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# 8

## Labor Issues in the Transactional Side of the Project

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## I. [8.1] INTRODUCTION

The purpose of this chapter is to inform practitioners representing participants in the construction process of various labor issues that have a direct bearing on the transactional considerations that participants must consider in forming their contractual relationships for undertaking construction projects. This chapter addresses not only various fundamental labor law issues, but also federal and state statutory and regulatory requirements to which the participants must respond and that they must incorporate in their construction documents and transactional considerations.

## II. [8.2] ILLINOIS STATUTORY REQUIREMENTS

A number of Illinois employment-related statutes impose requirements and limitations applicable to construction contractors that should be considered in the preparation of bid and contract documents. This is particularly true when a project involves contracting with a public body. Such requirements and limitations may call for the inclusion of explicit provisions in bid documents and construction contracts and, in some cases, necessitate separate contractor compliance certification with statutory requirements.

### A. [8.3] Illinois Procurement Code

Section 30-22 of the Illinois Procurement Code, 30 ILCS 500/30-22, sets forth myriad requirements for a construction contractor to be considered a “responsible bidder.” Included among these requirements are that the contractor must (1) comply with applicable provisions of the Prevailing Wage Act, 820 ILCS 130/0.01, *et seq.*; (2) have a valid federal employer identification number (EIN); and (3) comply with Title VII (Equal Employment Opportunity) of 42 U.S.C. §2000e, *et seq.* Title VII provides as follows:

**It shall be an unlawful employment practice for an employer —**

**(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin, or**

**(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual’s race, color, religion, sex or national origin.** 42 U.S.C. §2000e-2(a).

For further discussion of equal employment obligations of employers, see §8.53 below.

The Illinois Procurement Code imposes requirements when contracting with public bodies at both the bidding and contract stages. 30 ILCS 500/50-5. The Procurement Code prohibits the

awarding of a state contract or subcontract to a person or a business that has been convicted under any state law of bribery or attempting to bribe an officer or employee of the State of Illinois or any other state or has made an admission of guilt of that conduct that is a matter of record, even if not prosecuted for the conduct. In addition, the Illinois Procurement Code states:

**(a) Unless otherwise provided, no person or business convicted of a felony shall do business with the State of Illinois or any State agency, or enter into a subcontract, from the date of conviction until 5 years after the date of completion of the sentence for that felony, unless no person held responsible by a prosecutorial office for the facts upon which the conviction was based continues to have any involvement with the business.**

**(b) Every bid submitted to and contract executed by the State and every subcontract subject to Section 20-120 of this Code shall contain a certification by the bidder or contractor or subcontractor, respectively, that the bidder, contractor, or subcontractor is not barred from being awarded a contract or subcontract under this Section and acknowledges that the chief procurement officer may declare the related contract void if any of the certifications required by this Section are false.** 30 ILCS 500/50-10, as amended by P.A. 96-75 (eff. July 1, 2010).

A contractor can avoid or lift the bar from contracting with the state if (1) the convicted employee or agent of the business is no longer employed by the business, and (2) the business has been finally either adjudicated not guilty or demonstrates to the state body with which it seeks to contract that the commission of the offense was not authorized, requested, commanded, or performed by a director, officer, or high managerial agent on behalf of the business.

For the practitioner preparing bid and contract documents, the Illinois Procurement Code expressly requires:

**(d) Certification. Every bid submitted to and contract executed by the State and every subcontract subject to Section 20-120 of this Code shall contain a certification by the contractor or the subcontractor, respectively, that the contractor or subcontractor is not barred from being awarded a contract or subcontract under this Section and acknowledges that the chief procurement officer may declare the related contract void if any certifications required by this Section are false. A contractor who makes a false statement, material to the certification, commits a Class 3 felony.** 30 ILCS 500/50-5(d), as amended by P.A. 96-75 (eff. July 1, 2010).

Additionally, the Procurement Code requires that all bids of more than \$10,000 shall be accompanied by disclosure of the financial interests of the bidder, as well as the required certifications by the contractor or subcontractor in accordance with §§50-10 and 50-5. This information is maintained as public information subject to release by request pursuant to the Illinois Freedom of Information Act. 30 ILCS 500/50-35. The financial interests to be disclosed include the ownership or distributive income share in excess of 5 percent, or an amount greater

than 60 percent of the annual salary of the Governor, of the bidding entity or its parent entity, whichever is less, unless the contractor or bidder is a publicly traded entity subject to federal 10K reporting.

The disclosure must also include (1) the names, addresses, and dollar or proportionate share of ownership of each person making the disclosure; (2) their instrument of ownership or beneficial relationship; and (3) notice of any potential conflict of interest resulting from current ownership or beneficial interest of each person making the disclosure having any of the relationship required to be disclosed. Such disclosures shall indicate any other current or pending contracts, proposals, leases, or other ongoing procurement relationships the bidding entity has with any other unit of state government.

#### **B. [8.4] Executive Order No. 1 (2007)**

Relative to state procurement, Executive Order No. 1, ¶IV(a) (Feb. 28, 2007), available at [www.illinois.gov/gov/execorders/docs/execorder2007-1.pdf](http://www.illinois.gov/gov/execorders/docs/execorder2007-1.pdf), prohibits a contractor, vendor, or bidder from causing, directing, or permitting “any procurement lobbying activities on its behalf to be undertaken by a family member of the then-serving Governor of the State of Illinois.” Moreover, contractors, vendors, and bidders are prohibited from causing, directing, or permitting procurement lobbying activities on its behalf by “a former employee of the State of Illinois who had procurement authority at any time during the one-year period immediately preceding the procurement lobbying activities.” ¶IV(b). Compliance with this order is a material term of any state procurement contract, and violations will be treated as a material breach. The violating party may also be referred for suspension in accordance with the Illinois Administrative Code. ¶V(b).

#### **C. [8.5] Prevailing Wage Act**

The Prevailing Wage Act comes into play in construction contracts involving public works. The Act pertains to all “laborers, workers and mechanics as are directly employed by contractors or subcontractors” on public works construction projects and requires that such be paid no less than the prevailing rate of wages for work of “a similar character . . . in the locality in which the work is performed.” 820 ILCS 130/3. See §§8.23 – 8.27 below for a detailed discussion of this Act and how it needs to be implemented at the project’s contracting stage.

#### **D. [8.6] Day Labor and Temporary Services Act**

In addressing contract documents when temporary or so-called “day laborers” may be used, practitioners should be familiar with the Day and Temporary Labor Services Act, 820 ILCS 175/1, *et seq.* The Act establishes worker rights and protections, and imposes requirements on both the agencies that place the workers and the contractors who use them. Agencies that place temporary and day laborers in manufacturing, construction, and other nonclerical occupations are required to register with the Illinois Department of Labor (IDOL) and comply with specified employment standards. The Act prohibits the charging of a fee to transport a day or temporary laborer to or from the designated work site. 820 ILCS 175/20.

For the contractor, the Act clearly sets forth duties when using day and temporary laborers. First, contractors must verify the IDOL status of the day and temporary labor service agency before entering into a contract with it. 820 ILCS 175/85; 56 Ill.Admin. Code §260.510. Contractors may rely on information on the IDOL website, [www.state.il.us/agency/idol](http://www.state.il.us/agency/idol), and will be held harmless if such information is inaccurate. *Id.*

In addition, contractors must provide documentation on the use of each employee. Specifically, at the end of each work day, the contractor must provide each day or temporary laborer with a work verification form approved by the IDOL stating “the date, the day or temporary laborer’s name, the work location, and the hours worked on that day.” 820 ILCS 175/30(a-1). Contractors who violate this requirement may be subject to a civil penalty up to \$500 per violation found by the IDOL, and up to \$2,500 for a second or subsequent violation. *Id.* Each day that a third party contracts with a day and temporary labor service agency that is not registered with the IDOL is considered a violation of the Act.

#### **E. [8.7] Minimum Wage Law**

The Minimum Wage Law, 820 ILCS 105/1, *et seq.*, guarantees a minimum wage of \$8 per hour for workers 18 years of age or older (through June 30, 2010), while workers under age 18 may be paid \$0.50 per hour less. Note that the minimum wage for adults goes up to \$8.25 per hour July 1, 2010. 820 ILCS 105/4. Credit for tips may not exceed 40 percent of the applicable minimum wage. Employers may apply for licenses to pay subminimum rates to learners and certain workers with physical and mental limitations. Overtime must be paid after 40 hours of work per week at time-and-one-half the regular rate. 820 ILCS 105/4a. See also 56 Ill.Admin. Code pt. 210.

When determining whether an employee is exempt or nonexempt from receiving overtime, an employer in Illinois needs to review the employee’s classification against both the federal Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §201, *et seq.*, and the Illinois Minimum Wage Law.

#### **F. [8.8] One Day Rest in Seven Act**

The One Day Rest in Seven Act, 820 ILCS 140/1, *et seq.*, provides employees with a minimum of 24 hours of rest in each calendar week and a meal period of 20 minutes for every 7½-hour shift, beginning no later than 5 hours after the start of the shift. The Act does allow employers to secure permits from the Illinois Department of Labor to have employees work the 7th day provided that the employees have voluntarily elected to work. See also 56 Ill.Admin. Code pt. 220.

#### **G. [8.9] Illinois Wage Payment and Collection Act**

The Illinois Wage Payment and Collection Act, 820 ILCS 115/1, *et seq.*, (1) establishes when, where, and how often wages must be paid; and (2) prohibits unilateral deductions from wages or final compensation without the employee’s consent. See also 56 Ill.Admin. Code pt. 300. While construction contracts do not normally address the timing and logistics of wage

payments of laborers, the various sub-relationships that may arise on projects require an understanding of the nuances of this often misunderstood statute. For instance, the required timing of wage payments may dictate the timing of payments between contractor and subcontractor.

Under the Act, employers must pay employees at least semimonthly or biweekly and must pay all wages earned during the semimonthly pay period. These wages must be paid no later than 13 days after the end of pay period in which they were earned. 820 ILCS 115/4. If employers choose to pay their employees on a weekly basis, then wages earned during a pay period must be paid no later than 7 days after the end of the pay period in which they were earned. Wages of executive, administrative, and professional employees may be paid once a month. The above terms, however, do not apply when a valid collective-bargaining agreement exists that provides for a different system of wage payment.

One challenging area of the Act is the limitation on wage withholding. Many contractors operate on the misunderstanding that they are able to offset monies owed by the employees against wages that are due to be paid to these employees. This issue frequently arises when inadvertent overpayment occurs or when an employee is obliged to pay for tools or clothing provided by the employer. However, the Act prohibits deductions from wages or final compensation “unless such deductions are (1) required by law; (2) to the benefit of the employee; (3) in response to a valid wage assignment or wage deduction order; [or] (4) made with the express written consent of the employee, given freely at the time the deduction is made.” 820 ILCS 115/9.

This Act also requires employers to pay final compensation to separated employees in full, if possible, at the time of separation. If that is not possible, then separated employees must be paid no later than the next regularly scheduled payday. Separated employees may also request, in writing, that their final compensation be paid by check and mailed to them. If a contract employee is terminated or resigns without having taken all his or her earned vacation time, the monetary equivalent of earned vacation must be paid in their final paycheck (unless otherwise provided in a collective-bargaining agreement). 820 ILCS 115/5.

#### **H. [8.10] Employment of Illinois Workers on Public Works Act**

The Employment of Illinois Workers on Public Works Act, 30 ILCS 570/0.01, *et seq.* (also known as the “Preference to Illinois Citizens Act”), requires contractors to use Illinois laborers on all public works construction and improvement projects during a period of “excessive unemployment.” See §8.53 below for a more detailed discussion of this Act and similar local laws, ordinances, and rules that require the hiring of local resident workers in preference to workers from other geographic areas.

#### **I. [8.11] Equal Pay Act of 2003**

The Equal Pay Act of 2003, 820 ILCS 112/1, *et seq.*, prohibits employers with four or more employees (820 ILCS 112/5) from paying unequal wages to men and women for doing the same or substantially similar work that requires equal skill, effort, and responsibility and is performed

under similar working conditions for the same employer in the same county (120 ILCS 112/10). This requirement does not apply if the wage difference is based on (1) a seniority system, (2) a merit system, (3) a system measuring earnings by quantity or quality of production, or (4) factors other than gender or a factor that would constitute unlawful discrimination under the Illinois Human Rights Act, 775 ILCS 5/1-101, *et seq.* 820 ILCS 112/10(a).

Employers are prohibited from (1) interfering with an employee attempting to exercise a right under this Act, or (2) discharging or discriminating against an individual for inquiring about, disclosing, comparing, or otherwise discussing an employee's wages. 820 ILCS 112/10(b). Employers may not discharge or discriminate against a person who files a charge under or institutes a proceeding relating to this Act, gives information in connection with an inquiry or proceeding under this Act, or testifies in an inquiry or proceeding under this Act. 820 ILCS 112/10(c).

From the practitioner's perspective, the Act includes documentation and posting requirements that should be considered in the contract drafting process. For instance, employers are required to record the name, address, occupation, and wages of each employee. Such records must be preserved for at least five years unless they relate to an ongoing investigation under this Act, in which case they must be maintained until destruction is authorized by the Illinois Department of Labor or a court order. 820 ILCS 112/20. In addition, employers covered by this Act must post notices to employees, in areas where notices are customarily posted for employees, which summarize the requirements of this Act and information regarding how to file a charge.

Employers violating this Act are subject to civil liability for all underpaid wages, plus interest and attorneys' fees. An additional civil penalty up to \$2,500 may also be assessed for each violation for each employee affected. 820 ILCS 112/30.

The Act does not apply to the engagement of independent contractors. 56 Ill.Admin. Code §320.130.

#### **J. [8.12] Wages of Women and Minors Act**

The Wages of Women and Minors Act, 820 ILCS 125/0.01, provides that any employer, or the officer or agent of any corporation, must pay any woman or minor employee equal rates applicable to such woman or minor under a mandatory minimum fair wage order. Violators shall be guilty of a Class B misdemeanor, and each week, in any day of which such employee is paid less than the rate applicable to him or her under a mandatory minimum fair wage order, and each employee so paid less, shall constitute a separate offense. 820 ILCS 125/15(2).

