

# **The History and Development of the Use of Project Labor Agreements in the U.S.A.**

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## Background <sup>1</sup>

A project labor agreement (PLA) is a type of collective bargaining agreement sometimes used on construction projects. It forms the centerpiece of labor relations by standardizing terms and conditions of employment among multiple contractors and providing a single dispute resolution mechanism. Another common aspect of project-labor agreements is that unions agree not to strike or slow down a project for the entire duration of the project. Once agreed to, a PLA is a contractually binding agreement which becomes part of the bid specification that all winning contractors, union and nonunion, must follow. Typically, a PLA remains effective for the duration of the project.

Such agreements were first developed by public owners of large construction projects as a method to resolve problems unique to the construction industry. Under the original version of the National Labor Relations Act (NLRA), all pre-hire agreements were illegal because the agreements appointed a sole union representative before an election of union members had been held. However, the NLRA was subsequently amended in 1959 by adding 29 U.S.C. Sec. 158(f) and 158(e) which allow contractors to enter into pre-hire agreements.

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<sup>1</sup> See Kopp, Robert W. and Gaal, John, "The Case for Project Labor Agreements", Construction Lawyer (January 1999); Langworthy, David J., "Project-Labor Agreements after Boston Harbor: Do They Violate Competitive Bidding Laws?", William and Mitchell Law Review (Summer 1996); and "Project Labor Agreements on Public Construction Projects: The Case For and Against", Worcester Municipal Research Bureau (May 21, 2001).

## History of PLA Use<sup>2</sup>

The lack of available complete data on the use of PLAs precludes an exact count of their total numbers at any level—federal, state government, or private sector. Although information concerning the use of PLAs is fairly scarce, there is some general agreement about their historical use. PLAs likely were first used on government-funded projects in the late 1930s and early 1940s on a variety of government projects such as flood control and hydroelectric dams. Examples include the Grand Coulee Dam in the State of Washington which began in 1937 and the Shasta Dam in California which began in 1940. During and after World War II, atomic energy and defense construction projects used PLAs. There appears to have been a lull in the use of such agreements during the 1950s. However, interest in the use of project agreements renewed in the 1960s. For example, there was the Walt Disney World Construction Project Agreement and large project managers began to use project agreements. NASA also used PLAs in construction at Cape Canaveral, FL, during the 1960s. When construction industry wage inflation led a general price inflation that accelerated through the early 1970s, a variety of efforts to reform the employee relations structure in the construction industry further increased interest in PLAs. Such agreements were used successfully to build the TransAlaska Pipeline (1975-77) and a number of other important public works projects. More recently PLAs have been used on large projects such as the downtown Boston Central Artery Project (the "Big Dig") and the Boston Harbor Project.

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<sup>2</sup> See Johnston-Dodds, Kimberly. "Constructing California: A Review of Project Labor Agreements." California State Library, California Research Bureau Reports (October 2001); Perritt, Jr, Henry H., "Keeping the Government Out of the Way: Project Labor Agreements under the Supreme Court's Boston Harbor Decision", Labor Lawyer (Spring 1996); Kopp, Robert W. and Gaal, John, "The Case for Project Labor Agreements", Construction Lawyer (January 1999); and "Project Labor Agreements - The Extent of Their Use and Related Information" United States General Accounting Office Report to Congressional Requestors (May 1998).

The Federal General Accounting Office (GAO) reports that PLAs have been used in all 50 states and the District of Columbia on federal, state, local government, or private sector construction projects, including nonfederal projects that involved federal funds.

## Contents of Project Labor Agreements<sup>3</sup>

### Older PLAs

Until around 1980, PLAs were generally used only on large, extended duration and complex construction projects. As such, they were relatively rare and typically established wages and conditions to obtain labor for the large and complex projects. In the 1980s, PLAs started to take on a new role in the construction industry. With a sharp downturn in construction, customers started to become more price-conscious. This environment favored non-union contractors. In order to keep some of the union sector's largest customers and stop the loss of jobs to the merit-shop industry, PLAs were written that contained wage and benefit concessions. The wage concessions were partially offset by the promise of steady work for an extended period of time.

