Project Labor Agreement Update

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https://tinyurl.com/2024PLAupdate

Background

- A project labor agreement, or "PLA," is a collective bargaining agreement negotiated and entered into between a union, or council of unions, and either a project owner, developer, or general contractor. A PLA typically sets the wages, hours, and working conditions for that workers performing construction on that particular project. In exchange, the PLA ensures labor harmony on the project for the life of the PLA.

Background (Cont'd)

- PLAs have a long history of use throughout the country, including on the construction of the Grand Coulee Dam in Washington state in 1938, the Shasta Dam in California in 1940, as well as at Cape Canaveral, FL, during the 1960s.
- In 1993, in a decision called *Boston Harbor*, the US Supreme Court unanimously upheld the use of PLAs by state and local agencies, which I'm sure means they are safe under the current Supreme Court given its demonstrated reverence for *stare decisis*.

Biden Executive Order and Related Agency Actions

- On February 22, 2022, President Biden issued an executive order (EO 14063) requiring the use of Project Labor Agreements on most large-scale federal construction projects ($35 million or more). Exec. Order No. 14,063, 87 Fed. Reg. 7,363 (Feb. 9, 2022). The PLA Rule projects that ten to fifty percent of covered projects will be excepted. 88 Fed. Reg. at 88, 724.

Biden Executive Order and Related Agency Actions (Cont'd)

- On December 22, 2023, the Department of Defense, NASA, and GSA published a rule intended to implement the EO. U.S. Dep't of Defense, et al., *Federal Acquisition Regulation: Use of Project Labor Agreements for Federal Construction Projects* 88 Fed. Reg. 88, 708.

- Along with publication of final rule, OMB issued a memo to the heads of executive departments regarding implementation of exceptions to the PLA directive. *Memo. Re. Use of Project Labor Agreements on Federal Construction Projects to the Heads of Executive Departments and Agencies*, No. M-24-06 (Dec. 18, 2023)

Legal Challenges

- The Associated General Contractors ("AGC") filed a suit in Louisiana federal court challenging the order and the rule, which was dismissed for lack of standing.

- However, the Associated Builders and Contractors ("ABC") then filed a lawsuit challenging the Order, the Rule, and the Memo (collectively "the Rule"). *Associated Builders and Contractors Florida First Coast Chapter et al. v. General Services Administration*, 3:24-cv-00318-WWB-MCR (M.D. Fla.) They also moved for an emergency preliminary injunction.

Legal Challenges (Cont'd)

- ABC and GSA filed cross-motions for summary judgment on September 9, 2024, responses were filed October 9, and the replies were filed on October 24. So there has been no decision yet at this time.
- The ABC claims the Rule violates the First Amendment, is beyond the scope of executive authority under numerous statutes, and violates the Administrative Procedure Act. This is par for the course on these types of challenges, where either the AGC or the ABC throw everything at the wall and hope it sticks.


ABC LAWYERS PLANNING
PLA LEGAL CHALLENGE

ABC Arguments

PDF Links:

- ABC Motion for PJ
- ABC Oppo to SJ
- ABC MSJ

- First amendment claim
  - Member contractors will be forced to "associate" with icky labor unions, citing to *Janus*.
  - Again, par for the course.

- Executive authority
  - Actions are *ultra vires* because they directly conflict with: Federal Property and Administrative Services Act("FPASA"), Competition in Contracting Act ("CICA"), NLRA.
  - Further claim that they violate the "major questions doctrine," under which Democratic Presidents cannot exercise authority on issues of "economic and political significance" as defined by the Federalist Society.

ABC Arguments (Cont'd)

PDF Links:

- ABC Motion for PJ
- ABC Oppo to SJ
- ABC MSJ

- APA challenge
  - Claim that the agencies failed to give an adequate explanation for mandating PLAs.
  - Claim that the OMB memo is a rule provided without notice and comment.
    - This will sound familiar when I'm talking about the Oregon case.

- NLRA
  - 8(d) – federal government cannot compel employers to agree to any substantive contract provision.

USA Arguments

PDF Links:

- USA MSJ
- Response to PJ
- USA Oppo to SJ

- FPASA provides broad procurement authority that courts have long recognized.
  - Authorizes the President to "prescribe policies and directives that the President considers necessary to carry out this subtitle" 40 USC § 121(a)
  - Also pointed to other sections of the statute that grant agencies more authority
    - 41 U.S.C. § 3703(c), agencies shall award contracts "to the responsible source whose proposal is most advantageous to the Federal Government, considering" the "cost or price" of the contract "and the other factors included in the solicitation."
    - 41 U.S.C. § 3306(a)(1)(A) gives agencies the authority to "specify [their] needs,"
    - 41 U.S.C. § 3306(a)(2)(B) states that they can "include restrictive provisions or conditions" in solicitations "to the extent necessary to satisfy [those] needs."