#### **K. [8.13] Illinois Municipal Code**

For contracts involving public bodies, §3.1-55-10 of the Illinois Municipal Code, 65 ILCS 5/3.1-55-10, sets forth a detailed code of conduct directed to prohibitions of interest of municipal officers in municipal contracts and works. The prohibitions in the Municipal Code are similar to those under the Public Officer Prohibited Activities Act, 50 ILCS 105/0.01, *et seq.*

**L. [8.14] Public Officer Prohibited Activities Act**

For contracts involving public bodies, the Public Officer Prohibited Activities Act states:

**No person holding any office, either by election or appointment under the laws or Constitution of this State, may be in any manner financially interested directly . . . or indirectly . . . in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. No such officer may represent, either as agent or otherwise, any person [or entity] with respect to any application or bid for any contract or work in regard to which such officer may be called upon to vote. . . . Any contract made and procured hereof is void.** 50 ILCS 105/3(a).

Sections 105/3(b) and 105/3(c) of the Act allow elected or appointed members of the governing body of a public entity to provide materials, merchandise, property, services, or labor — subject to certain restrictions and limitations.

For purposes of the Public Officer Prohibited Activities Act, a municipal officer

**shall not be deemed interested [in the contract] if the officer is an employee of a company or owns or holds an interest of 1% or less in the municipal officer’s individual name in a company, or both, that company is involved in the transaction of business with the municipality, and that company’s stock is traded on a nationally recognized securities market, provided the interested member: (i) publicly discloses the fact . . . before deliberation of the proposed award of the contract; (ii) refrains from [involvement] in negotiation, approval, or both of the contract, work or business; (iii) abstains from voting on the award of the contract . . . and (iv) the contract is approved by a majority vote of those members currently holding office.** 50 ILCS 105/3(e).

A municipal officer is also not deemed “interested” if the officer holds an interest of one percent or less of the publicly traded company through a mutual fund. Due to the complexity of this Act, the practitioner will want to be familiar with the court decisions and opinions of the Illinois Attorney General construing and opining on the application of this Act.

**M. [8.15] Educational Loan Default Act**

Section 3 of the Educational Loan Default Act, 5 ILCS 385/3, bars an individual in default on an educational loan from contracting with a state agency for goods or services. The Act also provides that “[a]ny contract used by any State agency shall include a statement certifying that the individual is not in default on an educational loan as provided in this Section.” *Id.*

**N. [8.16] School Code**

Practitioners reviewing and preparing contracts with Illinois school districts will need to be familiar with the provisions of the School Code, 105 ILCS 5/1-1, *et seq.*, applicable to

construction projects. The School Code prohibits any member or employee of a school board in districts having between 100,000 – 500,000 inhabitants from being directly or indirectly interested in any contract or work that is paid for by the school district. 105 ILCS 5/33-5.

In addition, the School Code states that “[n]o school board member shall be interested, directly or indirectly, in his own name, or in the name of any other person, association, trust or corporation, in any contract, work or business of the district, or in the sale of any article. . . or purchase of any property . . . of the district.” 105 ILCS 5/10-9(a). Certain contracts may be given to a board member (or to his or her business) if the contract is \$1,000 or less, or in certain limited situations provided disclosure procedures are followed and the board member owns less than 7.5 percent of the business. 105 ILCS 5/10-9. Also, if the materials, labor, or merchandise is not available from any other source, the contract may be let to a board member provided the total amount in any one year does not exceed \$5,000. *Id.*

#### **O. [8.17] Drug Free Workplace Act**

The Drug Free Workplace Act, 30 ILCS 580/1, *et seq.*, requires that contractors seeking to be considered for the award of a state contract certify to the granting or contracting agency that it will provide a drug-free workplace. The certification must be made by

1. publishing a drug-free workplace statement;
2. establishing a drug-free awareness program;
3. requiring that each employee receive a copy of the drug-free workplace statement;
4. notifying the granting or contracting agency within 10 days after receiving notice that an employee has been convicted of a criminal drug offense;
5. sanctioning convicted employees or requiring that they participate in a rehabilitation program;
6. assisting employees in selecting drug counseling, treatment, or rehabilitation, as required; and
7. making a good faith effort to continue to maintain a drug free workplace. 30 ILCS 580/3.

With respect to drafting contract clauses affirming the obligation to comply with the Drug Free Workplace Act, the following example may be appropriate:

**The Contractor by submitting its bid certifies that it will provide a drug-free workplace and that it is in compliance with the requirements of the Drug Free Workplace Act, 30 ILCS 580.1 *et seq.***

**P. [8.18] Substance Abuse Prevention on Public Works Projects Act**

Section 10 of the Substance Abuse Prevention on Public Works Projects Act, 820 ILCS 265/1, *et seq.*, prohibits employees from using, possessing, distributing, delivering, or being under the influence of a alcohol while working on a public works project. 820 ILCS 265/10. Note that being under the influence of alcohol means the employee's blood or breath alcohol concentration "is at or above 0.02." *Id.* This Act also imposes duties on employers, requiring that all employers have a written substance abuse prevention program in place before commencing work on a public works project. 820 ILCS 265/15. Employers must file their written prevention program with the public body it is working for, and such programs must include

1. a nine-panel urine drug test plus a test for alcohol;
2. the prohibition under 820 ILCS 265/10;
3. a requirement that employees submit to prehire, random, reasonable suspicion, and postaccident drug and alcohol testing; and
4. a procedure for notifying an employee who violates 820 ILCS 265/10, tests positive for drugs, or refuses to submit to testing that he or she cannot work on the public works project until certain conditions are met. 820 ILCS 265/15(1).

Unless otherwise provided in a collective-bargaining agreement, an employer is solely responsible for the cost of developing, implementing, and enforcing its substance abuse prevention program. 820 ILCS 265/15(3).

**Q. [8.19] Criminal Code**

Section 33E-11 of the Criminal Code of 1961, 720 ILCS 5/33E-11, requires that

**[e]very bid submitted to and public contract executed pursuant to that bid by the State or by a unit of local government shall contain a certification by the prime contractor that the prime contractor is not barred from contracting with any unit of State or local government as a result of a violation of either Section 33E-3 [bid rigging] or Section 33E-4 [bid rotating] of this Article.**

**R. [8.20] International Anti-Boycott Certification Act**

Under the International Anti-Boycott Certification Act, 30 ILCS 582/1, *et seq.*,

**[e]very contract entered into by the State of Illinois for the manufacture, furnishing, or purchasing of supplies, material, or equipment or for the furnishing of work, labor, or services, in an amount exceeding the threshold for small purchases according to the purchasing laws of this State or \$10,000, whichever is less, shall contain certification, as a material condition of the contract by which the contractor**

**agrees that neither the contractor nor any substantially-owned affiliated company is participating or shall participate in an international boycott in violation of the U.S. Export Administration Act of 1979 or the regulations of the U.S. Department of Commerce promulgated under the Act. 30 ILCS 582/5.**

Failure to include this contract provision allows the state agency with jurisdiction over the contract to forfeit or void the contract. 30 ILCS 582/10.

### III. [8.21] FEDERAL STATUTORY REQUIREMENTS

Construction contracts may be financed in whole or in part with federal funds. For example, the Illinois Department of Transportation constructs and repairs roads and bridges using federal funds. See Article 3 of the Illinois Highway Code, 605 ILCS 5/3-101, *et seq.* Through the Illinois Department of Transportation Division of Aeronautics, federal funds are granted to local airports for airport construction projects. 620 ILCS 5/34a. When federal funds are used to finance a construction project, the federal government can require compliance with federal laws and regulations as a condition of receipt of the federal monies, for the Supreme Court has held that Congress may attach conditions to the receipt of federal money incident to its Spending Clause power. *South Dakota v. Dole*, 483 U.S. 203, 97 L.Ed.2d 171, 107 S.Ct. 2793 2795 (1987); *In re Application of County Collector of Cook County*, 332 Ill.App.3d 277, 774 N.E.2d 832, 846, 266 Ill.Dec. 393 (1st Dist. 2002) (recognizing *South Dakota, supra*). A state entity may not rely on the Tenth Amendment to avoid or disavow as involuntary its compliance with a condition attached to the receipt of federal funds. See *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 72 L.Ed.2d 532, 102 S.Ct. 2126, 2141 (1982), citing *State of Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 91 L.Ed. 794, 67 S.Ct. 544, 553 – 554 (1947) (when Congress displaces state regulation of private conduct in preemptible area, Congress may also require state entity to conduct its own affairs in accordance with federal regulation as condition to state entity’s continued participation in preemptible area). See also *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 67 L.Ed.2d 694, 101 S.Ct. 1531, 1543 – 1544 (1981) (requiring conditions attached to federal grants must be expressed clearly by Congress in statute so state can “knowingly decide whether or not to accept those funds”); *Milwaukee County Pavers Ass’n v. Fiedler*, 922 F.2d 419, 424 (7th Cir. 1991) (“[T]he federal government can, by virtue of the [E]nforcement [C]lause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can . . . by authorizing states to do things that they could not do without federal authorization.”).

Numerous federal laws bear on labor and employment standards, duties, and obligations that are applicable to federally assisted construction projects:

- a. The Fair Labor Standards Act of 1938, 29 U.S.C. §201, *et seq.*, prescribes certain minimum standards for employee wages and hours.
- b. The Portal-to-Portal Act of 1947, 29 U.S.C. §251, *et seq.*, sets guidelines for whether certain workday activities occurring before or after an employee begins or ceases his or her principal activity are compensable.

c. The Davis-Bacon Act, 40 U.S.C. §3141, *et seq.*, prescribes certain minimum wages that must be paid on public construction projects.

d. The Contract Work Hours and Safety Standards Act, 40 U.S.C. §3701, *et seq.*, prescribes how the wages of employees are to be computed and prescribes certain health and safety working conditions.

e. The Copeland Anti-Kickback Act, 18 U.S.C. §874, prohibits wage kickbacks.

f. The Occupational Safety and Health Act of 1970, 29 U.S.C. §651, *et seq.*, prescribes certain minimum safety and health standards.

g. 42 U.S.C. §2000e-2 (Title VII of the Civil Rights Act of 1964) prohibits various forms of employment-related discrimination.

h. The Equal Pay Act of 1963, 29 U.S.C. §206(d), prohibits wage discrimination based on sex.

i. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621, *et seq.*, prohibits various forms of employment-related discrimination based on age.

j. The Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §4212, provides for affirmative action in the employment of Vietnam veterans and disabled veterans.

k. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, prohibits discrimination against the disabled by recipients of federal funding, including private organizations.

l. Executive Order No. 11,246 (Sept. 24, 1965), 30 Fed.Reg. 12,319, 12935 (Sept. 28, 1965), as amended by Executive Order No. 12,086 (Oct. 5, 1978), 43 Fed.Reg. 46,501 (Oct. 10 1978), prohibits discrimination and requires affirmative action in federally assisted contracts and subcontracts.

m. Executive Order No. 11,141 (Feb. 12, 1964), 29 Fed.Reg. 2,477 (Feb. 15, 1964), prohibits age discrimination in federally assisted contracts and subcontracts.

There are also the various federal regulations issued to implement these federal laws.

Practitioners representing clients involved with construction contracts must be aware, therefore, of whether the project is financed in part with federal assistance, and, if so, they must be familiar with the required provisions that federal law mandates be a part of the construction contracts. The remainder of this section discusses these required contract provisions and how they must be implemented.

The required contract provisions can be addressed by utilizing appendices to the construction contract that contain these provisions and otherwise appropriately referencing and calling out these requirements in the text of the contract. As discussed below, the federal regulations require the insertion of specific labor-related language into federally assisted contracts. The practitioner

also may wish to consider using a general contract clause to ensure compliance with the federal, as well as other governmental regulations. An example of such a general clause is as follows:

#### **Governmental Requirements, Regulations, Acts, and Statutes**

**a. Contractor shall, at its own expense, comply with all requirements, regulations, statutes, and acts promulgated by federal, state, local, or other governmental authority and applicable to the work of the prime contract and Contractor's work, including all successors and amendments thereto that may be promulgated during performance of the work. Particular attention is called, but not limited to those requirements, regulations, statutes, and acts related to safety, equal employment opportunity, wage and hours including prevailing wage laws, environment, and hazardous/toxic material. Contractor, as part of Contractor's compliance, shall make itself aware of, and readily comply with, any notification and/or reporting requirements of these regulations, statutes, acts and the associated penalties and deductions for failure to comply therewith. Contractor shall ensure and be responsible for similar compliance by all those working under Contractor in performance of the work called for under this Agreement. Contractor shall promptly cure, pay, remedy, or otherwise cause to be removed any violation, citation, fine, penalty, or claim by any governmental entity due to the failure of Contractor, or anyone working under it, to so comply.**

**b. Failure of Contractor, or anyone working under it, to comply with the requirements, regulations, statutes, or acts, as described in subparagraph a above, shall constitute a material breach of this Agreement by Contractor, and \_\_\_\_\_ may in its discretion exercise all of the rights and remedies provided by law or under the terms of this Agreement, including, but not limited to, withholding of a sum equal to \_\_\_\_ of the amount \_\_\_\_\_ reasonably believes it may be damaged by reason of such breach.**

**c. In addition to the general indemnity provisions of this Agreement, to the greatest extent permitted by law, Contractor shall defend, indemnify and hold \_\_\_\_\_ harmless from any loss, damage, injury, assessment, penalty, fine, forfeiture, or claim to, by or against \_\_\_\_\_, which results directly or indirectly from a breach of subparagraph a above, regardless of the fault or neglect of a party indemnified hereunder, save and except the sole negligence or willful misconduct of such party.**

Under 29 C.F.R. pt. 5, the U.S. Department of Labor (USDOL) has issued regulations set forth as the Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction. These labor standards implement the administration and enforcement of the labor standard provisions of the numerous federal statutes conferring on the Secretary of the USDOL duties and responsibilities to administer and enforce these labor standard provisions. Included in these statutes, and covered by these labor standards, are the Davis-Bacon Act and labor standards dealing with the fringe benefit provisions of the Davis-Bacon Act. 40 U.S.C. §3141, *et seq.*; 29 C.F.R. §§5.20 – 5.32. The Davis-Bacon Act prevailing wage requirements are discussed separately in §§8.23 – 8.27 below dealing with prevailing wage laws.