### "Modern"-era PLAs

In the 1990s when the construction economy improved and some of the incentive of the Unions to trade lower wages for the promise of steady work faded one would have expected PLAs to also fade from significance. But that was not the case. PLAs started to be used on more modest projects, such as schools and courthouses and to cover renovations in addition to new construction.

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<sup>3</sup> See Dale Belman, PhD, Michigan State University, Matthew Bodah, University of Rhode Island, and Peter Phillips, University of Utah. "Project Labor Agreements" (2007); and "Project Labor Agreements on Public Construction Projects: The Case For and Against", Worcester Municipal Research Bureau (May 21, 2001).

While the language of every PLA is different, most modern PLAs typically guarantee uniform wages, work rules, and benefits across the multiple crafts employed on a project. In addition, PLAs typically provide grievance procedures for settling disputes and include no-strike and no-lockout provisions. Many modern PLAs contain expedited procedures to handle any job actions that do occur and provide for quick arbitration and resolution of any issues that do arise. The no-strike/lockout and accelerated grievance provisions are often very important to the successful operation of a PLA.

### The History of Legal Challenges to PLAs<sup>4</sup>

PLAs have been prevalent for decades on private construction projects and their legality on such projects seems to be long beyond question. Even though PLAs also have had a long history on public projects, until the 1990s, their use on public projects was not a subject of great debate.

The seminal case dealing with the legality of PLAs on publically funded projects is *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*<sup>5</sup>, commonly referred to as "Boston Harbor", because it dealt with the clean up of the harbor around Boston. The cleanup project was undertaken in the early 1990's as a result of a U.S. District Court order under the Federal Water Pollution Control Act. The Massachusetts Water Resources Authority (MWRA) had primary responsibility for completing the multimillion dollar project. The MWRA selected

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<sup>4</sup> See Kopp, Robert W. and Gaal, John, "The Case for Project Labor Agreements", Construction Lawyer (January 1999); Langworthy, David J., "Project-Labor Agreements after Boston Harbor: Do They Violate Competitive Bidding Laws?", William and Mitchell Law Review (Summer 1996); "Project Labor Agreements on Public Construction Projects: The Case For and Against", Worcester Municipal Research Bureau (May 21, 2001); and Johnston-Dodds, Kimberly "Constructing California: A Review of Project Labor Agreements." California State Library, California Research Bureau Reports (October 2001).

<sup>5</sup> 507 U.S. 218, 113 S.Ct. 1190 (1993).

Kaiser Engineers, Inc. as the project manager. Kaiser suggested that a PLA be established for the project and adherence to it be made part of the bid specifications. The PLA was made between the unions and Kaiser on behalf of the MWRA.

The Associated Builders and Contractors of Massachusetts and Rhode Island Chapters (ABC) challenged the MWRA's Project Labor Agreement in the U.S. District Court for the Eastern District of Massachusetts. They argued that state sponsorship (through the MWRA) of a PLA violates the Federal National Labor Relations Act (NLRA) and the Employee Retirement Income Security Act (ERISA). They also alleged that the PLA violated the 14th Amendment and Federal and state antitrust laws. After the District Court ruled in favor of the MWRA, the U.S. Court of Appeals for the First Circuit overruled the District Court's decision by holding that such a PLA is not allowed under the National Labor Relations Act.

In 1993, the U.S. Supreme Court unanimously reversed the First Circuit Court of Appeals' decision, holding that the PLA was not preempted by the NLRA because sections 8(e) and 8(f) of that Act made special provision for the construction industry. These two sections of the NLRA, according to the Supreme Court ruling, were "intended to accommodate" such conditions specific to the construction industry as "the shortterm nature of employment, which makes post-hire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a longstanding custom of pre-hire bargaining in the industry." The Court also ruled that the MWRA and the State (Massachusetts) were not acting in a "regulatory" way, because the State had not enacted a regulation requiring that PLAs be used. Instead, the Court treated the MWRA as a private purchaser of products and services in the market, acting in a "proprietary" manner. Under the ruling, even though the NLRA does not specifically authorize governmental bodies to institute PLAs under sections 8 (e) and (f), they are

allowed to do so when acting as purchasers of services in the construction market just as private purchasers do.