USA Arguments (Cont'd)

PDF Links:

- USA MSJ
- Response to PJ
- USA Oppo to SJ

- No major questions issue because it is an exercise in proprietary, not regulatory authority.
- No APA issue because the President is not an agency, OMB Memo is not a rule, and the only actual rule is rational.
- No First Amendment issue because it is a commercial decision of the agencies, not inherently expressive.

The PLA (or, more accurately, CWA) Fight In Oregon

- Separately, in 2021, the Oregon legislature empowered contracting state agencies, like the Oregon Department of Transportation (ODOT) to designate certain public contracts "community benefit contracts" through SB 420.

- That statute empowered contracting state agencies to require that contractors "may include as material provisions of the contract, but need not be limited to, terms and conditions that require the contractor to…qualify as a training agent…employe apprentices…provide employer-paid family health insurance, and…[m]eet any other requirements that the contracting agency or local contract review board sets forth in the ordinance, resolution, rule, regulation or other legislative or administrative measure that authorizes procurements of community benefit contracts."

The PLA (or, more accurately, CWA) Fight In Oregon (Cont'd)

- Pursuant to that provision, the Oregon Department of Transportation implemented OAR 731-005-0900, which authorizes procurements of "community benefit contracts." The rule subjects Covered Projects to certain material provisions, including Community Workforce Agreements, essentially a subset of project labor agreements.

- As described above, SB 420 gave agencies a lot of discretion in deciding the makeup of a "community benefit contract." ODOT then entered into a pilot CWA for eight projects with the Oregon State Building and Construction Trades Council.

AGC's Myriad Legal Challenges

PDF Links:

- Petition for Mandamus
- Mandamus Memorandum

- The AGC challenged the initial rule in the Oregon Court of Appeals (under Oregon law, that's explicitly and exclusively where rule challenges go), asserting that the rule exceeded ODOT's rulemaking authority.

- They then filed another challenge to the CWA itself, claiming that the agreement was also a rule, and that it both exceeded ODOT's rulemaking authority and did not go through proper notice and comment. At no time did AGC ask the Court of Appeals to stay the rule or the CWA.

- In early January of this year, the first project subject to the CWA was set to bid. A couple days before that occurred, AGC filed a separate lawsuit in Marion County Superior Court, seeking a preliminary injunction.

AGC's Myriad Legal Challenges (Cont'd)

PDF Links:

- Petition for Mandamus
- Mandamus Memorandum

- Essentially, the AGC argued that, because the CWA was invalid (as it was arguing to the Court of Appeals), ODOT's imposition of the CWA violated the state's public contracting laws. The local judge determined that she had jurisdiction (despite, as noted above, the Court of Appeals having exclusive jurisdiction over rules challenges) and issued a TRO.
- The OSBCTC intervened, but after a brief hearing, the judge converted the TRO to a preliminary injunction. We subsequently filed an *amicus* brief in the Court of Appeals on the rule challenges, a direct appeal of the judge's decision (which was denied), and a mandamus action in the Oregon Supreme Court.
- The mandamus action and the rule challenge to the CWA have been consolidated and are scheduled for oral argument on December 9.

Our Response

- This is all a matter of first impression in Oregon state court. Neither the Oregon Court of Appeals nor the Oregon Supreme Court have, to date, ruled on the validity of a PLA implemented by a state agency.

- Our arguments are that the first rule was properly adopted, and that the CWA itself is not a rule.

Our Response (Cont'd)

- With regard to OAR 731-005-0900, the rule went through notice and comment, they just really don't like it, and that challenge is actually in abeyance (presumably because they know the challenge is stupid).

- With regard to whether the CWA is a rule, it's not a rule because it's not generally applicable.
  - ORS 183.310(9) ("'Rule' means any agency directive, standard, regulation or statement **of general applicability** that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency")
  - The CWA is not generally applicable as it does not apply to all ODOT contracts. The CWA only applies to public contracts designated by ODOT as community benefit contracts.

Our Response (Cont'd, again)

- The CWA requirement applies to less than half of ODOT's budgeted projects for the year.

- And, of course, if it was generally applicable, we would have a market participant issue – the State would not be acting as such, but instead would be regulating. *See generally Bldg. & Constr. Trades Council v. Associated Builders & Contrs., Inc.*, 507 US 218 (1993) ("*Boston Harbor*"); *Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F3d 1011 (9th Cir. 2010).

- On the mandamus side of things, the trial court erred by even considering the case, so they should undo the injunction and uphold the CWA.

…any questions?

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