29 C.F.R. §5.5 requires that for federally assisted construction contracts, the labor standard clauses set forth in §5.5 (or clauses modified with the approval of the USDOL) must be made a part of the contract. The practitioner must ensure that these clauses are inserted into federally assisted construction contracts that meet the following three triggers:

a. The contract must be “in excess of \$2,000 which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work.” 29 C.F.R. §5.5(a).

b. The contract must be financed in whole or in part from federal funds, or in accordance with federal agency guarantees, or financed from funds obtained by a federal agency pledge of a loan, grant, or annual contribution. *Id.*

c. The work must be subject to the labor standard provisions of the federal statutes listed in 29 C.F.R. §5.1. *Id.*

The term “contract” under the labor standards “means any prime contract . . . and any subcontract of any tier thereunder let under the prime contract.” 29 C.F.R. §5.2(h). A state or local government performing construction with its own employees is not regarded as a contractor under statutes providing federal financial assistance. “However, under statutes requiring payment of prevailing wages to all laborers and mechanics employed on the assisted project . . . State and local recipients of Federal-aid must pay these employees according to Davis-Bacon labor standards.” *Id.*

The terms “building” and “work” are defined by the labor standards to include any construction activity, but not the manufacturing or furnishing of materials, articles, supplies, or equipment not done at and in connection with the site of the building or work, or the servicing and maintenance work. 29 C.F.R. §5.2(i).

No federal funds will be approved

**after the beginning of construction unless there is on file with the [federal] agency a certification by the contractor that the contractor and its subcontractors have complied with the provisions of [29 C.F.R.] §5.5 or unless there is on file with the agency a certification by the contractor that there is a substantial dispute with respect to the required provisions.** 29 C.F.R. §5.6(a)(1).

Thus, the owner of a project financed in part by federal funds must determine the applicability of these Part 5 labor standards and must ensure that these labor standards are incorporated in the owner’s contract with the prime contractor. In addition, §5.5(a)(6) of the labor standards provides expressly that the contractor or subcontractor “shall insert in any subcontracts the clauses contained in 29 C.F.R. §5.5(a)(1) through (10) and such other clauses as the [name of the federal agency] may . . . require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontract.” If not expressly set forth in these subcontracts, a properly worded “incorporation by reference” or “flow-down” clause must be utilized. See §8.22

below for a discussion about incorporation-by-reference and flow-down clauses. The importance of ensuring the inclusion of these clauses, as well as compliance therewith, is critically important, as §5.5(a)(6) provides that “[t]he prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.”

The labor standards are implemented by various federal agencies through their own regulations and forms. Thus, the practitioner must identify the source of the federal assistance and review the applicable regulations of the federal agency providing the assistance. Two of the largest federally assisted construction programs that the practitioner may encounter are those dealing with federally assisted highway and bridge construction and federally assisted housing development construction. The following paragraphs highlight for the practitioner the required contract clauses that implement the labor standards for these two programs:

**Federal-aid highway construction contract labor provisions.** If the construction project is a federally assisted highway construction project (“Federal-aid highway” is defined in 23 U.S.C. §101 as “a highway eligible for assistance under this chapter other than a highway classified as a local road or rural minor collector”), the practitioner must be familiar with both the Davis-Bacon provisions of the Federal-Aid Highway Act, 23 U.S.C. §113, and with 23 C.F.R. pt. 633, Required Contract Provisions, established by the U.S. Department of Transportation Federal Highway Administration (FHWA). These Part 633 regulations prescribe required contract provisions that address, among other things, equal employment opportunity (EEO), nonsegregated facilities, payment of predetermined minimum wages, statements of payroll, labor records, safety and accident prevention, and limitations on subletting or assigning contract work. The required contract provisions for federal aid construction contracts are set forth in Form FHWA-1273, available at [www.fhwa.dot.gov/programadmin/contracts/1273.pdf](http://www.fhwa.dot.gov/programadmin/contracts/1273.pdf).

Form FHWA-1273 §I.1 provides that the Part 633 provisions apply to all work that a contractor performs with its own workforces as well as to all work which is performed by subcontractors. Form FHWA-1273 §I.2 requires that a contractor must insert the required contract provisions in all of its subcontracts and must insert a clause in subcontracts that requires the subcontractors to include the required contract provisions in any lower-tier subcontracts, together with a clause requiring lower-tier subcontractors to include the required contract provisions in any further subcontracts which they in turn make.

For federal aid highway construction projects administered through the Illinois Department of Transportation (IDOT), practitioners should refer to IDOT’s combined Construction Memorandum No. 09-14/Small Business Memorandum No. 09-1, p. 1, available at [www.dot.state.il.us/const/curpdf/memorandum\\_14.pdf](http://www.dot.state.il.us/const/curpdf/memorandum_14.pdf) (eff. Mar. 6, 2009), which “is composed of excerpts from the Labor Compliance Manual for Direct Federal and Federal-aid Construction, Fourth Edition, issued by the Federal Highway Administration, as well as excerpts from the Required Contract Provisions, Form FHWA 1273, and the U. S. Department of Labor Operations Handbook.”

**Federal housing project labor standards.** If the construction project involves a housing project assisted by one of the U.S. Department of Housing and Urban Development (HUD) programs, the practitioner should be aware that HUD has standard forms that specify labor

standard contract clauses applicable to HUD's various programs. Form HUD-5370, General Conditions for Construction Contracts — Public Housing Programs, available at [www.hud.gov/offices/adm/hudclips/forms/files/5370.pdf](http://www.hud.gov/offices/adm/hudclips/forms/files/5370.pdf), is applicable to any construction or development contracts and sets forth the contract clauses required by the U.S. Office of Management and Budget's (OMB's) common rule on grantee procurement implemented by HUD regulations. 24 C.F.R. §84.48; Appendix A to 24 C.F.R. pt. 84; 24 C.F.R. §85.36(i). Form HUD-5370 §46 sets forth labor standards for Davis-Bacon and related acts. Form HUD-5370 §40 sets forth the labor standards for "Employment, Training, and Contracting Opportunities for Low-Income Persons, Section 3 of the Housing and Urban Development Act of 1968."

Section 3 of the Housing and Urban Development Act of 1968, Pub.L. 90-448, 82 Stat. 476, sets forth what is known as the "section 3 clause." The section 3 clause, as set out at 24 C.F.R. §135.38, is a seven-paragraph clause required for inclusion in all contracts covered by §3 of the Housing and Urban Development Act of 1968, 12 U.S.C. §1701u. These are contracts awarded for work to be performed in connection with housing rehabilitation (including reduction and abatement of lead-based paint hazards), housing construction, or other public construction projects, for which the assistance exceeds \$200,000 and the contract or subcontract exceeds \$100,000. See 24 C.F.R. §135.3 (for the applicability of §3). See also Form HUD-2554, Supplementary Conditions of the Contract for Construction, [www.hud.gov/offices/adm/hudclips/forms/files/2554.pdf](http://www.hud.gov/offices/adm/hudclips/forms/files/2554.pdf) (issued primarily for Federal Housing Administration (FHA) multifamily housing and other construction projects administered by HUD); Form HUD-4010, Federal Labor Standards Provisions, [www.hud.gov/offices/adm/hudclips/forms/files/4010.pdf](http://www.hud.gov/offices/adm/hudclips/forms/files/4010.pdf) (used for Community Development Block Grant (CDBG) projects pursuant to the Housing and Community Development Act of 1974, 42 U.S.C. §5301, *et seq.*, and HUD's HOME Investment Partnerships Program (HOME) projects under Title II of the Cranston-Gonzalez National Affordable Housing Act (NAHA), Pub.L. 101-625, 104 Stat. 4079 (1990)).

**Disadvantaged business enterprise (DBE)/minority business enterprise (MBE) labor standards.** In addition to the labor standards discussed above, federally assisted construction contracts may be subject to the federal requirements for the participation of minority and disadvantaged business enterprises. See §8.52 below for a detailed discussion of these labor standards.

**Discrimination and affirmative action.** As noted above, and as one would expect, various federal statutes, regulations, and executive orders that govern equal opportunity in employment apply to employment in construction activities. The contract provisions required to be made a part of a federally assisted construction contract include these various equal employment opportunity requirements. Often, compliance with these federal requirements can be implemented in a contract or subcontract by providing that the contractor or subcontractor expressly certifies its compliance or agreement to comply with the specific federal nondiscrimination requirements as spelled out in the contract clause.

For federally assisted construction contracts, the practitioner needs to be familiar with the regulations of the Office of Federal Contract Compliance Programs (OFCCP) prescribing (a) affirmative action requirements for construction contractors, and (b) EEO clauses that are

required to be included in and made a part of all nonexempt, federally assisted construction contracts and subcontracts. 41 C.F.R. pt. 60-4. Individual federal agencies (e.g., FHWA and HUD) often have specific rules addressing EEO and affirmative action that are applicable to construction contracts assisted by those agencies. The practitioner will want to make sure that these specific agency requirements are reviewed along with the OFCCP requirements.

For a more detailed discussion of EEO and affirmative action requirements applicable to construction projects, see §§8.45 – 8.51 below.

#### **IV. [8.22] INCORPORATION-BY-REFERENCE AND FLOW-DOWN CLAUSES**

The basic construction contract is generally embodied and reflected in a contract document or set of contract documents between the project owner and the project contractor, or between the project owner and the project architect and/or engineer, or between the project owner and the project construction manager. Construction contracts, however, more often involve multiple other parties. This is so because a construction contractor often undertakes the subcontracts part of the construction contract obligations that the construction contractor does not intend to perform with its own forces. A contractor may also be subcontracting with material suppliers or equipment operators to furnish materials or equipment for the project. In addition, a construction project is often governed by more than one construction contract, and the various documents comprising the construction contract often, by their own terms, incorporate by reference other contract documents. Notwithstanding the delegation of responsibility through subcontracts, the ultimate responsibility for compliance with the contract documents and with statutory, ordinance, or other regulatory provisions bearing on the project lies with the contractor who has the direct contract with the project owner.

In order to ensure that subcontractors, suppliers, and other involved parties undertake the same commitments to the general contractor as the general contractor undertakes with the project owner, there must be a mechanism for imposing on the subcontractors and suppliers the same commitments that the general contractor is undertaking. This is true with labor-related and employment-related issues as it is with the actual contract work itself.

The common method employed in the construction industry to ensure that these “downstream” parties undertake the same commitments to the general contractor as the general contractor undertakes with the project owner is to include in the construction contract clauses commonly known as “incorporation-by-reference” and “flow-down” clauses. These clauses are designed to ensure that the general contractor’s obligations and commitments to the project owner flow down to the subcontractors and suppliers, in a manner that incorporates into the construction contract between the general contractor and its subcontractor/supplier the same obligations and commitments set forth in the general contractor’s agreement with the project owner. Such clauses are consistent with the general legal principle that a contract may effectively incorporate by reference another document so as to make it part of the contract as if expressly set forth therein. *Provident Federal Savings & Loan Ass’n v. Realty Centre, Ltd.*, 97 Ill.2d 187, 454 N.E.2d 249, 252, 73 Ill.Dec. 389 (1983); *Kirschenbaum v. Northwestern University*, 312 Ill.App.3d 1017, 728

N.E.2d 752, 762, 245 Ill.Dec. 670 (1st Dist. 1999) (“Contracts which specifically incorporate other documents by reference are to be construed as a whole with those other documents.”)

An incorporation-by-reference clause, as the name implies, typically identifies the other documents that are incorporated by reference into the prime contract document. For example, the primary contract document between the owner and prime contractor often incorporates by reference other documents that contain general, supplementary, or special conditions with which there must be compliance by the general contractor. In the case of a subcontract document, that document often incorporates by reference the contract between the project owner and prime contractor, the plans and specifications, and issued addendums, as well as the general, supplementary, or special conditions.

A flow-down clause, typically found in subcontract documents, may not identify other documents that have been incorporated by reference into the primary contract document. Rather, by its terms, it imposes on the subcontractor an express contractual obligation or duty to the prime contractor that maintains the same obligations, duties, and responsibilities as the prime contractor has assumed toward the project owner. Usually, a flow-down clause also grants to the subcontractor the same privileges and protections from the prime contractor as the prime contractor obtains from the project owner. *See, e.g., Plum Creek Wastewater Authority v. Aqua-Aerobic Systems, Inc.*, 597 F.Supp.2d 1228, 1233 (D.Colo. 2009) (discusses general import of flow-down clauses); *United States ex rel. Quality Trust, Inc. v. Cajun Contractors, Inc.*, 486 F.Supp.2d 1255, 1263 – 1264 (D.Kan. 2007) (same). By reason of such incorporation-by-reference or flow-down clauses, labor-related and/or employment-related obligations and commitments undertaken by the general contractor to the project owner are also made obligations and commitments by the subcontractor/supplier to the general contractor.

As is noted extensively in §8.21 above (federal labor requirements for federally assisted construction contracts), numerous provisions in the federal laws and regulations impose these incorporation-by-reference and flow-down requirements in the contracts, as federal laws dictate that the federal labor requirements are deemed incorporated by reference and dictate that the provisions must be included in lower-tier subcontracts.

NOTE: The existence of an incorporation-by-reference or flow-down clause does not create a contractual relationship between the project owner and the downstream subcontractor or supplier. *See, e.g., Turner Construction Co. v. Midwest Curtainwalls, Inc.*, 187 Ill.App.3d 417, 543 N.E.2d 249, 135 Ill.Dec. 14 (1st Dist. 1989).

Care must be taken in drafting incorporation-by-reference or flow-down clauses. Often, these clauses are drafted generally and simply provide that the subcontractor agrees to assume all the obligations and responsibilities that the contractor owes the owner to the extent of the work to be performed by the subcontractor. The contract between the project owner and the general contractor may also be written generally and exact only a promise from the general contractor to bind each of its subcontractors/suppliers to the extent of the work to be performed by the subcontractor/supplier. The question becomes whether the generally worded clauses bind subcontractors/suppliers to all of the labor and employment obligations undertaken by the general contractors, including all contract provisions for addressing and remedying violations of those clauses.

The contract drafter should not, therefore, take for granted that a simple or formbook version of the incorporation-by-reference or flow-down clauses binds the downstream subcontractor or supplier to all of the labor and/or employment provisions of the prime contract. If there are specific laws or provisions that are intended to be incorporated and whose obligations are intended to flow down to the subcontractors and/or suppliers, care should be taken to specifically call out these provisions or make clear reference to a provision in the prime contract that makes these labor and/or employment provisions applicable to the work at the construction project.

