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January 7, 2011

The Honorable Gregg Abbott, Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Re: Whether TEX. GOV'T CODE ANN. § 271.121 Prohibits a Governmental Entity from Requiring a Contractor or Other Vendor to Sign a Project Labor Agreement (Request No. 0931-GA).

Dear Mr. Attorney General:

Pursuant to the procedures set forth in TEX. GOV'T CODE ANN. § 402.042, the Honorable Todd Hunter, Chairman of the State of Texas House of Representatives Judiciary & Civil Jurisprudence Committee, has requested you to issue an opinion on a question affecting the public interest. Specifically, Chairman Hunter has asked whether TEX. GOV'T CODE ANN. § 271.121, which prohibits governmental entities from considering "whether a vendor is a member of or has another relationship with any organization" and requires such entities to "ensure that [their] bid specifications and any subsequent contract or other agreement do not deny or diminish the right of a person to work because of the person's membership or other relationship status with respect to any organization," prohibits a governmental entity from requiring a contractor or other vendor, as a condition of receiving a contract or subcontract awarded by a governmental entity for construction of a public work or public improvement, to agree to sign a project labor agreement, also known as a "PLA," for that project.

You have accepted Chairman Hunter's request, notified interested parties, and asked them to submit briefs if they care to do so. This letter is submitted on behalf of the Building and Construction Trades Department, AFL-CIO, its affiliate, the Texas State Building and Construction Trades Council, AFL-CIO, and the Texas State AFL-CIO, in response to your invitation to submit a brief concerning the issue raised in Chairman Hunter's request for an opinion.

The Building and Construction Trades Department, AFL-CIO ("Building Trades Department") is a department within the American Federation of Labor-Congress of Industrial Organizations comprised of thirteen national and international labor organizations that represent more than three million workers, many of whom are employed or are seeking employment in the building and construction industry. The Building Trades Department is also the parent organization of more than 300 state and local building and construction trades councils, including the Texas State Building and Construction Trades Council, AFL-CIO. The Building Trades Department and its state and local councils, including its councils in Texas, are or have been parties to many PLAs.

Project Labor Agreements Offer Governmental Entities in Texas a Useful Tool for Managing Large and Complex Public Works Projects.

A project labor agreement is a pre-hire collective bargaining agreement that governs labor relations for an entire construction project. PLAs are "designed to eliminate potential delays resulting from labor strife, to ensure a steady supply of skilled labor on the project, and to provide a contractually binding means of resolving worker grievances." *Associated Builders & Contractors v. San Francisco Airports Commission*, 981 P.2d 499, 502 (Cal. 1999). PLAs address issues specific to the construction industry, including "the short-term 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 prehire bargaining in the industry." *Building & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.* ("*Boston Harbor*"), 507 U.S. 218, 231 (1993).

When utilized, a PLA is made binding on every contractor and subcontractor employed on the project. Moreover, PLAs are comprehensive in their coverage of contractor/labor issues. Their provisions generally: (1) apply to all work performed under a specific contract or project, or at a specific location; (2) require recognition of the signatory unions as the sole bargaining representatives for covered workers, whether or not the workers are union members; (3) supersede all other collective bargaining agreements; (4) prohibit strikes and lockouts; (5) require hiring through union referral systems; (6) establish uniform work rules covering overtime, working hours, dispute resolution, and other matters; and (7) prescribe craft wages, either in the body of the agreement or in an appendix or attachment.

PLAs are most commonly used on large, complex, and time-sensitive construction projects, where the project owner sees the value in systematizing the terms under which the construction project proceeds. *See, e.g., Associated Builders & Contractors, Inc. v. Southern Nevada Water Authority*, 979 P.2d 224, 228 (Nev. 1999) (analyzing the importance of PLAs on large projects and their effect on competitive bidding laws); *New York State Chapter, Inc. v. New York State Thruway Authority*, 666 N.E.2d 185, 191-92 (N.Y. 1996) (discussing the validity of using PLAs on large projects and their relationship to competitive bidding requirements). By setting the terms of the project, PLAs coordinate how the different trades and contractors will work together in order to complete not only their individual tasks, but also the larger project. This is particularly important when the project is such that work on one aspect of the larger project may not begin until work on another aspect has been completed.

Notwithstanding the potential benefits that PLAs offer to both public and private owners, the Associated Builders and Contractors of America, Inc. ("ABC") and its political allies continue to argue that they are a bad deal. In response, America's Building Trades Unions pose one very simple yet profound question to the ABC and other individuals and organizations that oppose use of PLAs on public works projects: If PLAs are so bad, and if they are so inefficient and lead to huge cost increases, then why are so many cost-conscious and profit-oriented corporations in the private sector increasingly turning to PLAs to achieve "on time, on budget" results for their construction needs? In fact, if PLAs

are so bad, then how come over 300 of these agreements – both public and private, with a cumulative total cost in excess of $50 billion – were negotiated in 2010? Some of these projects include: the Blythe Solar project in California; the Plant Vogtle Nuclear project in Georgia; the Lawrence Energy Center in Kansas; a Toyota Manufacturing plant in Mississippi; W.R. Grace Chemical in Maryland; a Goodyear plant in Ohio; and the World Trade Center Towers in New York City.

