



IT'S THE LAW



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**SERVING THE CONSTRUCTION INDUSTRY IN
EMPLOYMENT AND LABOR MATTERS AND
CONSTRUCTION CONTRACT CLAIMS**

**STRIKE
BREAKERS**

**ILLINOIS STRIKE BREAKERS ACT
— IT'S HISTORY —
LITERALLY AND FIGURATIVELY**

In 1938, the United States Supreme Court recognized an employer's right to engage in economic self-help during a strike by hiring replacements for striking employees. The effect of the Supreme Court's decision regarding an employer's right to hire replacements became the law of the land, and any law or regulation

concerning replacement workers would be passed by the federal government. Any laws passed by the individual states that regulated or imposed restrictions on hiring of replacements would be invalid.

However, in 1975, the Illinois Legislature passed an Act which placed restrictions on those persons whom an employer may hire as a replacement. The Illinois Employment of Strikebreakers Act made it a misdemeanor to "knowingly employ any professional strikebreaker in the place of any employee during any period when a lockout or strike is in progress." 820 ILCS 30/2. A "professional strikebreaker" is defined as any person who "repeatedly and habitually offers himself for employment on a temporary basis" to replace a worker who has stopped working because of a strike or lockout. A few months after the passage of the Act, the State of Illinois sued an employer for violating the Act. However, the Supreme Court of Illinois found in favor of the employer and determined that the Act was invalid because only the federal government could lawfully impose restrictions on hiring replacement workers. Interestingly enough, despite the Act being invalidated in 1975, it remains in the Illinois statute book (and was recently amended) and is also still part of the Chicago Code of Ordinances.

One may wonder why after all these years, the Act was not removed from the statute book. There may, however, be a situation where a court may sustain this law. If the state can make a clear showing that the employment of "professional strikebreakers" has led to violence in the state, a court may be inclined to uphold the law. However, the link between "professional strikebreakers" and prevention of violence is speculative at best and a court would most likely reject this argument.

Since 1975, there are only two reported cases that address this Act. It goes without saying that the Act was an unsuccessful attempt by union lobbyists to curb one of the only economic weapons available to the employer in the face of a strike - the replacement worker.

This Newsletter is not intended as legal advice since each situation depends specifically on the facts presented. Persons reading this Newsletter should seek competent legal advice with regard to the subjects contained herein before making any employment or other decisions.



THE EFFECT OF THE PROJECT LABOR AGREEMENT

According to the Federal Labor Department's Bureau of Labor Statistics, employment growth in the construction industry over the next few years is projected at 15.1%, increasing by 1.013 million to 7.745 million by 2012. With the influx of workers and new construction companies coupled with the growth of existing companies, many new players will have the resources to competitively bid on public works contracts. However, the principles of free enterprise and competition may be threatened by Project Labor Agreements (PLA's).

A PLA is a contract negotiated between a public construction owner and a group of labor unions, usually the local building trades council which requires the project be awarded only to contractors who agree to recognize the unions as the representatives of all employees on the job and to obey the Union's restrictive work rules, job classifications, and arbitration procedures. Additionally, contractors must do the following: use the union hiring hall to obtain all or most of the workers; require all workers on the job to pay union representation fees, dues and/or assessments; pay union wages and benefits; and pay into union benefit trusts even if the contractor has other benefit plans in place and the employee will not receive payments from those union trusts.

In these arrangements, the government becomes the negotiator, and in theory the general contractor, perhaps without even assuming this role. The government controls the contractor's work rules, the strict craft jurisdictional lines, and who the contractor must employ. The general contractor is removed from the process of establishing its own labor relations and costs and is replaced by the government which is not knowledgeable of the day-to-day construction process.

In 2001, President Bush signed an Executive Order prohibiting mandatory PLA's on federally funded or federally assisted construction projects. The purpose of this Order was to promote and ensure open competition on federal projects and to prevent discrimination against government contractors based upon labor affiliation or lack thereof. At the state level, however, Governor Rod Blagojevich signed an Executive Order authorizing a state department or agency to include a PLA on public works projects. The determination of whether to include a PLA will be made on a project-to-project basis.

There is a strong argument that PLAs violate competitive bidding statutes. PLA's circumvent the competitive bidding statutes which require public bodies to award construction contracts to the lowest responsible bidder. The purpose of these statutes is to require public bodies to engage in competitive bidding, guard against favoritism, fraud and corruption, and secure work at the lowest price practicable. The duty to award the contract to the lowest responsible bidder is owed to both the taxpaying public and to the bidders. However, PLAs create an opportunity for the government to breach this duty. In instances where a PLA is required, the lowest responsible bidder may not receive the contract. The contract will be awarded to the lowest responsible bidder who is willing to sign a PLA. Clearly, the political agenda of the government takes precedence over efficient allocation of taxpayers' dollars.