## V. [8.23] PREVAILING WAGE REQUIREMENTS

When the construction project is a public work, both Illinois and federal law prescribe both (a) the labor rates (prevailing wage rates) to be paid to persons employed to perform the work, and (b) the contract requirements with which there must be compliance to ensure the payment of the prevailing wage rates.

For Illinois construction projects involving no federal financial assistance, the labor rates to be paid to persons employed to perform the work are dictated by the Illinois Prevailing Wage Act, 820 ILCS 130/0.01, *et seq.* When the project involves federal financial assistance, the labor rates are dictated by the Davis-Bacon Act, 40 U.S.C. §3141, *et seq.* The Prevailing Wage Act expressly disclaims its applicability to federal construction projects that fall under the Davis-Bacon Act. 820 ILCS 130/11. It should be noted, however, that on construction projects jointly funded by federal and state funds, even if the Davis-Bacon Act does not require payment of prevailing wages, the Illinois Prevailing Wage Act may require such payment as the Davis-Bacon Act is not deemed to preempt application of the Illinois statute if compliance can be had with both laws. *Frank Bros. v. Wisconsin Department of Transportation*, 409 F.3d 880, 894 (7th Cir. 2005) (contractor must comply with Wisconsin statute that specifically includes truck drivers although Davis-Bacon Act expressly exempts truck drivers from its coverage).

Even between the Illinois Prevailing Wage Act and the federal Davis-Bacon Act, the definition of what constitutes a “public work,” so as to trigger the applicability of these laws, is complex and interpretations vary. The scope and location of the work for which the prevailing wage rate is to be paid vary from state to state and from region to region within a state. Compare, *e.g.*, 820 ILCS 130/3 (Prevailing Wage Act) with 40 U.S.C. §3142(b) (Davis-Bacon Act) and 29 C.F.R. §5.2. In addition to dictating the prevailing wage rates to be paid, the two Acts impose certain requirements on public owners and on contractors and subcontractors, which must be made a part of the construction contract at issue.

Failure to comply with the statutory prevailing wage laws results in increased labor costs being imposed on the project work as well as statutory penalties, possible criminal sanctions, and possible contractor debarment. Moreover, the Prevailing Wage Act expressly provides:

**No public works project shall be instituted unless the provisions of this Act have been complied with. . . . Any contract for public works awarded at a time when the prevailing wage prerequisites had not been met shall be void as against public policy.** 820 ILCS 130/11.

As regards state contracts, the Illinois Procurement Code requires that a responsible bidder must, among other things, comply with the Prevailing Wage Act and present satisfactory evidence of that compliance to the appropriate construction agency, unless compliance with this provision would jeopardize the receipt of federal funds for the project. 30 ILCS 500/30-22(2). Responsible bidder laws of local government entities usually contain a similar requirement.

Both the Illinois and federal prevailing wage statutes and implementing interpretations require, therefore, that a practitioner representing a public owner, and a contractor or subcontractor performing work for the project, must be intimately familiar with the requirements of these prevailing wage laws in order to understand whether the construction contract under consideration falls under either the Prevailing Wage Act or the Davis–Bacon Act, and if so, what contract provisions must be utilized to implement the requirements of these two Acts.

## A. Illinois Prevailing Wage Act

### 1. [8.24] Does the Act Apply?

The Prevailing Wage Act requires that the prevailing wage rate, as determined in accordance with the provisions of that Act, be paid to all “laborers, mechanics and other workers employed in any public works . . . by any public body and to anyone under contracts for public works.” 820 ILCS 130/2. The practitioner often finds that the same section of the Act will be amended concurrently by several different public acts in the same General Assembly session. Consequently, when reviewing the most current version of the Act, a practitioner may have to review several different versions of the same section of the Act to determine the full extent of the provisions of the Act. The Act applies to both a public body performing the public work with its own forces and to contractors performing the work for the public body. The Act is applicable to home-rule units, and, thus, home-rule units may not opt out of or modify the Act’s requirements. *People ex rel. Bernardi v. City of Highland Park*, 121 Ill. 2d 1, 520 N.E.2d 316, 117 Ill.Dec. 155 (1988).

The Prevailing Wage Act defines the term “public works.” 820 ILCS 130/2. The definition begins with an all-encompassing standard that public works are “all fixed works constructed or demolished by any public body, or paid for wholly or in part out of public funds.” *Id.* Note that any demolition work undertaken by any public body is a “public work” regardless of whether the demolition work is part of a public works construction project. Section 2 of the Act goes on to define a “public works” as also “includ[ing] all projects financed in whole or in part” from the numerous specific financing sources expressly identified in the statutory definition of “public works.”

“Construction” is defined by §2 as “all work on public works involving laborers, worker or mechanics.” Work done directly by a public utility company or a project “undertaken by the owner at an owner-occupied single-family residence or at an owner-occupied unit of a multi-family residence” are expressly excluded by the Act from the definition of “public works.” *Id.*

By reason of the definition of “public works,” the inquiry also requires a determination of whether the public work is in fact being constructed by a public body. As defined by the Act in §2:

**“Public body” means the State or any officer, board or commission of the State or any political subdivision or department thereof, or any institution supported in whole or in part by public funds, and includes every county, city, town, village, township, school district, irrigation, utility, reclamation improvement or other district and every other political subdivision, district or municipality of the state whether such political subdivision, municipality or district operates under a special charter or not. *Id.***

The definition above is very encompassing as it includes all state entities, all entities that are political subdivisions, municipalities, school districts, or other districts of the state, and “any institution supported in whole or in part by public funds.” *Id.* In most cases, it should not be difficult for an owner, contractor, or subcontractor to know that the construction contract is for a public work, constructed for use by a public body, and thus aware that the contract documents must include various provisions implementing the Prevailing Wage Act.

The complexity of the Act, however, is reflected in the amendatory language added to §2, with the enactment of P.A. 96-58 (eff. Jan. 1, 2010). This amendment expanded the definition of “public works” to include “all projects financed in whole or in part with bonds, grants, loans or other funds made available by and through the State or any of its political subdivisions.” *Id.* The effect of this amendatory language was to extend the application of the Prevailing Wage Act to private enterprises that receive public financial assistance.

To understand the import of this amendatory language, practitioners need to be familiar with Illinois Attorney General’s Opinions 00-018 and 97-014, and the cases *Opportunity Center of Southeastern Illinois, Inc. v. Bernardi*, 204 Ill.App.3d 945, 562 N.E.2d 1053, 150 Ill.Dec. 250 (5th Dist. 1990) (private entity supported by public funding is subject to Act), and *People ex rel. Bernardi v. Illini Community Hospital*, 163 Ill.App.3d 987, 516 N.E.2d 1320, 114 Ill.Dec. 926 (4th Dist. 1987) (construction project of not-for-profit hospital receiving tax funds but using only private funds for construction project), which are discussed in those two opinions. P.A. 96-58 was directed at codifying the import of these two opinions.

In Op. Att’y Gen. 00-018, *supra*, the Illinois Attorney General, after analyzing Illinois caselaw, determined that the Prevailing Wage Act can be applied to construction projects undertaken by private entities. In that opinion, the Attorney General determined:

a. A nongovernmental entity that provides services to the public and receives in return public grant support is a “public body” for purposes of the Illinois Prevailing Wage Act.

b. The acceptance by a not-for-profit corporation or other private entity of a one-time grant of public funds for construction of a fixed work, even if the entity does not receive sufficient public financial support, is considered a “public body” subject to the provisions of the Act.

c. Although a bright-line test could not be fashioned to determine the level of public funding necessary to trigger the Act’s coverage, the receipt of even small amounts of public funding on a regular basis is sufficient to bring a nongovernmental entity within the Act’s definition of a “public body” even if the funding made up only a small part of the entity’s total funding.

d. The occasional receipt of a relatively insignificant amount of public funds not directly related to the construction of public works would not be sufficient to trigger the Act's coverage.

If the funding source is specifically called out in the Act, that would trigger the Act's coverage. The opinion did, however, state that if the private entity has to pay back a loan of public funds for which loan the local government entity lent its credit to raise the funds through the sale of municipal bonds, the Act's coverage is not triggered as this would be, in essence, construction with the private entity's own funds and not public funds or tax revenues.

In Op. Att'y Gen. 97-014, *supra*, the Attorney General concluded that the Prevailing Wage Act applied to construction of a classroom building undertaken on the campus of a community college by a community college foundation — said foundation supported entirely by private funds and a separate entity from the community college — because the project was being constructed for use by a public body on land belonging to that public body.

Thus, whether a construction project that, on first blush, appears to be a private undertaking is in fact a public work to which the Prevailing Wage Act applies will require careful analysis by the practitioner in order to determine whether the required contract provisions dictated by the Act must be utilized. The contractors should make inquiry of a private owner about the sources of funding since a contractor is not likely to be aware of whether public funds are provided for the project. Contractors may also have to evaluate whether the private owner receives public funding at a level or frequency that converts the project into a prevailing wage project.

NOTE: The amendatory language added to 820 ILCS 130/2 by P.A. 96-58 raised the as yet unanswered question as to whether projects that indirectly receive financial support by reason of being in a tax increment financing (TIF) district or enterprise zone are also covered by the Prevailing Wage Act. S.B. 43 introduced in the 96th Illinois General Assembly in 2009 would have so extended the Act; however, the bill did not pass.

In *Town of Normal v. Hafner*, 395 Ill.App.3d 589, 918 N.E.2d 1268, 335 Ill.Dec. 455 (4th Dist. 2009), the court held that a private redevelopment of property into multifamily residences in a TIF district, in exchange for a portion of increased tax revenues generated by the redevelopment to pay interest costs incurred on the project after its completion, did not subject the project to the Prevailing Wage Act — even in the face of a redevelopment agreement with the town providing that the developer's construction on the project site would conform to applicable law but that did not mention payment of prevailing wages. The factors leading the Fourth District to this conclusion were that the project did not include construction of a public works facility, the developer was not a public service provider, and the public funds were generated by the increased property taxes on property improved using a private mortgage loan. The Fourth District also found it important that this type of incentive was a common incentive offered to private companies and developers and that the purpose of the Prevailing Wage Act was to ensure that laborers on public projects be paid the prevailing wage and that the Act was not intended "to interfere with economic development by private companies." 918 N.E.2d at 1274. Moreover, the Fourth District pointed to the legislative history, which rejected H.B. 3399, 93rd General Assembly (2003).

## 2. [8.25] With What Construction Contract Requirements Must There Be Compliance To Implement the Prevailing Wage Act?

Once it is determined that the Prevailing Wage Act applies to the construction project at hand, the practitioner needs to then turn to 820 ILCS 130/4, which sets forth specific undertakings that are the responsibility of the public body or other entity awarding the contract and of the contractor and subcontractors performing the work. These responsibilities require that certain terms be included in the construction documents:

**Rate of wages.** The project specifications and the contract must contain a “stipulation to the effect that not less than the prevailing rate of wages . . . shall be paid to all laborers, workers and mechanics performing work under the contract.” 820 ILCS 130/4(a-1). If the work was awarded without a public bid, contract, or project specification, then this stipulation must be included in the form of a written notice to the contractor on the purchase order related to the work or in a separate document.

**Bonds.** The contract must ensure that all contractors’ and subcontractors’ bonds include a provision “as will guarantee the faithful performance of such prevailing wage clause.” 820 ILCS 130/4(c). The Illinois Department of Labor also offers a form for a labor and material payment bond, available at [www.state.il.us/agency/idol/publicb/publicb.htm](http://www.state.il.us/agency/idol/publicb/publicb.htm), that suggests the following text be included:

**and not less than the general prevailing rate of hourly wages of a similar character in the locality in which the work is performed, as determined by the State of Illinois Department of Labor pursuant to the Illinois Compiled Statutes 820 ILCS 130/1 – 12.**

The best guidance for the practitioner, however, is to use language that tracks essentially verbatim language in §4 of the Act.

**Call for bids.** All calls for bids must spell out the prevailing wage rates for each craftsperson or type of worker needed to execute the contract. The IDOL Advertisement for Bids Model Language suggests the following language, available at [www.state.il.us/agency/idol/publicb/publicb.htm](http://www.state.il.us/agency/idol/publicb/publicb.htm), as acceptable:

**1. All Contracts for the Construction of Public Works are subject to the Illinois Prevailing Wage Act (820 ILCS 130/1 – 12).**

**Or**

**2. Contractor shall not pay less than the prevailing rates of wages to all laborers, workmen, and mechanics performing work under this contract, and shall comply with the requirements of the Illinois Wages of Employees on Public Works Act (820 ILCS 130/1 – 12).**

**Subcontracts.** The contractor and each subcontractor performing the public work must have inserted into all subcontract agreements, including those with lower-tier subcontractors, “a

stipulation to the effect that not less than the prevailing rate of wages . . . shall be paid to all laborers, workers and mechanics performing work under the contract.” 820 ILCS 130/4(a-1). If there is no written subcontract agreement, the contractor must provide the subcontractor written notice that the prevailing wage rates must be paid.

To assist public bodies, contractors and subcontractors, the IDOL offers the following text to be inserted in the contract:

**This contract calls for the construction of a “public work,” within the meaning of the Illinois Prevailing Wage Act, 820 ILCS 130/.01 *et seq.* (“the Act”). The Act requires contractors and subcontractors to pay laborers, workers and mechanics performing services on public works projects no less than the “prevailing rate of wages” (hourly cash wages plus fringe benefits) in the county where the work is performed. For information regarding current prevailing wage rates, please refer to the Illinois Department of Labor’s website at: <http://www.state.il.us/agency/idol/rates/rates.HTM>. All contractors and subcontractors rendering services under this contract must comply with all requirements of the Act, *including but not limited to*, all wage, notice and record keeping duties. [Emphasis in original.] [www.state.il.us/agency/idol/forms/pdfs/contract.pdf](http://www.state.il.us/agency/idol/forms/pdfs/contract.pdf).**

**Notification of revision.** The contractor and each subcontractor must be notified of any revision to those specified prevailing wage rates. For example, if the prevailing wage rates increase after construction work has begun, the public body must notify the contractor and subcontractors of the new applicable prevailing wage rates.

