

In opposition to Worker Retention Directive

The Port Commissioners may feel they are in a no-win situation in voting for this directive: If they vote for the directive they may stand accused of being pro-union; by voting against it, they may be accused of being anti-union. You should **oppose the proposed Worker Retention Directive for the following reasons:**

- Though voluntary on its face, it is coercive in effect and is constructively a mandate.
- It protects the franchise of a particular union, Unite HERE, to the exclusion of other unions, as well as other employers who may want to create jobs.
- A court injunction prohibits the Port from engaging in “any conduct that interferes, either by the Port's actions or inactions, with the exercise of the federally protected rights of ... third parties using Port facilities to assign work to their own employees ...”
- Coercive effect of involuntary unionization and prevents concessionaires from assigning work to their own employees, interfering with federally protected rights.
- Preemption: Worker retention requirements are an unfair labor practice under the NLRA.
- Potential §1983 action from government interference with rights under NLRA.
- Interferes with the at-will employment presumption in Washington.
- Supplants one set of employees at the expense of another set of employees.
- Thwarts the ACDBE program objectives.

Voluntary Mandate

- The directive states the concessionaires have a choice whether to commit to 1) hiring current workers, 2) committing to retaining them for 180 days and 3) stipulating to hire workers from the Concession Worker Pool.
- The practical effect is that failure to commit to these three terms makes your bid less competitive, thus less likely to win the concession opportunity. **This directive, in practical terms, is a constructive mandate.**

Scoring Preference has a Coercive Effect: Constructive Mandate of Worker Retention terms

- The scoring preference has a coercive effect to compel concessionaires to commit to 1) hire current workers, 2) retain them for 180 days and 3) hire from the Concession Worker Pool. The coercive effect is an unfair labor practice enumerated under §8 of the NLRA and prohibited by the CityIce injunction.
- The scoring preference's coercive effect interferes with the employer's right to bargain in good faith over the terms and conditions of employment. 29 U.S.C. §§ 158(d)
- Contractors/subtenants are stripped of all negotiating power in obtaining union approval in setting wages and other initial terms of employment. 29 U.S.C. §§ 158(d)
- The unions are given an unfair advantage in the collective bargaining process.

How would the proposed bill impact existing small businesses?

- Earlier this year, the Port Commissioners laid out the performance goals & objectives for the POS CEO: Re-energize social responsibility efforts to increase participation by local small and disadvantaged businesses.
- DBE eligibility is determined by personal net worth, rather than the number of locations. So, the Directive's applicability to concessionaires owning more than three locations, is a barrier to participation and stifles expansion for DBEs.

- To compete, the DBEs are forced to hire and retain a prior tenant's workforce, an unfair labor practice prohibited by the NLRA and the U.S. Supreme Court.
- Involuntary unionization would be required for any concessionaire desiring to bid for concessions opportunities, an unfair labor practice prohibited by the NLRA.
- In a recent lawsuit the court found that the current agreement between the unions and the Port of Seattle, requires third party businesses to join the union and submit a Labor Harmony Plan (approved by the union) before their subleases/leases can be renewed. *Flying Eagle Espresso, Inc. v. Host Int'l, Inc.*, No. C04-1551P, 2005 U.S. Dist. LEXIS 37679, at 26 (W.D. Wash. Sept. 21, 2005).
- The Port of Seattle has been enjoined from enforcing involuntary unionization. *CityIce v. Port of Seattle* (C99-1647BJR, Dkt. No. 29).
- Specifically, the Port is prohibited from engaging in "any conduct that interferes, either by the Port's actions or inactions, with the exercise of the federally protected rights of ... third parties using Port facilities to assign work to their own employees ..." *Id.*
- Increases risk of litigation if a predecessor employee is not hired or is discharged. Compels layoffs of hand-picked and loyal staff, in order to hire the predecessor's employees. Interrupts business & damages goodwill.
- Street pricing requirement further restrains the DBEs ability to competitively bid on concessions opportunities, since the increased costs cannot be countered by increased pricing.

Worker Retention Directive Violates Protections under NLRA

- The Directive undermines typical "employee retention" goals. Typically, employee retention are strategies to hire, identify and retain your best and most talented staff, crucial to the health and long-term success of a business. This directive undermines this federally protected right and coerces the incoming concessionaire to hire the predecessor's workforce for the first six months of operation.
- The restraint on hiring its own workforce is coupled with the unbargained for inability to discharge without "demonstrated cause." This interferes with the bargaining process, a federally protected right.
- The design of the directive ensures the incumbent union will be recognized and remains the bargaining representative for the incoming concessionaire. This involuntary unionization interferes with the concessionaire's federally protected right afforded under the NLRA.
- A court order has enjoined the Port of Seattle from violating contractor's rights, represented by the protections afforded under the NLRA, provides the right to operate free from any other activities or conspiracies aimed at conditioning its continued operation on involuntary unionization. *CityIce v. Port of Seattle* (C99-1647BJR, Dkt. No. 29).
- The directive compels the third party to hire the predecessor's employees, forcing the third party to accept a collective bargaining agreement it did not negotiate. Another violation of collective bargaining rights protected under the NLRA.

Preemption Applies to the Worker Retention Requirements

The directive's practical effect is to mandate involuntary unionization, which interferes with collective bargaining, thus forbidden by federal law.

- "It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wis. Dep't of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986).
- **A court order prohibits the Port from engaging in any conduct that interferes with a third parties' exercise of the federally protected right to assign work to their own employees.** *CityIce v. Port of Seattle* (C99-1647BJR, Dkt. No. 29).