For example, Toyota, a company long renowned for a corporate culture premised upon cost containment and efficiencies, has built all of its manufacturing facilities in the United States under PLAs (with another currently under construction in Mississippi). Toyota has reported that its construction costs per square foot are approximately 1/3 less than its competitors that eschew the use of PLAs. But how can that be when, according to the ABC and its allies, PLAs are the essence of economic and financial foolishness, leading to catastrophic cost increases?

What the ABC and its allies apparently fail to understand is that a PLA serves as a management tool that establishes the ground rules binding on all contractors and workers engaged on a project for its entire duration. By overriding each contractor's practices and setting the common rules for the project, it provides the construction manager with a mechanism for coordinating how the different trades and contractors will work together to complete not only their individual tasks, but also the larger project. As discussed in more detail below, these agreements reduce many of the uncertainties that are inherent in large-scale construction projects, by ensuring a steady flow of highly qualified labor, harmonizing work hours and work rules for all the contractors on the site, and establishing effective mechanisms for fostering communication and cooperation and avoiding and resolving disputes. By providing comprehensive coverage of all contractor/labor issues, they are often presented as "the ideal bargain between the interests of the contractors and employees and the developer and the owner of the project."[1/]

A project labor agreement is a special kind of agreement, authorized under the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. §§ 151-169, specifically to meet the particular characteristics of the construction industry which, as noted above, include "the short-term 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 prehire bargaining in the industry." *Boston Harbor*, 507 U.S. at 231. Thus, Sections 8(e) and (f) of the NLRA, 29 U.S.C. §§ 158(e) and (f), make special exceptions from other requirements of the Act in order to permit employers and unions in the construction industry to enter into pre-hire agreements that apply to all contractors and subcontractors that will operate on a construction site.

That is, whereas the NLRA generally precludes unions and employers from agreeing not to deal with certain other business entities, the proviso to Section 8(e) permits unions and employers in the construction industry to limit subcontracting to employers that agree to abide by their collective

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[1/] Siegel, Jolie M., Comment, *Project Labor Agreements and Competitive Bidding Statutes,* 3 U. Pa. J. Lab. & Emp. L. 295, 297-98 (2001).

bargaining agreement; and whereas the Act generally permits unions to engage in collective bargaining only after securing the support of a majority of the employees employed in a bargaining unit, Section 8(f) permits unions in the construction industry to enter into "pre-hire" agreements, before employees are hired and, therefore, before they have secured majority support. Governmental entities in Texas do not have to be concerned about whether they qualify as construction industry employers, entitled to the § 8(e) and (f) exemptions, in order to negotiate PLAs because they are not covered by the NLRA in the first instance.[2/] As the Ninth Circuit explained in *Johnson v. Rancho Santiago Community College District,* 623 F.3d 1011 (9th Cir., Oct. 10, 2010), the NLRA's exclusion of public entities from its prohibitions "simply means that [they] can participate in the market in a way in which private parties cannot." 623 F.3d at 1027.

PLAs are not generally used on short-term projects that involve a small number of contractors and/or subcontractors and only the members of a few trades. In those cases, where the owner or construction manager does not have to be concerned with coordinating the work of multiple employers, the PLA's mechanisms for facilitating communication, harmonizing work practices, resolving disputes, and securing skilled labor throughout all of the trades may be unnecessary. However, PLAs can assist governmental entities in efficiently and successfully completing most of the types of projects they undertake.

Like major construction owners in the private sector,[3/] many governmental entities in Texas have found that PLAs enhance the efficiency of their construction projects through a number of different mechanisms.

First, PLAs address workforce issues through provisions that commit the signatory unions to provide labor on a timely and non-discriminatory basis, usually within 48 hours, a commitment that is supported by arrangements among the unions that, when necessary to an adequate supply, facilitate the movement of skilled labor to areas where there are shortages. In the public sector, they also commonly include provisions permitting contractors that do not usually use union labor to bring specified numbers of their own "core" employees onto the job.

Second, most PLAs prohibit work disruptions – strikes, slowdowns, lockouts and other labor actions – and provide fast and harsh penalties for violations of such clauses and the use of labor-management committees to address potential conflicts, grievance and arbitration procedures to handle most problems, and highly developed methods to handle jurisdictional issues, such as pre-job conferences, detailed work assignment language, and methods for neutral settlement. The presence of

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[2/] The Act states that the term "'employer' . . . shall not include the United States . . . or any State or political subdivision thereof . . . ." 29 U.S.C. § 152(2).