In sum, PLA's have the effect of polarizing the construction community and potentially depriving state agencies of bids from many contractors who do not wish to become involved in elaborately structured agreements. Remember though, the determination of whether a public works contract requires a PLA is determined on a job-by-job basis. The job you are interested in bidding may not require a PLA. If the job requires a PLA, consider the following before submitting a bid: 1) determine what is required by the PLA; 2) analyze the short and long-term impact of entering into PLA-labor disputes or stoppages; 3) check with counsel to determine if the local jurisdiction involved considered the legality of PLA's; 4) include the additional costs the PLA would require, over and above the contractor's actual costs. This list is not all inclusive and one should always consult counsel before bidding on a PLA project.



THE ILLINOIS PERSONNEL RECORD REVIEW ACT

The Illinois Personnel Record Review Act ("IPRRA") requires employers who maintain personnel records to, at an employee's request, allow the employee to "inspect any personnel documents which are, have been or are intended to be used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, discharge or other disciplinary action . . ." 820 ILCS 40/2. Employees involved in a grievance against their Employer may designate in writing an individual who may examine parts of their personnel file

that relate to the resolution of the grievance.

Employees have a right to at least two (2) annual inspection requests, if the requests are made at reasonable intervals (unless a collective bargaining agreement provides otherwise). Employers must provide an "inspection opportunity within seven (7) days of the request (unless the Employer can show it is unable to do so within the seven (7) days and then the Employer is provided an additional seven (7) days). The actual inspection should occur during working hours and near the place of employment, unless the Employer and employee agree that another time or place is more convenient.

If the employee is unable to view the records at the employing unit, the Employer must, at the employee's written request, mail a copy of the requested information, that does not fall into any valid exception of the IPARRA, to the employee. Employers may charge the employee for actual copying charges.

Employers may be barred from presenting, in a judicial or quasi-judicial proceeding, personnel record information which was not included in the personnel record, but should have been included. "However, personnel record information which, in the opinion of the judge in a judicial proceeding or the hearing officer in a quasi-judicial proceeding, was not intentionally excluded from the personnel record may be used by the employer in the proceeding if the employee agrees or has been given a reasonable time to review the information." 820 ILCS 40/4.

Employees may disagree with information in their personnel record. If the Employer does not agree to remove the disputed information, the employee may provide for his or her file a written statement containing an explanation underlying his/her position. This statement must be included in any disclosure to a third party.

Unless the employee has waived written notice or disclosure is ordered in a legal action, arbitration or requested by a government agency, "[a]n employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a part of a labor organization representing the employee, without written notice . . ." 820 ILCS 40/7.

Employers are prohibited from maintaining records of employees associations (such as political activities) unless employees in writing submit the information or authorize the employer to keep such a record. However, employers may record activities that occur on the employer's premises or during working hours. Employers may also record activities that "interfere with the performance of the employee's duties or the duties of other employees or activities, regardless of when and where occurring, which constitutes criminal conduct or may reasonably be expected to harm the

employer's property, operations or business, or could by the employee's action cause the employer financial liability." 820 ILCS 40/9.

There are many exceptions to the right of an employee to inspect his or her personnel records. For example, employees are not entitled to view materials that relate to an employer's business development, staff planning or operational goals. Employees who allege they have been denied rights under the IPARRA may file a complaint with the Department of Labor ("DOL"). If the DOL finds the employer is in violation of the IPARRA and the matter is unresolved, the DOL may file suit in the Circuit Court.

Illinois' Responsible Bidder Requirements

On December 31, 2003, the Illinois Legislature passed Public Act 93-0642, which amends the Illinois Procurement Code. This Act was effective June 1, 2004. The Act outlines the requirements of a responsible bidder in construction contracts. In order to be a responsible bidder under the Code, a bidder must:

- * Comply with all laws relating to a bidder's entitlement to do business in Illinois;
- * Comply with Prevailing Wage Act;
- * Comply with Subchapter VI. ("Equal Employment Opportunities") of Chapter 21 of Title 42 of the U.S. Code (42 U.S.C. 2000 and following) and with Executive Order 5 No. 11246, as amended by Executive Order 11375;
- * Have a valid Federal Employer Identification Number or, if an individual, a valid Social Security Number;
- * Must have general liability, professional liability, product liability, worker's compensation, completed operations, hazardous occupation and automobile insurance; and
- * Must participate in relevant apprenticeship and training programs that are approved and registered by and with the United States Department of Labor's Bureau of Apprenticeship and Training. Subcontractors must likewise participate.

Bidders must be able to provide evidence that they have complied with the above requirements. The Act does not apply to federally funded projects if compliance with the Act puts receipt or use of federal funds at risk.

For more information concerning the Illinois Procurement Code, please contact Berglund & Niew, P.C.