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- Forcing or requiring an employer to join a labor organization is an unfair labor practice under 29 U.S.C. § 157. Section 8 of the NLRA.
- Congress intended to leave the area of successorship obligation to be controlled by the free play of economic forces, not subject either to state law or to the control of the National Labor Relations Board (NLRB) ...and therefore, *Machinists* preemption applies.” *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 150, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976)
- One of the two types of federal labor law preemption, known as "*Machinists* preemption," forbids both the NLRB and States from regulating conduct that Congress intended "to be controlled by the free play of economic forces." *Machinists* at 140.
- "Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' *Shaw v. Delta Air Lines, Inc.*, 463 U.S., at 95, 103 S.Ct., at 2899
- To escape preemption: the directive must neither "encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." *Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 755, 105 S.Ct. 2380, 85 L.Ed.2d 728.
- The Supreme Court has made clear and reiterated the point that "the purchaser [of a business] is not obligated by the Act to hire any of the predecessor's employees...." *Golden State Bottling Co. v. NLRB* (1973) 414 U.S. 168, 184, fn. 6, 94 S.Ct. 414, 38 L.Ed.2d 388.
- When the successor employer has not at any time employed a majority of its workers who were formerly employees of the predecessor, then the successor employer has no duty to bargain. *NLRB v. Burns International Security Services, Inc.*, 1972, 406 U.S. 272, 280-81, n. 5, 92 S.Ct. 1571, 32 L.Ed.2d 61.
- Thus, by compelling the successor contractor to retain the predecessor's employees, the proposed law would affect the bargaining process by imposing an obligation to bargain on the successor contractor or interfere with the employees' right to require the successor contractor to bargain with their representative. This activity is prohibited as an unfair labor practice and is preempted by the NLRA.

Successor Liability Imposes a Duty to Bargain, which violates the Act

- An employer has a duty under § 8(a)(5) of the NLRA to bargain collectively with the chosen representative, **if chosen by a majority of its own employees**. See 29 U.S.C. § 158(a)(5)(1998).
- A successor employer, with substantial continuity, is also under a legal duty to bargain with the union established under the predecessor employer. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 36-41, 43, 107 S.Ct. 2225, 96 L.Ed.2d 22 (1987).
- Successor employer status is triggered by choosing to employ the same workers in the same jobs as predecessor employer, thus imposing a duty to bargain with the predecessor union or risk violating the Act. See *id.* at 41. The directive takes away the choice.

Potential Section 1983 action arising from government interference with federally-protected rights.

- Section 1983 provides a federal remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, including violations of federal statutory as well as constitutional rights. See *Felder v. Casey*, 487 U.S. 131, 139, 108 S.Ct. 2302, 2307, 101 L.Ed.2d 123 (1988).
- The Port satisfies the "state actor" requirement by virtue of being a municipal governmental entity.
- The 1983 claim provides a remedy "against all forms of official violation of federally protected rights." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 700-701, 98 S.Ct. 2018, 2040-2041, 56 L.Ed.2d 611 (1978).
- The concessionaires have a right to operate free from ... any other activities or conspiracies aimed at conditioning its continued operation on involuntary unionization, and, under certain circumstances, §

1983 represents a bulwark against that kind of activity.” *Flying Eagle Espresso v. Host International, et al.* 2005 WL 2318827, U.S. District Ct., WD Washington (Sept. 2005)

- The Port increases its risk of a Section 1983 action against it, if the proposed directive is enacted.

The Scoring Preference gives preference to larger Prime Concessionaires

- Until 2003-2004, Host International had a 41 year monopoly providing food and beverage services at SeaTac Airport.
- The purpose of the ACDBE program, is to increase opportunities and create a level playing field for minority and women-owned small businesses to operate as concessionaires in the nation's airports. The DBEs will be disadvantaged in their bids, unless they accept and retain an already unionized workforce, surrendering control over hiring and retaining staff.
- Larger Prime Concessionaires, such as Host International, Hudson and Concessions International, will again receive preferential treatment in their responses to Requests for Proposals.

Port of Seattle Mission is not furthered by the Directive's Objectives

- The Port's primary mission is to invest public resources to advance trade and commerce, promote industrial growth, stimulate economic development, and create jobs. (adopted August 2009. Port of Seattle Mission.)
- Port of Seattle Constituents: All residents in King County.
- There is no compelling state interest to support the directive.
- It supplants one set of employees at the expense of another set of employees.
- The directive puts the new concessionaire in a lose-lose situation by forcing them to lay-off their own employees and to forego offering employment to other King County residents.
- It thwarts the Port's commitment to small business.

Conclusion: Why Vote "No" on the proposed Worker Retention Directive?

- Federal labor law preempts the authority of the POS to interfere with an employer's federally protected right to assign work to its employees and to collectively bargain, all unfair labor practices under NLRA
- The Port "may not ... 'add to an employer's federal legal obligations in collective bargaining....' " (*Machinists, supra*, 427 U.S. at p. 147.)
- **Protects Unite HERE's union franchise to the exclusion of other unions and other companies.**
- Supplants one set of employees with another set of employees.
- Vulnerability to Section 1832 lawsuits for interfering with federally protected rights under the NLRA.
- The CityIce injunction prohibits the Port from enforcing involuntary unionization.
- Counter to the Port's commitment to increasing participation by local, small and disadvantaged businesses.

For more information or for questions, please contact:

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