[3/] Among the major construction owners that routinely use PLAs are the Walt Disney World, Toyota, Wal-Mart, General Motors, and a number of oil refineries, to name just a few. That Toyota and Wal-Mart see the value in these agreements is particularly noteworthy, since they have both vigorously resisted any efforts among their non-construction employees to organize unions.

these bans and the establishment of dispute resolution mechanisms support the efficient conduct of the project, both by removing many of the causes of disruptions and by emphasizing the importance of timeliness and cooperation to all project stakeholders.[4/]

Third, PLAs can also facilitate sequencing work by requiring pre-bid and pre-job conferences, which enable the parties to identify particular challenges the project will present, and regular worksite labor-management meetings, to anticipate problems, secure cooperation among the contractors and subcontractors operating on the site, and ensure that work progresses smoothly. Fourth, many PLAs include provisions that harmonize work time and promote the efficient utilization of labor, thereby improving project performance. Fifth, obtaining the commitment of all of the stakeholders – owners, contractors, union officials and workers – through a PLA supports an understanding of the requirements of the project and of the overall objective of getting the job done properly and on time. And sixth, by establishing various forums for communication, including labor-management committees, they facilitate workplace cooperation and help ensure that all parties are invested in the project's success.

Not surprisingly, therefore, the use of PLAs on large projects in Texas has become quite prevalent. Ohbayashi USA is using a PLA on the Army Corps of Engineers' San Antonio River Channel Project, which involves construction of an eight-mile long reverse siphon drainage tunnel under the City of San Antonio. We understand that the Naval Air Station Joint Reserve in Fort Worth was built under a PLA, and NASA has a PLA in place that covers all large-scale maintenance and new construction at its Houston facility. Moreover, the City of San Antonio used a PLA to construct its Dos Rios sewage treatment plant.

In the private sector, NRG is scheduled to construct South Texas Project Nuclear Units 3 and 4 under a PLA. The company is using a PLA based on its experience in the first phase of its construction, when it began building Units 1 and 2 using non-union Brown & Root as its construction manager. In the mid-1980s, with construction underway, the utility cancelled its agreement with Brown & Root due to non-performance and poor quality workmanship, and contracted with Ebasco, which completed the project under a PLA. Similarly, Toyota used a PLA to build its truck plant in San Antonio and is now using a PLA for its multi-million dollar expansion of that plant.

[4/] The quick settlement of a strike at the San Francisco airport illustrates the importance of these provisions. When a group of employees staged a wildcat strike, the parties – employing the speedy arbitration provision and invoking requirements that the unions take affirmative steps to avoid work stoppages – were able to resolve the strike within a day, much more quickly than would have been the case without the PLA, its enforceable provisions, and the commitments of all of the parties to keep the job running. Belman, Dale and Bodah, Matthew, *Building Better: A Look at Best Practices for the Design of Project Labor Agreements* at 8 (Economic Policy Institute Briefing Paper #274, August 10, 2010), available at http://epi.3cdn.net/179fd74170130cd540_ibm6ib3kd.pdf.

On other projects, Deep South Construction used a PLA in building the new Cowboys Football Stadium in Arlington. Mortensen Construction has used a PLA in building a series of wind turbine facilities throughout central Texas. Turner Construction has used PLAs for renovation of the Emily Morgan Hotel and the Majestic Theater in San Antonio as well as construction of the new USAA Financial Center in northeast San Antonio. In addition, Manhattan Construction Co. used a PLA on construction of the River Center Mall, an inner-city mall; and Turner of Texas used a PLA to construct the Omni La Mansion Del Rio Hotel in San Antonio. A PLA was also applied to renovation and upgrading of Granada Homes, a 17-story HUD-202 high rise project for senior citizens in San Antonio.

ARGUMENT

TEX. GOV'T CODE ANN. § 271.121 does not Preclude a Governmental Entity from Incorporating the Terms and Conditions of a PLA in its Bid Specifications and Requests for Proposals for Construction of Public Works and Public Improvement Projects.

We understand that the foregoing discussion of the advantages of using project labor agreements on appropriate public works and public improvement projects does not directly address the issues raised by Chairman Hunter's request for an opinion concerning whether TEX. GOV'T CODE ANN. § 271.121 prohibits a governmental entity from requiring a contractor or other vendor to sign a project labor agreement. Nonetheless, it is clear that the Associated Builders and Contractors of Texas ("Texas ABC") is the "real party in interest" in this matter since Chairman Hunter's request appears to have been prompted by a letter dated November 8, 2010 from Texas ABC President Jon Fisher that was attached to Chairman Hunter's letter to you and, therefore, you are likely to receive arguments from Texas ABC and/or other organizations concerning the alleged drawbacks of using PLAs on public works projects.

Putting aside the wisdom and usefulness of applying PLAs to public works and public improvement projects in Texas, we explain why nothing in TEX. GOV'T CODE ANN. § 271.121 prohibits a governmental entity from requiring a contractor or other vendor to sign a project labor agreement as a condition of award of a contract or subcontract for construction of public works and public improvement projects.

TEX. GOV'T CODE ANN. § 271.121 (2010) states:

§ 271.121. Right to Work

(a) This section applies to a governmental entity while the governmental entity is engaged in:
(1) procuring goods or services;
(2) awarding a contract; or
(3) overseeing procurement or construction for a public work or public improvement.

> (b) Notwithstanding any other provision of this chapter, a governmental entity:
> (1) may not consider whether a vendor is a member of or has another relationship with any organization; and
> (2) shall ensure that its bid specifications and any subsequent contract or other agreement do not deny or diminish the right of a person to work because of the person's membership or other relationship status with respect to any organization.