After the Boston Harbor decision, legal challenges were brought against public PLAs in a variety of state courts. The majority of courts which have heard the issue have approved requirements for PLAs on public construction, often without much detailed analysis. Courts in Missouri<sup>6</sup>, Massachusetts<sup>7</sup>, Ohio<sup>8</sup>, Minnesota<sup>9</sup>, Nevada<sup>10</sup>, and California<sup>11</sup> have approved PLAs based simply on finding that the PLA requirement has a rational basis or because they are available to all contractors (union and nonunion) on the same basis. Although utilizing a more detailed analysis, Alaska also has authorized the use of PLAs as consistent with its competitive bidding requirements.<sup>12</sup> New York has also approved the use of PLAs, but requires an individualized assessment of each PLA requirement. New York requires that the implementing municipality demonstrate that the use of a PLA on a particular project will affirmatively advance the specific purposes of the state's competitive bidding laws.<sup>13</sup>

One state that has rejected the use of PLAs is New Jersey. The courts there generally do not allow the use of PLAs on public projects, except possibly in the most unique of situations, based upon a very narrow interpretation of its competitive bidding law.<sup>14</sup>

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<sup>6</sup> *Hanten v. School Dist. of Riverview Gardens*, 13 F.Supp.2d 971 (E.D. Mo. 1998).

<sup>7</sup> *Utility Contractors Ass'n of New England, Inc. v. Commissioners of the Massachusetts Dep't of Public Works*, 5 Mass.L.Rptr. 17 (Mass. Superior Court 1996).

<sup>8</sup> *Associated Builders v. Jefferson County*, 106 Ohio App. 3d 176 (1995).

<sup>9</sup> *Minnesota Chapter of Assoc. Builders v. St. Louis County*, 825 F. Supp. 238 (D. Minn. 1993).

<sup>10</sup> *Nevada Associated Builders and Contractors v. Miller*, Case No. A363857 (Dist. Ct. Clark County, Nev. Mar. 18, 1997).

<sup>11</sup> *Associated Builders and Contractors, Inc. v. San Francisco Airports Comm'n*, 68 Cal. Rptr. 2d 737 (Ct. App. 1997).

<sup>12</sup> *Laborers Local 942 v. Lampkin*, 956 P.2d 422 (AK Supreme Court 1998).

<sup>13</sup> *New York State Chapter Inc., Associated Gen. Contractors of Am. v. New York State Thruway Authority*, 666 N.E.2d 185 (N.Y. Ct.App. 1996).

<sup>14</sup> *Tormee Const. v. Mercer County Improvements Authority*, 669 A.2d 1369 (N.J. Supreme Court 1995).

## White House/Executive Orders and PLAs

In addition to the judicial treatment of PLAs, there has been a high level of political involvement in the controversy over the use of such agreements. This involvement has reached the highest level of our government. At the time Boston Harbor was working its way through the courts, President George H.W. Bush signed Executive Order 12818: "Open Bidding on Federal and Federally Funded Construction Projects", in 1992. The purpose of the Executive Order was to eliminate the use of project-labor agreements that deny opportunities to nonunion contractors and that discriminate against nonunion workers. The Executive Order was also expected to reduce significantly the costs on Federal construction projects. Pursuant to Executive Order 12818, a new section was added to the Code of Federal Regulations, 48 C.F.R. § 22.5, to implement the Order<sup>15</sup>. The new rule explained that some situations may require the use of a project-labor agreement. These situations include national security and imminent threats to public health or safety. The rule specifically stated that the threat of labor unrest was not a reason that could be used to justify the use of a project-labor agreement. The reason usually given by public authorities in support of project-labor agreements is the possibility of labor unrest on the project. The CFR indicates that project-labor agreements should only be permitted when the damage caused by them is less than some other potential damage to the public.