**Posting prevailing wage rates.** The contractor or construction manager performing the public work must “post, at a location on the project site of the public works that is easily accessible to the workers engaged on the project” the prevailing wage rates. 820 ILCS 130/4. Alternatively, a contractor having a business location where laborers, workers, and mechanics regularly visit may post the wage rates in a conspicuous place at that location or provide the laborers, workers, and mechanics written notice of the wage rates.

In order to document compliance with the Prevailing Wage Act, 820 ILCS 130/5 imposes specific payroll documentation requirements on contractors and subcontractors:

a. Contractors and subcontractors must keep and maintain for three years payroll records containing the information required by 820 ILCS 130/5(a)(1).

b. Contractors and subcontractors must submit monthly to the public body in charge of the project the required payroll records certified as true and accurate, certified to the wage rates paid, and certifying that the contractor/subcontractor is aware that the knowing filing of a false payroll is a Class B misdemeanor. A general contractor is permitted to rely on the certification of a lower-tier subcontractor provided the general contractor does not know that certification to be false.

c. The public body shall keep the submitted certified payrolls for three years.

d. The contractor and subcontractors shall, upon seven business days' notice, make their certified payrolls available for inspection to the public body in charge of the project and to the Illinois Department of Labor.

The practitioner should include in contract and subcontract documents language that essentially tracks verbatim the above §5 payroll requirements in order to ensure that these prevailing wage payroll requirements are met by all concerned.

**Comptroller's executive order.** Practitioners involved with state contracts should also consult the Illinois State Comptroller's executive order of August 29, 2002, available at [www.apps.ioc.state.il.us/ioc-pdf/prevailing\\_wage.pdf](http://www.apps.ioc.state.il.us/ioc-pdf/prevailing_wage.pdf), to assist in the enforcement of the Prevailing Wage Act. The Comptroller's executive order states that the Comptroller will no longer accept any grant or state contract for construction that does not contain the stipulation about the application of the Prevailing Wage Act and that no state warrant will be drawn for payment if reasonable grounds exist indicating that all parties are not in compliance with the Act. Moreover, the 2003 Annual Report notes that at the same time it issued its executive order, the Director of State Accounting issued Accounting Bulletin No. 104 (Aug. 29, 2002), available at [www.apps.ioc.state.il.us/ioc-pdf/bulletins/acctbull104.pdf](http://www.apps.ioc.state.il.us/ioc-pdf/bulletins/acctbull104.pdf), to all state agencies, recommending the insertion of certain specific language in all grant agreements and contracts involving the construction of fixed works, in order to notify grant contract recipients of the requirements of the Prevailing Wage Act.

NOTE: Due to the harsh penalties for noncompliance contained in the Prevailing Wage Act, including (eff. Jan. 1, 2010) penalties applicable to public bodies, and considering that §11 of the Act voids any contract not in compliance with the Act, practitioners and their clients must review carefully and comply with the Act.

## **B. The Davis-Bacon Act**

### **1. [8.26] Does the Act Apply?**

The federal Davis-Bacon Act, 40 U.S.C. §3141, *et seq.*, mandates the payment of federally determined prevailing wages on federal and federally funded construction projects over \$2,000 for the construction, alteration, or repair, including painting and decorating, of public buildings or public works. This discussion does not address federal projects for which a contractor directly contracts with a federal body to perform the work, but rather focuses on construction projects in Illinois that are financed, in whole or in part, with federal funds but the public body awarding the contract is not a federal governmental body. When speaking about The Davis-Bacon Act, it must be understood that what is being addressed is what commonly is called the Davis-Bacon and related acts (DBRA), for, since 1931, the Davis-Bacon prevailing wage requirements have been extended by statute to some 60 related federal acts that provide for federal assistance for construction, either by loans, grants, loan guarantees, or insurance. Examples of such related statutes are the Federal-Aid Highway Act, 23 U.S.C. §113; the Housing and Community Development Act of 1974, 42 U.S.C. §5301, *et seq.*; and the American Recovery and Reinvestment Act of 2009 (ARRA), Pub.L. 111-5, 123 Stat. 115 (stimulus bill).

The U.S. Department of Labor has issued regulations for administering the DBRA. These regulations are codified at 20 C.F.R. pts. 1, 3, 5, 6, and 7. Part 5 of these regulations applies to federally assisted construction contracts.

For practitioners involved with construction projects involving federal assistance through HUD's HOME Investment Partnerships Program, created by the Cranston-Gonzalez National Affordable Housing Act (see §8.21 above), the practitioner should review HUD Labor Relations Letter concerning the application of federal labor standards to HOME projects because the application of Davis-Bacon prevailing-wage requirements to HOME projects is materially different from the application of Davis-Bacon requirements to other federally assisted construction projects, including other HUD-assisted projects. LR-96-02 Aug. 21, 1996, [www.hud.gov/offices/olr/olr\\_9602.cfm](http://www.hud.gov/offices/olr/olr_9602.cfm).

The NAHA expressly makes the Davis-Bacon Act prevailing wage requirements applicable to the HOME program:

***Any contract for the construction of affordable housing with 12 or more units assisted with funds made available under this part shall contain a provision requiring that not less than the [federally determined Davis-Bacon prevailing wages] shall be paid to all laborers and mechanics employed in the development of affordable housing involved. [Emphasis added.]*** 42 U.S.C. §12836.

The key for triggering Davis-Bacon requirements on HOME projects is that the construction contract need only be "assisted with" HOME funds, not that the housing is constructed with HOME funds. HUD regulations implementing this provision makes clear that the contract for construction of such housing must contain the Davis-Bacon wage provision if HOME funds are used for any project costs, including construction or nonconstruction costs, for housing with 12 or more HOME-assisted units. 24 C.F.R. §92.354. Thus the Davis-Bacon prevailing wage requirements apply to the construction of the entire project, both HOME-assisted and non-assisted portions.

Contrast the Davis-Bacon requirement for HOME projects with the labor standards for HUD Community Development Block Grants (CDBG) projects that apply Davis-Bacon requirements to "construction work financed in whole or in part" with assistance received through CDBG. 42 U.S.C. §5310(a). Unlike CDBG projects, in which the focus is the "construction work," under HOME-assisted projects, the focus is on "construction contracts" covering 12 or more units "assisted" by the HOME funds even if the construction work is not financed by the HOME funds.

HUD labor standards containing these prevailing wage requirements are available from HUD's website, [www.hud.gov/offices/olr/olr\\_9601.cfm](http://www.hud.gov/offices/olr/olr_9601.cfm). HUD also makes a prevailing wage guide available for contractors working on federally assisted housing projects. HUD-LR-4812, [www.hud.gov/offices/adm/hudclips/guidebooks/HUD-LR-4812/4812-LR.pdf](http://www.hud.gov/offices/adm/hudclips/guidebooks/HUD-LR-4812/4812-LR.pdf) (case sensitive).

## 2. [8.27] With What Construction Contract Requirements Must There Be Compliance To Implement the Davis-Bacon Act?

Each contract subject to the Davis-Bacon labor standards requirements must contain labor standards clauses and a Davis-Bacon wage decision. More specifically, the Davis-Bacon Act requires that all advertised specifications for every federally assisted contract in excess of \$2,000 for the construction, alteration, or repair, including painting and decorating, of public buildings or public works must contain a provision stating the minimum wages to be paid to laborers and mechanics employed on the project. The labor standards clauses describe the responsibilities of the contractor under the Davis-Bacon Act, obligate the contractor to comply with the labor requirements, and provide, among other things, for the withholding of payments due to the contractor to ensure the payment of wages or liquidated damages that may be found due.

The Davis-Bacon Act specifically requires that every contract based on these specifications must contain the following stipulations:

- a. that the contractor or subcontractor shall pay all mechanics and laborers at least weekly at wage rates not less than those stated in the advertised specifications;
- b. that the contractor will post the prevailing wage scale in a prominent place; and
- c. that funds may be withheld from the contractor equal to accrued payments due laborers and mechanics employed by the contractor or any subcontractor. 40 U.S.C. §3142(c).

In addition, the Davis-Bacon Act requires that every contract contain a provision that if laborers and mechanics are paid less than the contractually required prevailing wage rates, then on notice to the contractor, the contractor's right to proceed with the work may be terminated for failing to pay the required wages and the contractor's sureties shall be liable for such underpayment of wages. 40 U.S.C. §3143.

Contractors subject to the Davis-Bacon requirements must maintain payroll and basic records for all laborers and mechanics during the course of the work and for a period of three years thereafter and must provide, on a weekly basis, payrolls accompanied by a "Statement of Compliance." 29 C.F.R. §5.5(a)(3)(ii)(B).

Failure to comply with DBRA requirements can result in contract termination, and in some cases, debarment of the contractor from future contracts for three years. The practitioner can usually find assistance in understanding the applicability of the Davis-Bacon requirements to specific federally assisted programs by searching the website of the federal agency providing the funding.

Recent discussion has focused on the applicability of DBRA to construction work under the American Recovery and Reinvestment Act of 2009. The U.S. Department of Labor has issued guidance on how to apply Davis-Bacon labor standards to construction projects receiving federal assistance under ARRA. The Wage and Hour Division (WHD) of the USDOL has released

guidance concerning implementation of §1606 of the ARRA that provides for application of Davis-Bacon labor standards to certain federal and federally assisted construction work funded in whole or in part under provisions of ARRA. WHD's Memorandum No. 207 (May 29, 2009), available at [www.dol.gov/whd/recovery/aam207.pdf](http://www.dol.gov/whd/recovery/aam207.pdf), addresses the application and implementation of ARRA Davis-Bacon wage requirements. For construction projects awarded before ARRA assistance is received or for which construction was started before ARRA assistance is received, the USDOL's guidance states that the relevant contracts and assistance agreements must have added to them, effective as of the date of the ARRA assistance, the applicable Davis-Bacon wage determinations, and reminds contractors to include appropriate clauses and wage determinations in subcontracts for such ARRA-assisted projects.

## VI. [8.28] COLLECTIVE-BARGAINING RELATIONSHIPS AND THE CONSTRUCTION CONTRACT

On any given construction project, a contractor is faced with a myriad of contractual obligations, imposed not only by the construction contract itself, but also by any project labor agreements (PLAs) that are part thereof. In addition, the contractor may have obligations imposed by any existing labor agreements to which it may already be a party. As is discussed below, these contracts may impose conflicting obligations on the contractor. Thus, in advising their clients, practitioners must review all of the collective-bargaining agreements closely in an effort to protect clients from such competing claims.

As noted in §8.29 below, it is not uncommon for bid specifications to require that the contractor agree to be bound by the terms of a PLA already negotiated by the owner and various unions in the building trades. These PLAs typically require that the contractor recognize those unions as the exclusive bargaining representatives for the employees of the contractor who will work on the project. The PLAs also set the wages, benefits, and other working conditions for the contractor's employees working on that project.

However, a contractor — particularly if it has been in business for any length of time — may already have existing labor agreements in which it has recognized another competing union as the exclusive bargaining representative for the contractor's employees. Such existing labor agreements also set terms and conditions of employment for the contractor's employees. Wage rates are likely to be different and may obligate the contractor to make benefit contributions to health and welfare or pension funds different from those required by the PLA. Obviously, such conflicting and often contradictory obligations can place a contractor in a difficult situation as it tries to comply with the contractual responsibilities imposed by multiple labor agreements.

Illustrative of this quandary is the recent case *Sheet Metal Workers International Association Local Union No. 27 v. E.P. Donnelly, Inc.*, 673 F.Supp.2d 313 (D.N.J. Dec. 3, 2009). In this case, the town of Egg Harbor required that all parties participating in the construction of its community center become signatories to a PLA. The defendant, Donnelly, was awarded roofing work by the general contractor and signed a letter of assent binding it to the PLA. Under the PLA, roofing work was to be performed by the Sheet Metal Workers International Association Local Union No. 27 (Local 27). However, Donnelly was also a signatory to an existing labor agreement with

the Brotherhood of Carpenters and Joiners of America Local Union No. 623 (Carpenters Union) that required Donnelly to have members of that union perform roofing work. In line with its contractual obligations under the existing labor agreement, Donnelly awarded the work to the Carpenters Union, which was not a party to the PLA.

Local 27 filed a grievance under the PLA contesting the award of the roofing work and was ultimately successful in arbitration. However, in an effort to avoid threatened picketing by Local 27 while the Carpenters Union completed the work, Donnelly instituted a §10(k) (29 U.S.C. §160(k)) proceeding before the National Labor Relations Board (NLRB). Under §10(k), the NLRB has the authority to resolve jurisdictional disputes when competing unions with which the employer has labor agreements claim the same work. The NLRB does not have jurisdiction to resolve the dispute under §10(k) if the parties have an agreed method for resolving the dispute. *United Mine Workers of America, Local Union 1269*, 241 N.L.R.B. 231, 100 L.R.R.M. (BNA) 1496 (1979). See §8.56 below for a more detailed discussion of jurisdictional dispute issues. In the §10(k) proceedings, the NLRB awarded the roofing work to the Carpenters Union. The NLRB's decision expressly stated that its findings could not be used as a defense in the event that both unions were found to have binding contracts with Donnelly.

After the NLRB's decision, Local 271 filed suit under §301 of the Act against Donnelly, alleging that Donnelly had breached the PLA by awarding the work to the Carpenters Union. 673 F.Supp.2d at 327. Relying on the arbitration decision under the PLA in favor of Local 27, the court granted summary judgment to that local on its breach of contract claim. The court found that the NLRB's order had merely resolved a jurisdictional dispute between the unions and did not absolve Donnelly from its obligations to Local 27 under the PLA it had signed. The net effect is that unless this case is overturned on appeal or the parties reach some settlement, Donnelly potentially is forced to pay twice for the same work — once to the Carpenters Union members for work actually performed, and a second time to Local 27 members as damages for the work such members should have performed under the PLA.

Such conflicting obligations under a PLA vis-à-vis existing labor agreements may, as this case illustrates, be unavoidable. However, the case underscores the need for careful scrutiny of existing labor agreements to see if any of those terms may be in direct conflict with obligations that become binding if the contractor becomes a party to the PLA.

## VII. [8.29] PREHIRE AGREEMENTS AND PROJECT LABOR AGREEMENTS

Under ordinary circumstances, an employer would commit an unfair labor practice under the National Labor Relations Act (NLRA), 29 U.S.C. §151, *et seq.*, by recognizing a union as the exclusive bargaining representative of its employees without a showing that the union actually represents a majority of the employer's employees. 29 U.S.C. §§151 – 169. Any collective-bargaining agreement negotiated between the employer and such “minority” union would be invalid and unenforceable. *International Ladies' Garment Workers' Union v. National Labor Relations Board*, 366 U.S. 731, 6 L.Ed.2d 762, 81 S.Ct. 1603, 1607 (1961).