Texas ABC President Fisher's November 8, 2010 letter asserts: "Clearly, the application [of TEX. GOV'T CODE ANN. § 271.121] hinges on whether a project labor agreement as described above establishes a relationship with an organization." Mr. Fisher further contends:

> Since a project labor agreement is a contract, and contracts establish relationships, it appears this statute prevents governmental entities in Texas from requiring project labor agreements as described even though this type of relationship is not specifically spelled out in the statute. The statute appears to give teeth to Texas' longstanding Right to Work law.[5/]

Id.

Mr. Fisher's assertion that TEX. GOV'T CODE ANN. § 271.121 "appears to give teeth to Texas' . . . Right to Work law" may be correct. The Texas "Right-to-Work Act" prevents unlawful retaliation and discrimination because of membership or nonmembership in a union and protects employees in the exercise of their right of free choice to join or not join a labor union. *Gonzales v. Levi Strauss & Co.*, 70 S.W.3d 278, 281 (Tex. App. 2002); citing *Lunsford v. City of Bryan*, 156 Tex. 520, 297 S.W.2d 115, 117 (1957); *Vasquez v. Bannworths, Inc., 707 S.W.2d 886, 888* (Tex. 1986). Section 101.052 of the Act provides that "[a] person may not be denied employment based on membership or nonmembership in a labor union." TEX. LAB. CODE ANN. § 101.052 (2010). Furthermore, Section 101.301 provides that a person's right "to work may not be denied or abridged because of membership or nonmembership in a labor union or other labor organization." TEX. LAB. CODE ANN. § 101.301(a) (2010).

More specifically, Section 101.053 states:

§ 101.053. Contract Requiring or Prohibiting Labor Union Membership Void

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[5/] Mr. Fisher's assertion reflects a failure to appreciate the difference between prohibiting a governmental entity from ***considering*** whether a vendor is a union or non-union contractor during the bidding process, which is prohibited by TEX. GOV'T CODE ANN. § 271.121(b)(1), and ***requiring*** a vendor to agree to abide by the terms and conditions of a PLA, regardless of whether the vendor is a union or non-union contractor, as a condition of award of a contract for construction of a public works or public improvement project, which is not prohibited by that statute.

A contract is void if it requires that, to work for an employer, employees or applicants for employment:

(1) must be or may not be members of a labor union; or

(2) must remain or may not remain members of a labor union.

However, nothing in the Texas "Right-to-Work Act" or TEX. GOV'T CODE ANN. § 271.121 prevents a governmental entity in Texas from incorporating the terms and conditions of a PLA in its bid specifications or requests for proposals for construction of a public work or public improvement. Contrary to Mr. Fisher's assertion, TEX. GOV'T CODE ANN. § 271.121 does not prohibit a governmental entity in Texas "engaged in procuring goods or services; awarding a contract; or overseeing procurement or construction of a public work or public improvement" from requiring prospective contractors and subcontractors to agree to comply with the terms and conditions of a PLA as a condition of award of a contract or subcontract for construction of a public work or public improvement thereby creating a contractual relationship.

1. Inclusion of the Terms and Conditions of a Project Labor Agreement in the Bid Specifications or Requests for Proposals for Construction of a Public Work or Public Improvement does not Limit or Preclude Non-Union Employers from Competing for Award of such Contracts and Subcontracts.

Opponents of PLAs often describe them as "union only" agreements because they require all bidders to agree, if awarded the contract, they will abide by collectively-bargained wages, hours and other terms and conditions of employment on the project and hire workers in accordance with referral procedures included or incorporated in the PLA by reference. Texas ABC President Fisher's assertion in his letter dated November 8, 2010 that TEX. GOV'T CODE ANN. § 271.121 "prevents governmental entities in Texas from requiring project labor agreements" assumes *sub silentio* that PLAs only permit contractors to bid if they are already signatory to one or more local labor agreements with building and construction unions and/or that PLAs only permit employment of members of the signatory building and construction trades unions. PLAs would violate TEX. GOV'T CODE ANN. § 271.121 if either of these propositions is true, but they are not.

Use of PLAs does not unlawfully discriminate against non-union contractors even though they typically require all bidders to abide by collectively-bargained terms and conditions of employment applicable to all craft workers on the job, including use of the hiring hall referral procedures in such agreements.[6/] Inclusion of PLA specifications in bid solicitations and requests for

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[6/] Hiring halls in the construction industry are classified either as exclusive or nonexclusive. An exclusive hiring hall is one that makes the union the sole source of a contractor's employees, although a contractor has the right to reject applicants it does not want to hire, and the right to hire from other sources if the union cannot supply the number of employees requested by an employer within a specified time period, usually 48 hours. An exclusive hiring hall must refer members and nonmembers on a nondiscriminatory basis. A nonexclusive hiring hall provides employees if they are requested, but permits employers to hire from other sources as well.

proposals does not, however, foreclose any person or entity from submitting a bid on a public works project, inasmuch as public sector PLAs do not require bidders to have preexisting collective bargaining agreements with one or more labor unions in order to bid on the contract.