Shortly after Bill Clinton took office in 1992, he revoked President Bush's Executive Order with the issuance of Executive Order 12836. Additionally, in 1997, President Clinton announced his intention to issue an Executive Order requiring Federal agencies to consider using PLAs on construction contracts of a certain size. After the announcement garnered criticism, including proposed bills to halt the order if issued, the President shelved the Executive Order

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<sup>15</sup> 57 Fed. Reg. 55470-01. This section was removed from the Code of Federal Regulations after issuance of Executive Order 12836.

plan. He opted instead to issue an Executive Memorandum encouraging (rather than requiring) Federal agencies to consider PLAs on projects costing over \$5 million. Despite the more limited character of the Memorandum, it too incurred widespread criticism.

On February 17, 2001, President George W. Bush effectively revoked his predecessor's memorandum by issuing Executive Order 13202 prohibiting PLAs on federally funded or assisted construction projects. President Bush described his Order as necessary to promote "economical, nondiscriminatory, and efficient administration and completion of Federal and federally funded or assisted construction projects." Besides rescinding the 1997 Clinton Memorandum, this Executive Order also overturned Clinton's 1993 Executive Order that in turn had revoked President George H.W. Bush's Executive Order in 1992 limiting the use of PLAs.

Current President Barack Obama also became involved with PLAs. On February 6, 2009, he issued Executive Order 13502 encouraging the use of Project Labor Agreements on Federal projects of \$25 million or more. According to the Order, Project Labor Agreements promote efficient and timely completion of large-scale construction projects and prevent many of the problems inherent in such construction. The Obama Administration's Order restores the Clinton Administration's policy, and reverses the position of both Bush administrations.

## Conclusion

Project Labor Agreements have been around for a long period of time, even though the media attention makes them seem like a "new" thing. Although occasionally successful, legal challenges to the use of such agreements generally fail. Because the legality of such agreements appears to be relatively settled, both in the private and public arenas, it is important to understand how such agreements work and the general terms that are in such agreements. Before any such



agreements are entered into by contractors or employers, experienced legal counsel should be contacted to ensure appropriate terms and conditions are included.



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#### **LAW SCHOOL**

Syracuse University College of Law

J.D., 1974

#### **UNDERGRADUATE / GRADUATE EDUCATION**

University of Rochester

B.A., 1971

#### **PRACTICE AREAS**

- Construction Law
- Employment Litigation
- Entertainment & Sports Law
- Labor & Employment Law

#### **STATE(S) OF ADMISSION**

- District of Columbia
- Florida
- Michigan

#### **PROFESSIONAL EXPERIENCE**

- Foster, Swift, Collins & Smith, P.C., Shareholder(2008)
- Dickinson Wright, PLLC(2003-2008)
- Clark Hill(1995-2003)
- Honigman Miller(1987-1994)
- Proskauer, Rose, Goetz & Mendelson, Washington, D.C.(1979-1983)
- National Labor Relations Board, Office of General Counsel(1975-1979)

#### **COURTS**

- U.S. Supreme Court
- U.S. Sixth Circuit Court of Appeals
- U.S. District Court for the Eastern District of Michigan
- U.S. District Court for the District of Columbia
- U.S. District Court for the Northern District of Indiana
- U.S. Court of Appeals for the District of Columbia Circuit