A showing of majority interest can be accomplished in two ways. First, as allowed by §9(a) of the Act, the union can present to the employer objective evidence (e.g., signed authorization cards from a majority of the employees in the appropriate bargaining unit), at which point the employer may voluntarily recognize the union as its employees' bargaining representative. The second, and more frequent, path to recognition is through a secret ballot election conducted by the National Labor Relations Board under §9(c) of the Act. 29 U.S.C. §159(c). Under this scenario, if a majority of the employees in the appropriate bargaining unit vote in favor of the union, the employer is obligated under the Act to recognize the union as the employees' exclusive bargaining representative.

Under either circumstance, an employer has a statutory obligation to recognize the union and bargain with the union in good faith in an effort to arrive at a labor agreement setting out the terms and conditions of employment for the employees. This duty to recognize and bargain with the union continues throughout the term of the labor agreement and survives the expiration of the labor agreement, except in very limited circumstances. On the expiration of a §9 labor agreement, the employer may refuse to continue to recognize the union as the employees' bargaining representative only if the employer has objective evidence that the union has lost its majority status, or if the employees' vote to oust the union through a decertification election conducted by the NLRB pursuant to §9(c) of the Act. Both the withdrawal of recognition based on loss of majority status and the decertification process are complicated, fraught with danger for the employer, and beyond the scope of this chapter. Absent either of these developments, the employer remains statutorily obligated to continue to recognize the union even after the expiration of the labor agreement and must continue to bargain in good faith with the union for a replacement agreement. *Madison Industries, Inc.*, 349 N.L.R.B. 1306, 1307 – 1313, 182 L.R.R.M. (BNA) 1055 (2007).

A union that has achieved majority status under §9 of the Act is entitled to certain protections. Thus, for the first year after a successful NLRB-conducted election, the union enjoys an irrebuttable presumption of majority status, and no other union can petition for an election during this time period to represent the employees. 29 U.S.C. §159(c)(3). In cases of voluntary recognition, no election bar will be imposed unless (a) employees in the appropriate bargaining unit receive notice of the voluntary recognition and of their right to file a decertification petition or to support a petition for election by a rival union, and (b) 45 days have passed since the giving of such notice without a petition for election being filed. *Dana Corp.*, 351 N.L.R.B. 434, 441, 182 L.R.R.M. (BNA) 1457 (2007). A similar presumption prevails during the life of any §9(a) labor agreement negotiated between the majority union and the employer. No other union may petition for an election during the life of such agreement (the "contract bar doctrine"). If the labor agreement's duration is more than 3 years, the contract bar only applies to the first 3 years of the agreement. *General Cable Corp.*, 139 N.L.R.B. 1123, 1125, 51 L.R.R.M. (BNA) 1444 (1962); *Cind-R-Lite Co., Division of T.E. Connolly, Inc.*, 239 N.L.R.B. 1255, 100 L.R.R.M. (BNA) 1138 (1979).

However, as a result of amendments to the NLRA achieved by passage of the Labor-Management Reporting and Disclosure Act of 1959 (also known as the Landrum-Griffin Act) (LMRDA), 29 U.S.C. §401, *et seq.*, the rules are different in the construction industry. Specifically, §8(f) was added to the NLRA. 29 U.S.C. §158(f). This section applies only to employers engaged in the construction industry.

As a result of §8(f), an employer engaged in the construction industry is allowed to enter into a labor agreement with a union without the normally required showing under §9(a) of the Act (*i.e.*, that such union has the majority support of the employer's employees). Such agreements are alternatively referred to as "§8(f) agreements," or, more commonly, as "prehire agreements."

The validity of a prehire agreement is subject to two important qualifiers imposed by §8(f). First, a prehire agreement will be invalid if the union has been established, maintained, or assisted by the employer in a manner that would violate §8(a)(2) of the Act. Second, as contrasted to the contract bar doctrine in a §9(a) situation, a prehire agreement does not prohibit, during the term of the agreement, an election petition from being filed by the employees (by way of a decertification petition) or by a rival union, to determine majority status. *Bear Creek Construction Co.*, 135 N.L.R.B. 1285, 1286, 49 L.R.R.M. (BNA) 1674 (1962). Under §8(f), the grace period for construction employees to join the union under a union-security clause in a labor agreement is 7 days. See §8.30 below for a discussion of union-security clauses.

Indeed, prior to 1987, the NLRB and the courts consistently held that absent a showing of majority status, either the employer or the union was free to repudiate the prehire agreement at any time. *R.J. Smith Construction Co.*, 191 N.L.R.B. 693, 695, 77 L.R.R.M. (BNA) 1493 (1971), *remanded sub nom. Local No. 150, International Union of Operating Engineers v. National Labor Relations Board*, 480 F.2d 1186, 1187 (D.C.Cir. 1973). The NLRB's approach was condoned by the Supreme Court in *National Labor Relations Board v. Local Union No. 1033, International Association of Bridge, Structural & Ornamental Iron Workers Local 103*, 434 U.S. 335, 340 – 341 (1978). However, until the agreement was repudiated, the parties were obligated contractually to abide by its terms, and could enforce such agreements under §301 of the Act, 29 U.S.C. §185. *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 75 L.Ed.2d 830, 103 S.Ct. 1753, 1759 (1983).

However, the NLRB's approach, and the rules relating to prehire agreements, changed dramatically in 1987 with the Board's decision in *John Deklewa*, 282 N.L.R.B. 1375, 124 L.R.R.M. (BNA) 1185 (1987), *enforcement granted sub nom., International Association of Bridge, Structural & Ornamental Iron Workers Local 103 v. National Labor Relations Board*, 843 F.2d 770, 779 – 780 (3d Cir.), *cert. denied*, 109 S.Ct. 222 (1988).

In *Deklewa*, the NLRB expressly overruled its *R.J. Smith* decision relating to repudiation during the term of the prehire agreement. 843 F.2d at 777 – 778. Rather, the Board held that §8(f) agreements could not be unilaterally repudiated during their term and that each party had the bargaining obligations imposed by §§8(a)(5) and 8(b)(3) of the Act. It further held that such agreements would not bar election petitions filed under §9(c) or §9(e) of the Act. Moreover, the Board held that although the prehire agreement could not be repudiated unilaterally during its term, on the expiration of the agreement, the union would not be entitled to a presumption of majority status, and either party was then free to repudiate the §8(f) bargaining relationship.

It should be kept in mind that a prehire agreement (upon expiration of which can be repudiated by either side) can be converted into a §9(a) agreement (under which the bargaining relationship continues upon expiration, absent a showing of loss of majority status) by actions of the parties. In the construction industry, there is a rebuttable presumption that a bargaining

relationship is a §8(f) relationship rather than a §9(a) relationship absent proof to the contrary. *Madison Industries, Inc.*, 349 N.L.R.B. 1306, 1308, 182 L.R.R.M. (BNA) 1055 (2007).

The NLRB has held that a construction union employer and a union can convert a §8(f) agreement into a §9(a) relationship if the union demands recognition as a majority union and if the employer voluntarily agrees to recognize it as such based on a contemporaneous showing of union support among a majority of employees in an appropriate bargaining unit. *Pierson Electric, Inc.*, 307 N.L.R.B. 1494, 1495, 140 L.R.R.M. (BNA) 1293 (1992).

As shown above, it is critical that a practitioner advising a contractor in the construction industry carefully analyze all labor agreements presented to the contractor for execution to determine if such an agreement will establish a §9(a) or a §8(f) relationship with the union and for the practitioner to understand the important differences between the two relationships.

The project labor agreement is a specialized type of prehire agreement. Concerns over labor disputes on construction projects often encourage a public property owner to require a PLA as part of its agreement with its general contractor. Although PLAs had their origins on large multiemployer projects, PLAs can be and are used on any size project, even those involving a single contractor.

In simple terms, a PLA requires all contractors and subcontractors on a given project, whether the employees of such contractor are unionized or not, to agree to be bound by a collective-bargaining agreement that typically is included in the project's bid specifications. In order to receive a contract to work on the project, a contractor or subcontractor must agree to be bound by the collective-bargaining agreement for the life of the project. In effect, a PLA is a prehire agreement permissible under §8(f) of the NLRA. The PLA defines wages, benefits, and other work conditions for the project and eliminates the need to negotiate a separate labor agreement with each contractor and each building trade. Importantly, PLAs prohibit strikes and set up a binding grievance and arbitration dispute resolution mechanism.

Although each PLA can be different, based on the negotiations between the owner and the building trades, the vast majority of PLAs have provisions covering the following:

**Union recognition.** All contractors and subcontractors working on the project agree that the unions signatory to the PLA are to be recognized as the exclusive bargaining representatives of employees working on the project with respect to rates of pay, hours of work, and other conditions of employment while working on the project.

**Union security.** All employees covered by the PLA must become members of the union or pay periodic dues and customary initiation fees required of nonmembers. Such union-security provisions are legal under the NLRA. But see §8.30 below regarding the effect of state right-to-work laws.

**Hiring hall and referral systems.** To the extent that the individual unions have a hiring hall or referral system, all contractors and subcontractors agree to use them.

**Contributions to health and welfare and pension funds.** PLAs typically require the contractor or subcontractor to contribute an amount (usually based on hours worked by an employee) to the union's health and welfare fund and pension fund, whether the employer also pays for company-sponsored benefits and whether the employees of the contractor or subcontractor receive any benefits from these union funds.

**Grievance and arbitration.** PLAs typically set up a final and binding grievance and arbitration process to handle any labor disputes that may arise under the PLA or the underlying collective-bargaining agreements.

**No-strike clause.** The parties typically agree that there are to be no strikes, picketing, slowdowns, or other disruptions of work pending the resolution of any dispute under the grievance and arbitration process. There may be limited exceptions to the no-strike provision. For example, many collective-bargaining agreements provide that the union retains the right to strike if the employer refuses to make appropriate contributions to the union benefit funds in a timely fashion.

**Subcontracting clause.** See §8.31 below for a general discussion of subcontracting clauses and their legality under §8(e) of the NLRA.

**General working conditions.** These provisions cover items such as start times, overtime pay, hours of work, work rules, discipline, and the like.

**Jurisdictional disputes.** Whenever there are multiple building trades working on a large project, disputes invariably arise as to which craft is entitled to do what work. For example, is the installation of a "green" roof properly the work of the roofers trade or a landscaping company? To avoid such disputes leading to work stoppages or protracted proceedings before the NLRB or the federal courts, most PLAs set up a binding resolution mechanism to resolve these disputes in a more timely fashion.

It is important for the practitioner to keep in mind that employees of contractors or subcontractors have the right to refrain from union membership or from paying dues depending on the state in which they work (see §8.30 below for a discussion of union-security clauses and right-to-work state laws). Practitioners should also recognize that the PLA binds contractors and subcontractors only for work performed on the specific project and through this project's conclusion. The PLA does not extend automatically to other projects of the contractor or subcontractors and terminates on the completion of the project.

There have been challenges to the legality of PLAs mandated by governmental agencies on public works projects, on the grounds that such agreements are violative of federal antitrust laws. The theory behind the challenges is that the mandatory provisions of the PLA are anticompetitive in nature since all parties must sign the agreement and be bound by its provisions as to wages, benefits, and other terms and conditions of employment in order to work on the project. These challenges have been rejected for the most part by the courts and agencies based on the "nonstatutory" exemption granted to labor unions in certain circumstances. Although a full discussion of the nonstatutory exemption is beyond the scope of this chapter, generally it will be

applied in those situations in which the goals of labor are furthered by the agreements, despite the agreements' anticompetitive effect. *Albany Specialties, Inc. v. Board of Education of South Glens Falls School District*, 162 L.R.R.M. (BNA) 3071 (N.D.N.Y. 1999). Legitimate union goals include organizing nonunion contractors in the industry or the stabilization of wage and benefit standards among all contractors with which a union has collective-bargaining agreements. *Donald Schriver, Inc. v. National Labor Relations Board*, 635 F.2d 859, 884 – 885 (D.C.Cir. 1980), *cert. denied*, 101 S.Ct. 2058 (1981).

To be valid, PLAs must also fall within the protections of §8(e) of the NLRA. *Albany Specialties, supra*, 162 L.R.R.M. (BNA) at 3075. In other words, the PLA must be between an employer engaged in the construction industry — at least for the project in question — and must arise in the collective-bargaining context (*i.e.*, the union must represent or desire to represent the employer's employees). *Glen Falls Building & Construction Trades Council*, 350 N.L.R.B. 417, 182 L.R.R.M. (BNA) 1499 (2007). It has also been suggested in dicta that the PLA must be for the purpose of preventing conflict between union and nonunion contractors on a common construction site. *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 44 L.Ed.2d 418, 95 S.Ct. 1830, 1839 (1975), citing *Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees & Helpers, Local Union No. 695 v. National Labor Relations Board*, 361 F.2d 547, 553 (1966).

Practitioners who represent contractors who work on federally assisted construction projects need to be aware of Executive Order No. 13,502 (Feb. 6, 2009), 74 Fed.Reg. 6,985 (Feb. 11, 2009), signed by President Obama. The executive order, although not mandating the use of PLAs on large federal construction projects (defined as projects costing \$25 million or more), does allow federal agencies to require the use of a PLA if the agency believes that the use of a PLA will advance the government's interest in achieving economy and efficiency, producing labor-management stability, and ensuring compliance with laws governing safety and health, equal employment opportunity, and labor and employment standards. If these criteria are met, the federal agency may require that every contractor or subcontractor on the project agree, for that project, to negotiate or become a party to a PLA with one or more appropriate labor organizations.

Executive Order No. 13,502 expressly repeals Executive Order Nos. 13,202 (Feb. 17, 2001), 66 Fed.Reg. 11,225 (Feb. 22, 2001), and 13,208 (Apr. 6, 2001), 66 Fed.Reg. 18,399 (Apr. 9, 2001), both issued by President Bush. The Bush executive orders prohibited federal agencies from requiring that bidders on federal construction projects adhere to PLAs and from discriminating against bidders who refused to sign an agreement with unions.