Moreover, the typical public sector PLA does not require any contractor to become a "union employer," *i.e.* abide by labor agreements with local building and construction trades unions when they perform other construction work within the geographic jurisdiction of the signatory labor unions. Instead, PLAs simply require prospective bidders to agree as a condition for being selected to perform work on the project to be bound by the same terms and conditions of employment as all others similarly engaged while working on the project. *Ohio ex rel. Associated Builders and Contractors v. Jefferson County Bd. of Commissioners,* 665 N.E.2d 723, 726 (Oh. Ct. App. 1995), *appeal not allowed*, 659 N.E.2d 314 (1996); *Utility Contractors Ass 'n. of New England, Inc. v. Commissioners of the Massachusetts Department of Public Works*, 1996 Mass. Super. LEXIS 687, 1996 WL 106983 (Mass. Super. 1996) (wherein the trial court held that the PLA "applies equally to union and non-union contractors; both may bid on the Project on the same terms. No contractor is favored under the Project Labor Agreement, although a non-union contractor is required to be bound by the same terms and conditions under which a union contractor already operates. . . ."); *A. Pickett Constr., Inc. v. Luzerne County Convention Center Auth.*, 738 A.2d 20, 26 (Pa. Commw. Ct. 1999) ("Hence, the mere inclusion of a PLA does not constitute illegal discrimination.").

Insofar as non-union contractors may choose not to bid, because they find it difficult or distasteful to accept the provisions of the PLA, their choice does not render the specification discriminatory or anti-competitive. *San Francisco Airports Commission*, 981 P.2d at 510. As the Supreme Court observed in *Boston Harbor,* "Confronted with . . . a purchaser [that requires its contractors to enter into a PLA], those contractors who do not normally enter into such agreements are faced with a choice. They may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement." 518 U.S. at 231. In this regard, the PLA requirement is no different than an insurance or bonding requirement. *See e.g., A. Pickett Constr., Inc. v. Luzerne County Convention Center Auth.*, 738 A.2d 20, 26 (Pa. Commw. Ct. 1999) (upholding PLA as a legitimate condition of contractor responsibility).

Thus, the only legitimate question here is whether incorporation by a governmental entity in Texas of the terms and conditions of a PLA in its bid specifications and any resulting "contract or other agreement . . . [denies] or diminish[es] the right of a person to work because of the person's membership or other relationship status with respect to any organization," in violation of TEX. GOV'T CODE ANN. § 271.121(b)(2). As explained below, nothing in an otherwise lawful project labor agreement violates TEX. GOV'T CODE ANN. § 271.121(b) (2).

2. Nothing Contained in an Otherwise Lawful PLA Violates TEX. GOV'T CODE ANN. § 271.121(b) (2).

PLAs often include "union security clauses," exclusive hiring hall referral provisions pursuant to which the employer relies upon the union to refer craft or industry employees on an as-needed basis, and dues check-off provisions. There is no question that the Texas "Right-to-Work Act" and TEX. GOV'T CODE ANN. § 271.121(b)(2) preclude inclusion of a union security clause in a PLA executed in Texas. On the other hand, neither the Texas "Right-to-Work Act" nor TEX. GOV'T CODE ANN. § 271.121(b)(2) precludes inclusion of two other provisions, an exclusive hiring hall referral provision and/or a dues check-off provision, in a PLA.

a. Union Security Agreements

Congress enacted Section 14(b) of the National Labor Relations Act as part of the Taft-Hartley Act in 1947, which authorized individual states to enact laws proscribing all forms of union security agreements reached through collective bargaining. Section 14(b) states:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

29 U.S.C. § 164(b).

Twenty-three states, including Texas, have adopted right-to-work laws by statutory enactment or constitutional amendment. U.S. Department of Labor, Table of State Right-to-Work Laws as of December 28, 2010, http://www.dol.gov/whd/state/righttowork.htm. Each of these "right-to-work" laws, including the Texas statute, operates within a limited sphere carved from pervasive federal regulation. In carving the exception for state "right-to-work" laws in the National Labor Relations Act, Congress noted the specific type of laws it intended to save from preemption:

> Many states have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those states illegal. It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of the act, to preempt the field in this regard so as to deprive the states of their powers to prevent compulsory unionism. Neither the so-called "closed shop" proviso in section 8(3) of the existing act nor the union shop and maintenance of membership proviso in section 8(a)(3) of the conference agreement could be said to authorize arrangements of this sort in states where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14(b), contains a provision having the same effect.

See H.R. Rep. No. 80-510, at 60 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1135, 1166.

Accordingly, the Texas "Right-to-Work Act" is in place ***only*** to prevent "compulsory unionism" or "conditions that would come into effect only ***after*** an individual is hired" and require the employee to join a union or pay the equivalent of dues to a union to maintain employment. *See Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 416-17 (1976) (emphasis added); *see Retail Clerks Local 1625 v. Schermerhorn* ("*Schermerhorn II*"), 375 U.S. 96, 105 (1963) ("[S]tate power, recognized by § 14(b), begins ***only with actual negotiation and execution of the type of agreement described by § 14(b)***. Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under [the NLRA preemption doctrine recognized in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)]." (Emphasis added).

