).
[64] 29 U.S.C. §1383(b).
[65] 29 U.S.C. §1383(b)(1).

the employer continues to perform work in the same jurisdiction of the collective bargaining agreement, on either a non-union basis or without resuming its contribution obligation, within five years of ceasing its contribution obligation.[66]

Certain requirements must be met in order to fall within the construction industry exemption. Specifically, the exemption applies if: (i) the DB plan "*primarily covers employees in the building and construction industry*;" and (ii) "*substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry*".[67] The first prong's use of the term "primarily" suggests more than 50% of the employees covered by the DB plan would need to perform work in the building in construction industry. While neither ERISA nor its regulations define the phrase "*substantially all*" for purposes of the second prong, the Seventh Circuit Court of Appeals defined it as meaning 85% or more.[68] In addition, courts that have interpreted ERISA's construction industry exemption have referred to the National Labor Relations Act to determine which employees are performing work in the building and construction industry.[69] Thus, employees who manufacture construction materials at remote fabrication plants that are installed by others at a construction site have been found not to be in the building and construction industry.[70] Similarly, employees who merely drive materials to a job site (typically Teamsters) are not considered building and construction industry employees.[71]

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[66] 29 U.S.C. §1383(b)(2).

[67] 29 U.S.C. §1383(b)(1). A DB Plan is also permitted to adopt the construction industry exemption by amendment; however, any such amendment must be approved by the Pension Benefit Guaranty Corporation. See 29 U.S.C. §1383(b)(1)(B)(ii).

[68] *Central States, Southeast and Southwest Areas Pension Fund v. Robinson Cartage, 55 F.3d 1318 (7th Cir. 1995).*

[69] *Union Asphalts and Roadoils, Inc. v. MO-KAN Teamsters Pension Fund, 857 F.2d 1230 (8th Cir. 1988).*

[70] See *Ohio Valley Carpenters District Council (Cardinal Industries, Inc.), 136 NLRB 977 (1962); Local 27, Sheet Metal Workers Intern. Ass'n (Aerosonics, Inc.), 321 NLRB 540 (1996).*

[71] *Union Asphalts and Roadoils, Inc. v. MO-KAN Teamsters Pension Fund, 857 F.2d 1230 (8th Cir. 1988); Central States, Southeast and Southwest Areas Pension Fund v. Robinson Cartage, 55 F.3d 1318 (7th Cir. 1995); Warner & Sons, Inc. v. Central States, Southeast and Southwest Areas Pension Fund, 2009 WL 5178376 (N.D.Ill. 2009).*

With the rise of PLAs on public and private projects, it is unclear how contributions to a DB Plan for work performed under the PLA would be handled for purposes of withdrawal liability. However, at least one federal court has applied ERISA's construction industry exemption to withdrawal liability with respect to the cessation of a contribution obligation that arose under a PLA. See *Northern New England Carpenters Pension Plan v. H.P. Cummings Construction Company, 2003 WL 1856440 (D.Maine 2003).*

In *H.P. Cummings*, the employer, H.P. Cummings Construction Company ("Cummings"), was bound by an *area wide* collective bargaining agreement with the Northern New England District Council of Carpenters (the "District Council") covering construction projects in Maine which required Cummings to contribute to the Northern New England Carpenters Pension Fund ("NNEC Pension Fund"). Cummings also signed *project* agreements with local carpenter unions in northern and central New Hampshire and Vermont on a job-by-job basis. Those agreements also required Cummings to contribute to the NNEC Pension Fund. On February 23, 2001, the District Council disclaimed interest in further representing Cummings's employees on construction projects in Maine. When Cummings continued to perform construction projects in Maine on a non-union basis, the Northern New England Carpenters Pension Plan determined that Cummings effectuated a complete withdrawal from the plan. The withdrawal liability assessment included contributions remitted to the plan for work performed in Maine, as well as contributions made pursuant to project agreements in New Hampshire and Vermont. Cummings challenged the plan's assessment in arbitration.

The arbitrator held that Cummings "*at least partially*" withdrew from the plan by continuing to work on a non-union basis in Maine, but ordered the plan to recalculate the withdrawal liability assessment to exclude from the computation contributions made on behalf of

employees covered by project agreements in Vermont and New Hampshire. The arbitrator discussed the Vermont and New Hampshire contributions as follows:

> The pension contribution obligation for the non-Maine employees arose under very different collective bargaining agreements than covered the bulk of the Company's carpenter workforce. In Vermont and New Hampshire, Union members were employed only under very narrowly drawn project labor agreements. The Union accepted these agreements, presumably because it was the best they could get, which were limited to specific projects at particular institutions. Once a project was completed, the agreement expired, and the Company was under no on-going obligation to use Union labor, and make contributions, if it did work in that state, or even at the same institution on a different project.
>
> The relevance of this for withdrawal liability purposes is that §1383(b)(2)(B) states a withdrawal occurs if an employer who ceases to have an obligation to contribute to the plan either continues to perform work "in the jurisdiction of the collective bargaining agreement," or resumes such work in the following five years. As was evident from the fact that in 1998, 1999, and early 2000, the Company would work non-union throughout New Hampshire and Vermont on any project not covered by a project labor agreement, the "jurisdiction of the collective bargaining agreement" only covered the work defined in the specific project labor agreements. Hence, the fact that the Company withdrew regarding its Maine employees at the point it no longer had an obligation to contribute under the Maine collective bargaining agreement, yet continued to perform work in Maine, did not mean it withdrew regarding the New Hampshire and Vermont employees.

See *Cummings*, *2003 WL 1856440, at p. 10*.

The U.S. District Court of Maine upheld the arbitrator's award in its entirety and held, in pertinent part:

> The jurisdiction of the collective bargaining agreement from which Cummings withdrew in this case was Maine. From all that appears in the record, the jurisdiction of the New Hampshire and Vermont agreements was a single project in each case, and each project has been completed. In statutory terms, there was nothing in New Hampshire and Vermont from which Cummings withdrew.

See *Cummings*, *2003 WL 1856440, at p. 11*.

H.P. Cummings involved construction work performed at the site of construction and, therefore, ERISA's construction industry exemption was applicable. However, employers who remit contributions under a PLA for non-construction industry work or to a non-construction industry DB Plan would not be covered by the ERISA construction industry exemption and may be exposed to a withdrawal liability assessment upon the completion of the project if the employer's contribution obligation to the DB Plan ceases upon the completion of the project.[72]

CONCLUSION

Project labor agreements continue to be a prominent vehicle for ensuring labor harmony and the availability of skilled labor on private and public projects. However, as PLAs become more commonly tied to third-party financing, it should be expected that PLA drafters will push the boundaries of permissible contractual provisions. Thus, it is imperative that contractors understand what provisions of a PLA are enforceable and the potential liability that could result from agreeing to and abiding by an unlawful contractual provision.

[72] Although we are not aware of any caselaw addressing this issue, we question whether a non-construction industry employer who contributed to a DB Plan pursuant to a PLA ever had an "obligation to contribute" to the DB Plan within the meaning of ERISA and thus could be subjected to withdrawal liability upon the completion of the project if the PLA was void and unenforceable under Section 8(f) of the NLRA with respect to that employer.