Under Executive Order No. 13,502, any such PLA must

- a. bind all contractors and subcontractors on the construction project;
- b. allow all contractors and subcontractors to compete for contracts without regard to whether such employers are union or nonunion;
- c. contain guarantees against strikes, lockouts, and similar job disruptions;

- d. set forth a mechanism for the prompt, binding resolution of labor disputes; and
- e. provide other mechanisms for matters of labor-management cooperation.

Although the executive order deals with large federal construction projects over \$25 million, it does not preclude federal agencies from mandating PLAs for smaller federal projects or for projects receiving federal financial assistance.

Practitioners should also be aware of a similar executive order issued by then-Governor Blagojevich, Executive Order No. 2003-13 (May 7, 2003), 27 Ill.Reg. 8,563 (May 23, 2003). The Governor's executive order directs state departments, agencies, authorities, boards, or instrumentalities, on a project-by-project basis, to include a PLA on state projects when such would advance the state's interests of cost, efficiency, quality, safety, timeliness, skilled labor force, labor stability, or the advancement of minority-owned and women-owned businesses or employment. When it is determined that a PLA is appropriate, it becomes part of the bid documents and shall be binding upon all contractors and subcontractors on the project. The Illinois executive order further directs that the decision to include a PLA must be supported by a written, publicly disclosed finding setting forth the reasons justifying the use of the PLA. In addition, the Illinois executive order states that it is not to be construed to contravene any state or federal law, or to jeopardize the state's right to receive federal funding.

The practitioner should note that both the federal and state executive orders provide that contractors and subcontractors are not to be differentiated based on union or nonunion status. This is to insure that the use of PLAs by public bodies does not amount to discrimination against nonunion contractors. It is manifestly clear that any effort by a public body to restrict bidding or public contracting to unionized firms only is unconstitutional and against public policy. See *Master Printer Ass'n v. Bd. of Trustees of Junior College District No. 508*, 356 F. Supp. 1355, 1357 (N.D.Ill. 1973); *Holden v. City of Alton*, 179 Ill. 318, 53 N.E. 556, 557 (1899).

## VIII. [8.30] UNION SHOP PROVISIONS

At the time of its initial passage in 1935, §8(3) of the National Labor Relations Act permitted both "closed" shop (requiring union membership as a condition of initial employment) and "union" shop (requiring employees to ultimately become union members or face termination of employment) arrangements between unions and employers. Thus, employees who refused to join a union could lawfully be refused initial employment or could be terminated. The only restriction at the time was that the union must legitimately represent the employees (*i.e.*, not be a "company" union dominated by the employer).

However, the Taft-Hartley Amendments to the NLRA in 1947 substantially restricted the types of union-security agreements that had been permissible under §8(3). See 29 U.S.C. §§141 – 197. First, §8(a)(3) (29 U.S.C. §158(a)(3)), the amended version of §8(3), banned closed-shop arrangements but allowed union shop agreements. Second, the Taft-Hartley Amendments added §8(b), enumerating for the first time certain activities by unions that would constitute unfair labor practices under the Act. Certain provisions of §8(b) bear on union shop agreements.

For example, §8(b)(1)(a) makes it unlawful to coerce or restrain an individual in the exercise of his or her rights protected by §7 of the Act, including the specifically enumerated right to refrain from joining a union. Similarly, §8(b)(2) makes it illegal for a union to cause or attempt to cause an employer to discriminate against an employee who has been denied membership in the union or whose membership has been terminated for any reason other than the employee's "failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. §158(b)(2). Finally, §8(b)(5) makes it unlawful for a union to require an employee covered by a union shop provision to pay excessive or discriminatory initiation fees.

The cumulative effect of these amendments, most notably §§8(a)(3) and 8(b)(2), is that it is currently permissible for parties to a collective-bargaining agreement to require employees, as a condition of continued employment, to obtain and maintain "membership" in a union.

Full membership in the union cannot be compelled, due to constitutional and statutory considerations. However, under union shop provisions, employees can be forced to pay periodic dues and customary initiation fees, a situation that has been referred to as "financial core" membership. *National Labor Relations Board v. General Motors Corp.*, 373 U.S. 734, 10 L.Ed.2d 670, 83 S.Ct. 1453, 1459 (1963). In this scenario, an employee does not need to become a full member of the union, but must pay such sums as are required by the union for its collective-bargaining and representational activities. Courts have upheld these provisions in the face of constitutional challenges. *See, e.g., Buckley v. American Federation of Television & Radio Artists*, 496 F.2d 305 (2d Cir.), *cert. denied*, 95 S.Ct. 688 (1974).

Although financial core members can be forced to pay periodic dues and customary initiation fees, they cannot be compelled to pay a proportionate share of the union's expenses for political or fraternal activities. *Communications Workers of America v. Beck*, 487 U.S. 735, 101 L.Ed.2d 634, 108 S.Ct. 2641, 2648 (1988). Financial core members have the right to information as to union expenditures and may object if they believe that they are being charged for such political or fraternal expenditures. *Penrod v. National Labor Relations Board*, 203 F.3d 41, 48 (D.C.Cir. 2000).

In general, employees must be given a grace period of at least 30 days under a union-security clause. Under §8(f) of the NLRA, however, due to the faster-paced and transitory nature of employment in the construction industry, employees engaged in the construction industry may be given a grace period of 7 days.

As noted above, if a valid union shop agreement has been negotiated, a union may lawfully require the employer to terminate the employment of an individual who refuses to pay periodic dues or reasonable initiation fees. However, it would be a violation of §8(b)(2) for the union to seek the discharge of an employee for reasons other than the employee's refusal to pay dues or the initiation fee. For example, if a union imposed fines on the individual, the refusal to pay the fines cannot be a ground for discharge without violating the Act. *Bricklayers' & Stonemasons' International Union, Local No. 8*, 235 N.L.R.B. 1001, 1005, 98 L.R.R.M. (BNA) 1343 (1978). Similarly, an employee's refusal to contribute to a union strike fund is not a refusal to pay dues and thus not a valid ground for discharge. *Pacific Northwest Newspaper Guild, Local 82 v. National Labor Relations Board*, 877 F.2d 998 (D.C.Cir. 1989).

The prohibitions in §8(b)(2) have been broadly applied by the courts when unions have sought the discharge of employees for reasons other than the payment of periodic dues or customary initiation fees. Thus, the union violated the NLRA when it sought the discharge of an employee who refused to attend union meetings (*National Labor Relations Board v. National Automotive Fibres, Inc.*, 277 F.2d 779 (9th Cir. 1960)), or an employee who had attempted to promote a rival union (*Communications Workers of America, Local 9509*, 193 N.L.R.B. 83, 78 L.R.R.M. (BNA) 1190 (1971)).

Although the use of a hiring hall referral system has been found to be legal (*Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. National Labor Relations Board*, 365 U.S. 667, 6 L.Ed.2d 11, 81 S.Ct. 835 (1961)), the courts have held that the refusal to refer an otherwise qualified individual through a hiring hall procedure based on the fact that the individual is not a union member violates §8(b)(2) of the Act. See, e.g., *National Labor Relations Board v. International Brotherhood of Electrical Workers, Local Union 16*, 425 F.3d 1035, 1040 (7th Cir. 2005). However, in the construction industry, preference in referral can be based on (a) minimum training or experience, (b) seniority with a specific employer or within the industry, (c) residency, and (d) other objective factors. 29 U.S.C. §158(f)(4).

As a general rule, federal labor laws preempt state laws attempting to regulate activities that arguably fall within the ambit of the NLRA. *San Diego Building Trades Council v. Garmon*, 353 U.S. 26, 1 L.Ed.2d 618, 77 S.Ct. 607 (1957). There is, however, an important exception as it relates to union shop agreements. Section 14(b) of the Act, added in 1947, provides:

**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).

The effect of §14(b) is that union-security agreements that otherwise would be permissible under the NLRA are invalid in right-to-work states that have passed such statutes. Employees in these states cannot be forced to join a union, or be forced to pay financial support to the union, even if such amounts are less than the dues charged to a full member. *International Union of United Association of Journeymen & Apprentices of Plumbing & Pipefitting Industry of United States & Canada, Local Unions 141, 229, 681, & 706 v. National Labor Relations Board*, 675 F.2d 1257, 1261 – 1262 (D.C.Cir. 1982). Right-to-work statutes have withstood constitutional challenges. *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 93 L.Ed. 212, 69 S.Ct. 251 (1949). However, §14(b) only applies to statutes passed by a state — local right-to-work ordinances do not fall within the purview of §14(b). *New Mexico Federation of Labor v. City of Clovis, New Mexico*, 735 F.Supp. 999, 1003 (D.N.M. 1990). At the present time, 22 states have right-to-work statutes, but Illinois is not one of them.

It is important to note that §14(b) does not allow the application of right-to-work statutes to hiring hall referral systems that are otherwise permissible under the NLRA. As the Eighth Circuit stated in *Laborers' International Union of North America, Local No. 107 v. Kunco, Inc.*, 472 F.2d 456 (8th Cir. 1973):

**Section 14(b) does not empower states to ban all involuntary relationships between workers and unions. . . . A hiring hall 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).** [Citation omitted.] 472 F.2d at 458.

## **IX. [8.31] SUBCONTRACT AGREEMENTS AS AFFECTED BY SUBCONTRACTING CLAUSES IN THE GENERAL CONTRACTOR'S COLLECTIVE-BARGAINING AGREEMENTS**

A significant construction contracting issue presents itself when a general contractor's collective-bargaining agreement contains a subcontracting clause. Such clauses typically prohibit a general contractor from subcontracting work to an entity that does not have a labor agreement with the union whose jurisdiction covers the work at issue. The following is an example of such a clause:

**Contractor agrees that neither it nor any of its subcontractors on the jobsite will subcontract any work to be done at the site of construction or plants established on or adjacent to the jobsite to process or supply materials for the jobsite use except to a person, firm, or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.**

Such subcontracting clauses have significant implications for both the general contractor and the subcontractor. The practitioner advising a general contractor or subcontractor during the contract formation stage of a construction project needs to be familiar with the import of such subcontracting clauses in the construction industry. Similarly, practitioners advising construction project owners should also be aware of the import of such clauses, as a violation of such clauses may result in labor actions that disrupt or delay a project.

Section 8(e) of the National Labor Relations Act, the so-called "hot-cargo" provision, prohibits an agreement between an employer and a union that requires the employer to cease doing business with another party or to refrain from using, selling, transporting, or otherwise dealing in the products of another person that is not affiliated with the contracting union. 29 U.S.C. §158(e). Section 8(e) thus prohibits provisions in collective-bargaining agreements that allow employees of a signatory employer to refuse to deal with nonunion employers or their goods.

A special statutory exemption included in §8(e) of the Act, known as the "construction industry proviso," exempts subcontracting clauses from the proscription of §8(e), if the subcontracting clause was sought or negotiated in the context of a collective-bargaining relationship between a labor organization and an employer in the construction industry. The purpose of the §8(e) proviso is to resolve the potential for jobsite disruption when a single nonunion subcontractor is working at the jobsite of a multiemployer construction project and to reduce labor problems that may arise at the jobsite of a construction project where union and nonunion employees are working continuously alongside each other. These subcontracting

clauses are lawful even when they are not limited in application to a particular jobsite at which both union and nonunion workers are employed and even if the subcontracting clause results in “top-down” pressure for unionization. *Woelke & Romero Framing, Inc. v. National Labor Relations Board*, 456 U.S. 645, 72 L.Ed.2d 398, 102 S.Ct. 2071 (1982); *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 44 L.Ed.2d 418, 95 S.Ct. 1830 (1975). The §8(e) exemption is limited, however, to work actually and traditionally performed at the jobsite. It does not apply to the delivery of materials and supplies to the jobsite nor to work performed away from the jobsite. *Ohio Valley Carpenters District Council, United Brotherhood of Carpenters & Joiners of America*, 136 N.L.R.B. 977, 49 L.R.R.M. (BNA) 1908 (1962); *General Teamsters, Chauffeurs, Warehousemen & Helper, Local 982*, 181 N.L.R.B. 515, 76 L.R.R.M. (BNA) 1764 (1970), *aff’d*, 450 F. 2d 1322 (D.C.Cir. 1971); *Local Union No. 551, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 176 N.L.R.B. 801, 72 L.R.R.M. (BNA) 1095 (1969) (exemption does not apply to mixing, delivering, and pouring ready-mix concrete at site as it is final act of delivery); *International Union of Operating Engineers, Local No. 12*, 204 N.L.R.B. 742, 83 L.R.R.M. (BNA) 1457, *enforcement granted and remanded*, 511 F.2d 848 (9th Cir. 1975) (exemption does not apply to work such as equipment repair that can be done either on or off jobsite); *International Union of Operating Engineers, Locals 542, 542-A, 542-B*, 216 N.L.R.B. 408, 88 L.R.R.M. (BNA) 1405, *enforced*, 532 F.2d 902 (3d Cir. 1976) (exemption does not apply to rental of unmanned equipment from non-signatory employer).

The practitioner should also note that in the construction industry, contractors may have a collective-bargaining agreement with a union by reason of the contractor’s voluntary recognition of the union without a showing of majority support of the contractor’s employees by card check. (NOTE: On this point, the practitioner should follow the debate and development of the proposed Employee Free Choice Act of 2007 (EFCA), H.R. 800, 110th Congress, presently being considered to amend the NLRA.) This kind of labor agreement, known as a “prehire agreement,” is permitted in the construction industry by the NLRA. 29 U.S.C. §158(f). See §8.29 above for a discussion regarding the different types of collective-bargaining agreements. This construction industry exception gives recognition to the fact that contractors often work in a variety of geographic areas with no established workforce, hiring their workers on a job-by-job basis. It has been held that even when the bargaining relationship between the contractor and the union is established through such a prehire agreement, a subcontracting clause in such a §8(f) agreement is enforceable under the §8(e) proviso. *Los Angeles Building & Construction Trades Council*, 239 N.L.R.B. 264, 99 L.R.R.M. (BNA) 1593 (1978), *enforcement granted*, 635 F.2d 859, 873 (D.C.Cir. 1980). However, the NLRB has also held that such a subcontracting clause is not enforceable if the contractor does not employ workers covered by the §8(f) agreement and has no reasonable expectation of hiring any such workers in the future. Such a circumstance evidences that the union simply wanted the subcontracting clause and there was no desire of the parties to establish a complete bargaining relationship that would otherwise validate the subcontracting clause. *Iron Workers District Council of Pacific Northwest*, 292 N.L.R.B. 562, 131 L.R.R.M. (BNA) 1726, *enforcement granted*, 913 F.2d 1470 (9th Cir. 1990).