Consequently, it would be unlawful to include a union security clause, which requires all employees in a bargaining unit represented by a labor union to pay membership dues or agency fees as a condition of employment, in a PLA incorporated in the bid specifications and resulting contract for construction of a public work or public improvement in Texas. *See International Ass'n of Machinists & Aerospace Workers v. Dyncorp*, 796 F. Supp. 976 (N.D. Tex. 1991) (Federal law allowing union security clauses in collective bargaining agreements did not preempt provisions in the Texas "Right-to-Work Act" banning such clauses, and the clauses were not enforceable against an employer engaged in servicing equipment on an Air Force base in Texas). Accordingly, union security agreements are not incorporated in PLAs in Texas because they are unenforceable. This is ironic inasmuch as the Texas "Right-to-Work Act" does not relieve a union of its statutory duty to fairly represent all employees in the union's bargaining unit, including those who decline to pay membership dues or an agency fee. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *see also Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 203 (1944).

b. <u>Union Hiring Hall Referral Provisions</u>

Hiring halls have been an enduring feature of the construction industry because the unique nature of the industry makes them exceedingly valuable to employers, to unions and to employees in the industry. The building and construction industry consists of a series of projects, some of relatively short duration. The site is cleared and then excavated; the foundation is laid; the superstructure is built; the electrical, plumbing, heating and air conditioning systems are installed, and so on. However, this description vastly oversimplifies the construction process. For example, it is not unusual to have numerous different contractors on a project site solely to perform the various aspects of site clearing, which can include, among other things, grading, soil remediation and fencing. Many employees in the building and construction industry work for relatively short periods of time and are then laid-off when their phase of the project is complete.

Thus, contractors and subcontractors in the building and construction industry need a source of skilled craft workers who can be available on short notice and who can be laid-off when a job is completed. Hiring halls are the mechanism by which many unions in the building and construction

industry refer employees to employers who need them.[7] A hiring hall in the building trades is simply an arrangement pursuant to which a local union registers applicants for work and then refers them, on request, in some pre-determined order, to employers with which they have collective bargaining relationships. The order in which a hiring hall refers applicants may be simple—for example, first in, first out—or more complex—based on some combination of experience, residency, seniority, training, journeyman status or other factors.[8] The number of applicants referred is determined by the employer, who usually has the right to reject any applicant for any lawful reason and the right to hire employees from other sources if the union cannot supply them within a specific time period, typically 48 hours. When a job ends, the employees are laid-off and they return to the hiring hall, register on the out-of-work list, and go through the process again.

Before the passage of the Taft-Hartley Act in 1947, building trades unions used closed shop agreements to facilitate their role as providers of employees and employment. *See* Louis Sherman, *Legal Status of the Building and Construction Trades in the Hiring Process,* 47 GEO. L. J. 203, 206 (1958) (hereafter "*Sherman*"); *see also Teamsters Local 357 v. NLRB,* 365 U.S. 667, 672 (1961) ("The hiring hall at times has been a useful adjunct to the closed shop.") A proviso to Section 8(3) of the original 1935 Wagner Act permitted unions and employers to enter into closed shop agreements. That proviso stated "nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization to require as a condition of employment membership therein. . . ." Act of July 5, 1935, c. 372, § 8, 49 Stat. 449 (1935).

In the Taft-Hartley Act, Congress prohibited closed shops, but not hiring halls. As Senator Taft explained after passage of that law:

> In order to make clear the real intention of Congress, it should be clearly stated that the hiring hall is not necessarily illegal. The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall.

S. Rep. No. 1827, 81st Cong., 2d Sess. 13 (1950), quoted in *Teamsters Local 357*, 365 U.S. at 673-74.

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[7] While not every local union in the building trades operates a hiring hall, most do. In 1970, the Department of Labor published a study of hiring halls in the construction industry in which it examined 291 collective bargaining agreements and found that 230, or 79 percent, provided for hiring halls of one type or another. U.S. Department of Labor, *Exclusive Union Work Referral Systems in the Building Trades*, 23-25 (1970).

[8] *Compare Operating Engineers Local 137 (Various Employers),* 317 NLRB 909 (1995) (first in, first out), with *IBEW Local 6 (San Francisco Electrical Contractors Assn.),* 318 NLRB 109. 114 (1995), *enf'd,* 1998 U.S. App. Lexis 2784 (9th Cir. 1998) (multiple factors).

The initial decisions issued by the National Labor Relations Board (hereafter "Board" or "NLRB") following passage of the Taft-Hartley Act held, consistent with the view expressed by Senator Taft, that the Act permitted unions to operate hiring halls, as long as they did not discriminate on the basis of union membership. *See Hunkin-Conkey Construction Co.*, 95 NLRB 433, 435 (1951) ("we have not found a provision that personnel be secured through the offices of a union violative of the Act, absent evidence that the union unlawfully discriminated in supplying the company with personnel"); *Marine Cooks and Stewards (Pacific American Shipowners Assn.)*, 90 NLRB 1099, 1101 (1950). In 1956 and 1957, however, the NLRB issued two major decisions based on the Board's belief—unstated but implicit in the first decision, but explicitly stated in the second—that there was something inherently coercive about operation of a union hiring hall.