#### **PUBLICATIONS**

- Author, "Job Safety Issues in the Construction Industry," American Bar Association, 1994
- Author, "Potential Liability of Architects, Engineers and Designers Under the Occupational Safety and Health Act of 1970," American Bar Association, 1993
- Author, "Paid Union Organizers: Trojan Horse of the Nineties?," Labor Law Reports - Insight (Commerce Clearing House, Inc.), 1993
- Author, "NAFTA's Labor Agreement: Does it Change the Outlook?," Labor Law Reports - insight (Commerce Clearing House, Inc.), 1993
- Author, "The Year Ends: A Look Back and a Look Ahead," Labor Law Reports - Insight (Commerce Clearing House, Inc.), 1992
- Author, "Americans With Disabilities Act, Compliance Handbook," Smith Publishers (Michigan Law), 1992
- Author, "Contending With Today's Key Employment Issues in Michigan," The Cambridge Institute, 1990-1991
- Author, "Should the Use of Permanent Strike Replacements Be Abolished?," Labor Law Reports - Insight (Commerce Clearing House, Inc.), 1990
- Author, "Wrongful Discharge Under Michigan Law," The Cambridge Institute, 1988-1990
- Author, "The Role of State Plans," Occupational Safety and Health Law, PLI 1980
- Author, "State Power to Regulate Liquor: Section Two of the Twenty-First Amendment Reconsidered," 24 Syracuse Law Review II 31, 1973

#### **AWARDS**

- Detroit Business, Best Lawyers in Detroit
- Best Lawyers in America
- Michigan Super Lawyers
- College of Labor & Employment Lawyers (Elected in 2001)
- Selected by three U.S. Presidents for the following positions: Federal Judge, U.S. District of Michigan (1986-1988); Assistant Secretary of Labor (1992); Chairman, National Labor Relations Board (2001)
- Top 100 Labor Lawyers in the U.S. (Labor Relations Institute)
- Who's Who in American Law (Since 1986)
- Who's Who in Finance and Industry (Since 1986)
- Who's Who of Emerging Leaders in America (Since 1986)
- Who's Who in the World (Since 1986)
- Who's Who in America (Since 1986)
- Who's Who in the Midwest (Since 1986)

#### **COMMUNITY ACTIVITIES**

- General Counsel, Republican Committee of Oakland County
- Temple Israel Brotherhood, Board of Directors
- B'nai B'rith, Barristers (Past President)
- B'nai B'rith, Metropolitan Detroit Council

- YMCA of Metropolitan Detroit (Camping Services Division) (1987 - 1993, 2002 - present)

#### **BAR ASSOCIATIONS**

- Federal Bar Association (Labor Law Committee)
- State Bar of Michigan (Labor Law Section)
- District of Columbia Bar (Labor Law Committee)
- The Florida Bar (Labor Law Committee)
- Detroit Bar Association
- American Bar Association (Construction Industry Forum; Labor Law Committee)

#### **LEGAL ASSOCIATIONS**

- American Employment Law Council
- Republican National Lawyers Association

#### **PROFESSIONAL ASSOCIATIONS**

- American Society of Employers (Chairman, 2003-2005)
- Construction Code Commission of Michigan (Chairman, 1999-2005)
- Construction Finance Management Association (President)
- Michigan Association of Home Builders (State Board of Directors, 1996-present)
- National Labor Relations Board (Member, Committee on Practice and Procedure, Region 7)
- Anti-Defamation League (Board of Directors, 1990-2003)
- Jewish Vocational Services (Board of Directors, 2001-2005)
- 400 Club (Republican Party) (Founder/President)
- Oakland County Lincoln Republican Party (President, 1990)
- Republican Committee of Oakland County (General Counsel)
- Associated General Contractors of America - Labor & Employment Council (Chairman 2006-2008)
- Construction Financial Management Association (Detroit, President 2008 - present)
- Michigan Construction Code 1993-2007 (Chairman 2001-2006)
- Air Conditioning Contractors of America, Detroit Chapter (Legal Counsel 1985-2002)
- Air Conditioning Contractors of America, Michigan Chapter (Legal Counsel 1985-2002)
- Michigan Food and Beverage Association, Labor Counsel (1987-present)
- Michigan Business and Professional Association, Labor Counsel (1987-present)
- Michigan Infrastructure and Transportation Association (Board of Directors, 2006-present)