In 1956, the Board decided *Plumbers and Pipefitters Local 231 (J.S. Brown-E.F. Olds Plumbing and Heating Corp.) ("Brown-Olds")*, 115 NLRB 594 (1956), which held that a union found to have operated a hiring hall in a discriminatory manner would be compelled to return all dues or assessments received from union members during the six month period prior to the filing of the charge. A year later, the Board issued its decision in *Mountain Pacific Chapter of Associated General Contractors, (Laborers Local 242)*, 119 NLRB 883 (1957), *enf. denied*, 270 F.2d 425 (9th Cir. 1959), which held that any union-operated exclusive hiring hall would be deemed unlawful, unless the collective bargaining agreement contained provisions explicitly stating that: (1) applicants would be chosen on a non-discriminatory basis; (2) the employer could reject any applicant referred by the union; and (3) the parties would post all provisions relating to the operation of the hiring hall. *Id.* at 897. The Board explained that all exclusive hiring hall arrangements (without these provisions) would be deemed unlawful because "[f]rom the standpoint of the working force generally—those who, for all practical purposes, can obtain jobs only through the grace of the Union or its officials —it is difficult to conceive of anything that would encourage their subservience to union activity, whatever its form, more than this kind of hiring hall arrangement." *Id.* at 895.

These two decisions, particularly *Brown-Olds,* had a dramatic effect on building and construction trades unions. In response, the International Brotherhood of Electrical Workers and then other international unions that represent workers engaged in the building and construction industry formulated and recommended to their local unions referral provisions based on various objective criteria, many of which are widely used today. *Sherman*, at 210.

The issues raised by *Brown-Olds* and *Mountain Pacific* reached the Supreme Court in 1961. In two landmark decisions issued on the same day, the Court swept aside both *Brown-Olds* and *Mountain Pacific.*[9/] The Court rejected the Board's *Mountain Pacific* decision in *Teamsters Local 357 v. NLRB,* 365 U.S. 667 (1961), stating that, since Congress had not chosen to ban hiring halls, the Board had no authority to do so. The Court reasoned that unlawful discrimination against nonmembers could not be inferred from the mere existence of an exclusive hiring hall provision and that, since the Taft-Hartley Act only prohibits

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9/ In *Carpenters Local 60 v. NLRB,* 365 U.S. 651 (1961), the Court rejected *Brown-Olds* as a remedy for the discriminatory operation of a hiring hall, stating that reimbursement of membership dues was not an appropriate remedy where there had been no finding that any member had been coerced into joining a union or paying dues.

encouragement of union membership accomplished through discrimination, operation of nondiscriminatory hiring halls is not unlawful. 365 U.S. at 675.

In 1959, two years before the Supreme Court decided *Teamsters Local 357,* Congress enacted the Labor-Management Reporting and Disclosure Act, which is also known as the "LMRDA" or the "Landrum-Griffin Act," which included Section 8(f) of the NLRA, 29 U.S.C. § 158(f). Section 8(f) expressly permits establishment of hiring halls in the building and construction industry. Section 8(f) provides that employers and unions in the building and construction industry can enter into agreements permitting the union to refer applicants for employment and "specifying minimum training or experience qualifications for employment or providing for priority in opportunities for employment based upon length of service with such employer, in the industry, or in the particular geographical area."[10/] The criteria listed in Section 8(f) are not exclusive; other objective non-discriminatory criteria may be used. *See Teamsters Local 83,* 243 NLRB 328, 331 (1979) ("Section 8(f) permits an exclusive referral system based on objective criteria, such as seniority, residence, or training"). Thus, hiring halls are lawful in the building and construction industry as long as referrals for employment are based on objective, non-discriminatory criteria and not on membership status.

As a result, non-discriminatory union hiring hall referral systems, otherwise permissible under Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), may not be prohibited by State "right-to-work" laws under Section 14(b) of the Act. *Laborers' Int'l Union, Local 107* v. *Kunco, Inc.,* 472 F.2d 456 (8th Cir. 1973*); NLRB v. Tom Joyce Floors, Inc.,* 353 F.2d 768 (9th Cir. 1965); *NLRB* v. *Houston Chap. Associated General Contractors of Am., Inc.,* 349 F.2d 449 (5th Cir. 1965); *see also Master Builders of Iowa, Inc.* v. *Polk County, Iowa,* 653 N.W.2d 382 (Iowa 2002) (exclusive hiring-hall referral systems incorporated in a PLA do not violate the Iowa right-to-work law). As the Eighth Circuit explained:

> Section 14(b) does not empower states to ban all involuntary relationships between workers and unions. It merely allows the prohibition of "agreements requiring ***membership*** in a labor organization as a condition of employment". . . . A hiring hall

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10/ In pertinent part, Section 8(f) states:

> It shall not be an unfair labor practice under subsections (a) or (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 . . . because . . . (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographic industry[.]

29 U.S.C. §158(f).

> which, though exclusive, does not require union membership does not violate the closed shop prohibition of §8(a)(3), . . . and thus, *a fortiori,* it is not within the ambit of § 14(b).

Kunco, 472 F.2d at 458.

Therefore, it is well-settled that inclusion or incorporation of a non-discriminatory union hiring hall referral provision in a PLA is not prohibited under the Texas "Right-to-Work Act" and does not violate TEX. GOV'T CODE ANN. § 271.121(b)(2).

c. <u>Dues Check-Off Provisions</u>

Similarly, in *SeaPak* v. *Industrial, Technical & Professional Employees, Div. of Natl. Maritime Union,* 300 F. Supp. 1197, 1200 (S.D.Ga.1969), *aff'd,* 423 F.2d 1229 (5 Cir. 1970), *aff'd w/o op.,* 400 U.S. 985 (1971), a division of W.R. Grace brought an action against the National Maritime Union seeking declaratory relief in respect to the right of the union to insist upon continued weekly deductions of union dues from the payroll of three employees after they had requested discontinuance of dues check-off, which they had previously authorized in writing.

SeaPak contended that the dues check-off authorization signed by the three employees must be revocable at "will" as is required by the Georgia "Right-to-Work" law, which the company asserted is excluded from federal preemption by Section 14(b) of the NLRA. However, the court noted that Section 302 of the LMRA, 29 U.S.C. §186, permits a union to bargain for and receive a check-off of dues under individual written authorizations, which may be irrevocable for as long as one year. After discussing the legislative history of Section 302, the court concluded:

> I am confident Congress did not conceive that check-off of dues for a limited time after an employee's revocation of authorization therefor would amount to compulsory union membership as interdicted by state "Right-to-Work" laws. Nor do I think that when Congressman Hartley stated that state laws prohibiting the right of an employer to require employees to become "or remain" members of a labor organization would be valid notwithstanding the Federal Act, he conceived that the check-off revocation in the Labor-Management Relations Act derogated against the powers of states under §14(b).
>
> After all, state prohibition of compulsory unionism is a congressional dispensation of grace, not the imperious right of a state. I do not agree that the one year irrevocability provision in the Act can be varied by a state legislature under the reservation to the states of the power to prohibit "agreements requiring membership in a labor organization as a condition of employment." Section 14(b) says that and no more and it reaches no further. Preemption of the field of check-off regulation by Title 29 §186(c)(4) leaves unimpaired the right of any state to prohibit union or closed shops. Section 14(b) contemplates state regulation only as to forms of union security which are

> "the practical equivalent of compulsory unionism." *NLRB* v. *Houston Chap. Associated General Contractors of America, Inc.*, 349 F.2d 449 (5th Cir.), *cert. denied,* 382 U.S. 1026, 86 S. Ct. 648, 15 L. Ed. 2d 540. Check-off authorizations irrevocable for one year after date do not amount to compulsory unionism as to employees who wish to withdraw from membership prior to that time.

SeaPak, 300 F. Supp. at 1200-01; *see also NLRB v. Shen-Mar Food Prods.*, 557 F.2d 396 (4th Cir. 1977) (contractual dues check-off provision is not a union security device that is subject to the Virginia "Right-to-Work" law enacted pursuant to Section 14(b)); *NLRB v. Atlanta Printing Specialties & Paper Prods. Union 527*, 523 F.2d 783, 787 (5th Cir. 1975) (dues check-off provisions are not union security devices but are intended to be an area of voluntary choice for the employee).

Perhaps because of this line of cases, Section § 101.004 of the Texas "Right-to-Work Act" expressly states:

> **§ 101.004. Contract for Withholding Union Dues from Employee's Compensation Void Without Employee's Consent**
>
> A contract that permits or requires the retention of part of an employee's compensation to pay dues or assessments on the employee's part to a labor union is void ***unless the employee delivers to the employer the employee's written consent to the retention of those sums***.

(Emphasis added).

Accordingly, there is no question that dues check-off provisions are not prohibited by the Texas "Right-to-Work Act" or TEX. GOV'T CODE ANN. § 271.121(b)(2) since such provisions do not have the effect of denying or diminishing the right of persons to work because of his/her membership or other relationship status with respect to any organization.

Conclusion

Consequently, application of a PLA to a public works or public improvement project by a governmental entity in Texas does not violate TEX. GOV'T CODE ANN. § 271.121. First, inclusion of a PLA in a government entity's bid specifications or resulting contract does not cause the governmental entity to consider a prospective contractor or subcontractor's membership or relationship with any organization, including labor unions, in deciding whether they are qualified to perform work on public works or public improvement project. Second, none of the terms and conditions of an otherwise lawful

PLA precludes a person from employment "based on membership or nonmembership in a labor union" and/or denies or abridges a person's right to work "because of membership or nonmembership in a labor union or other labor organization."

Respectfully submitted,
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