The subcontracting clauses permitted under the §8(e) construction industry proviso are often called secondary subcontracting clauses as they are directed to the contractor’s relationship with a secondary contractor (*i.e.*, the subcontractor). There also may be subcontracting clauses contained

in a collective-bargaining agreement that are directed to the labor relations of the contractor's own employees. Such clauses are designed to protect the wages and job opportunities of the employees covered by the bargaining agreement by forbidding the contractor from having certain kinds of work done outside the contractor's own shop rather than being directed at the labor policies or products of other employers. These clauses are called primary subcontracting clauses because they are directed to the primary employer who is the signatory with the union. These primary clauses fall outside the ambit of §8(e) and are valid and enforceable. *George Ryan Co. v. National Labor Relations Board*, 609 F.2d 1249, 1254 (7th Cir. 1979) ("Agreements to force cessation of business with other employers that have 'primary,' as opposed to 'secondary,' goals are permissible even though the terms of §8(e) do not draw a distinction.").

The general contractor, being a party to the collective-bargaining agreement, must adhere to the subcontracting clause or subject itself to liability for damages by reason of a breach of the collective-bargaining agreement. This means that the general contractor has to take care in subcontracting work only to subcontractors who come within the terms of the subcontracting clause. If the general contractor subcontracts work in violation of the subcontractor clause, the general contractor could find itself paying twice for the work — the usual penalty for a violation of the subcontracting clause is that the general contractor must pay to the union the wages and benefits the general contractor would have paid if the union general contractor had performed the subcontracted work with a subcontractor who came within the terms of the subcontracting clause.

The subcontractor, who seeks to submit a bid to the general contractor, thus earning the award of the subcontract, must be concerned with the terms of the subcontract that it is proposing to enter. This subcontract, either by its express terms or by reason of terms imposed through incorporation-by-reference or flow-down clauses, may require the subcontractor to have a labor agreement with the appropriate union or unions. The failure to understand the subcontracting clause may result in a nonunion subcontractor being faced with a labor dispute at the jobsite as well as a damage claim by the general contractor that the subcontractor breached the subcontracting clause that has been made a part of the subcontract agreement with the general contractor.

These subcontracting clauses must be read very carefully because they vary in their terms. The subcontracting clause may also not identify the union with which the subcontractor must be a signatory, leaving the subcontractor to determine which union has jurisdiction over the work it will be performing. This in turn requires familiarity with the terms of the various union collective-bargaining agreements, both with individual contractors and with multiemployer associations, in order to determine who has jurisdiction of the work. Subcontractors need to take great care that they understand the subcontracting clause and to ensure that they are not binding themselves to an ambiguous subcontracting clause that may open them to risk.

An equally difficult situation presents itself when the subcontractor is already a party to a labor agreement with one union but this union is not the same union with which the subcontracting clause requires the subcontractor to have a labor agreement. Subcontractors must be aware of this situation and address this matter before binding themselves to perform work in accord with the tendered subcontract agreement.

One form of a subcontracting clause is a “union standards” that prohibits a contractor from subcontracting work to subcontractors that do not observe the economic equivalent of the union’s wage and benefit standards contained within the union’s agreement with the contractor. *Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. National Labor Relations Board*, 334 F.2d 539 (D.C.Cir. 1964). Such clauses have been held valid under the §8(e) proviso as a primary subcontracting clause because their purpose is deemed to remove the economic incentive of the general contractor to subcontract the work (away from its employees) to a subcontractor who pays its workers at a lower rate. *Sheet Metal Workers International Association, Local Union No. 223 v. National Labor Relations Board*, 498 F.2d 687 (D.C.Cir. 1974).

Another form of a subcontracting clause is a “work preservation” clause that requires a contractor to perform all work on a product with the signatory contractor’s employees at a particular jobsite. Such a clause requires a contractor to fabricate an item needed for the construction project using its own employees rather than subcontracting out the work. Work preservation clauses have been held to have a primary purpose and therefore to be lawful. *National Woodwork Manufacturers Ass’n v. National Labor Relations Board*, 386 U.S. 612 (1967).

In addition to subcontracting clauses, subcontractors must also be familiar with “harmony clauses” that may be contractually imposed on them either directly or by reference. A typical harmony clause does not require that the subcontractor be signatory to a union agreement, but it does require that the subcontractor use workers who will work in harmony with the other workers on the jobsite. If a labor dispute on the jobsite causes “disharmony” and a disruption to the work results, the subcontractor whose workers caused the dispute may be liable for the damages caused by the disharmony as the subcontractor has breached a material term of its subcontract agreement. Such harmony clauses are, therefore, a provision that indirectly requires the subcontractor to be a party to a labor agreement.

The concern over such labor disputes often motivates a public project owner to require a PLA as part of its contract with the general contractor. The PLA will in turn impose a subcontracting clause. Such PLAs are valid when the public owner is a market participant and not simply regulating labor. See §8.29 above for a more detailed discussion of PLAs.

These PLA requirements and other clauses that could lead to labor disputes must be carefully read in conjunction with contract clauses that deal with time extension claims or delay/disruption claims for which the cause of the claim is a labor dispute. If these claim clauses do not allow for time extension or compensation, a contractor is exposed to risk that possibly involves matters that are beyond the contractor’s control. For public projects that are competitively bid, and for which contract terms cannot be negotiated, the risk to the contractor is heightened and must be guarded against through clauses with its subcontractors and suppliers. For private projects, care must be taken in evaluating how time and money claim clauses may interact with labor subcontracting clauses.

## X. [8.32] COMMON SITUS PICKETING AND RESERVED GATES

Practitioners representing parties drafting construction contracts should anticipate the possibility of labor actions that can cause work stoppages or delays. This is of particular concern when multiple contractors/subcontractors are involved in a project with varying degrees of union affiliation. As noted in §§8.33 – 8.35 below, labor actions (*e.g.*, picketing) at work sites can be limited to allow work to continue while a union exercises its rights to mount a legal picket. However, practitioners may wish to include provisions that affirm the duty to continue work during labor activity and, in some cases, require contractors/subcontractors to alter work schedules outside normal work hours when reasonably necessary to facilitate completion of assigned tasks.

Practitioners should be aware of permissible labor picketing scenarios and limiting lawful picketing through the establishment of a reserved gate.

### A. [8.33] Secondary and Primary Picketing

By way of review, “common situs picketing” can occur at a work site when two or more employers are engaged in the course of normal business operations, as opposed to an “ambulatory situs” that is a temporary work location used by a primary employer to perform work. Picketing of a common situs may be primary or secondary, depending on the object of the picketing and the manner in which the picketing is conducted. Picketing is an unfair labor practice. “Section 8(b)(4), in turn, defines picketing as an unfair labor practice if ‘any object of that activity is to exert improper influence on secondary or neutral parties.’” *R.L. Coolsaet Construction Co. v. Local 150, International Union of Operating Engineers*, 177 F.3d 648, 654 (7th Cir. 1999), quoting *International Union of Operating Engineers, Local 150 v. National Labor Relations Board*, 47 F.3d 218, 223 (7th Cir. 1995).

**Where a union has a grievance with the terms and conditions of employment of a certain employer, (the “primary” employer), it must focus its picketing activity on that employer. The union may not exert pressure on an unrelated, “secondary” employer in order to coerce the secondary employer to cease dealing with the primary employer, thereby advancing the union’s goals indirectly.** *Mautz & Oren v. Teamsters, Chauffeurs & Helpers Union, Local No. 279*, 882 F.2d 1117, 1120 (7th Cir. 1989).

Further, if the union acted with mixed motives that are partially primary and partially secondary in nature, it has acted unlawfully. *Id.*

The prohibition of §8(b)(4) on secondary activity becomes complicated in the often confusing nature of common situs when multiple contractors/subcontractors are present. *Id.* While a union’s picketing of a primary employer at a common situs may have substantial and foreseeable consequences on the secondary employer, such a result is not deemed illegal. Rather, what is deemed illegal is for the union to intend to cause disruption of the secondary employer’s business. *Id.* The Seventh Circuit applies the *Moore Dry Dock* standards to determine whether picketing on a common situs violates the prohibition on secondary activity. See *Coolsaet, supra*; *Mautz & Oren, supra*.

**When a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights. *In re Sailors' Union of the Pacific*, 92 N.L.R.B. 547, 549, 27 L.R.R.M. (BNA) 1108 (1950).**

The picketing of the premises of a secondary employer is primary and unlawful if the following conditions exist:

1. The picketing is strictly limited to times when the *situs* of the dispute is located on the secondary employer's premises.
2. At the time of the picketing, the primary employer is engaged in its normal business at the *situs*.
3. The picketing is limited to places reasonably close to the location of the *situs*.
4. The picketing discloses clearly that the dispute is with the primary employer. *Id.*

These elements are not to be applied “mechanistically, but with common sense” as the union's state of mind, a question of fact, is dispositive. *Mautz & Oren, supra*, 882 F.2d at 1121. Remember that there is a presumption that union activity is lawful, but this presumption can be rebutted by evidence of unlawful intent. *Coolsaet, supra*, 177 F.3d at 655. Intent is ascertained from the totality of the union's conduct. *Helgesen v. International Association of Bridge, Structural & Ornamental Ironworkers, Local Union 498*, 548 F.2d 175, 181 (7th Cir. 1977).

#### **B. [8.34] Reserved Gate Solution**

Reserved gates are established to protect neutral employers and employees who work at a common *situs*. *Mautz & Oren v. Teamsters, Chauffeurs & Helpers Union, Local No. 279*, 882 F.2d 1117, 1122 (7th Cir. 1989). Reserved gates are an attempt to “make concrete the application of the [*Sailors' Union of the Pacific*, 92 N.L.R.B. 547, 549, 27 L.R.R.M. (BNA) 1108] standards.” *Mautz & Oren, supra*, 882 F.2d at 1122, quoting *Constar, Inc. v. Plumbers Local 447*, 748 F.2d 520, 522 (9th Cir. 1984). A separate gate is established for the exclusive use of the primary employer and those doing business with it. Picketing limited to that gate is permitted. If the union pickets at other gates, their action is presumed to be evidence of illegal secondary intent. *International Union of Operating Engineers, Local 150 v. National Labor Relations Board*, 47 F.3d 218, 223 (7th Cir. 1995).

A reserved gate system must use clear and unambiguous signs setting forth the gates to be used by the primary and secondary employers, employees, and suppliers. Without proper signage, the gate system is improper, and the union can ignore it. *See International Brotherhood of Electrical Workers, Local 441*, 158 N.L.R.B. 549, 552, 62 L.R.R.M. (BNA) 1074 (1966). Picket signs must also name the primary employer as sole participant in the dispute. *Building & Construction Trades Council of New Orleans*, 155 N.L.R.B. 319, 60 L.R.R.M. (BNA) 1296 (1965).

Gates must be separate but can be within reasonable proximity of each other. The primary gate must be accessible, visible to the public, and close to the portion of the project that is the object of the picketing. Further, the union must be provided with actual knowledge of the existence of separate gates. Employers should give notice via fax or certified mail return receipt requested. To prevent the “contamination” of a legally enforceable reserved gate, employers should notify other contractors, subcontractors, and suppliers of the reserved gate system and should tell employees that discipline up to and including termination may result if the reserved gate system is violated. Additionally, employers should warn contractors, subcontractors, and suppliers of their obligation to ensure that their employees, material providers, and other business invitees use the proper gate and that a violation may breach their subcontract. Employers must police gates to ensure proper gate usage. Policing also gives employers a witness to refute alleged contamination.

Once a proper gate system has been established, the union must limit the picketing to take place on public grounds, to be in close proximity to the entrance used by the primary employer, and to prohibit blocking access to the project. If access to the project is denied, employers may obtain an injunction.

Even when a valid gate system has been established, it is necessary to determine whether it has been properly used. If it has not, and the gates have been “tainted,” then the union is free to picket at any gate. *Mautz & Oren, supra*, 882 F.2d at 1122. “The question of taint is an extremely difficult factual and legal question.” 882 F.2d at 1122 –1123. Generally, gate contamination does not occur when a gate has been improperly used only once but when the employer has a pattern of misuse. *Id.* However, a single attempt to contaminate a gate has been found violative of the National Labor Relations Act in the context of other activity, even though the attempt to contaminate was aborted. *See International Brotherhood of Electrical Workers, Local Union No. 211*, 277 N.L.R.B. 1041, 121 L.R.R.M. (BNA) 1182 (1985). The employer can “rehabilitate” a tainted gate by reestablishing the reserved gate and providing notice to the parties. *Id.* In cases of contamination, the union must be told of the reestablishment of separate gates. As stated above, notice should be given by fax or certified mail, return receipt requested.

An alternative to the establishment of separate gates is establishing a “reserve time” — a time when the contractor or subcontractor with which the union has a dispute is working on the construction site and thus the only time when the union may picket. However, if the primary employer violates the reserved time, the union can, too. *See International Union of Operating Engineers, Local Union No. 450*, 219 N.L.R.B. 997, 90 L.R.R.M. (BNA) 1104 (1975).

### C. [8.35] Drafting Considerations

As picketing at work sites can be disruptive even when legal, such labor actions can slow and delay project completion. In many cases, employees are unsure of their obligations to enter a work site where pickets are visible notwithstanding the creation of a reserved gate. In other cases, the reserved gate is improperly established or tainted. See §8.34 above. In light of the confusion that can occur at multi-contractor/subcontractor project sites, contract provisions can be included that affirm the duty of contractors and subcontractors to adhere to reserved gate rules when picketing situations arise and to properly instruct their employees of the obligation to adhere to reserved gate restrictions.

In many cases, labor conflict can be resolved when a targeted contractor/subcontractor agrees not to be present and performing work during times that union-affiliated contractors and subcontractors are working. This solution may resolve the labor issue but may also cause delay by the need to reschedule the presence of contractors/subcontractors. This resolution may also be unworkable when the work of the targeted contractor or subcontractor must be performed before the work of other contractors and subcontractors. Anticipating the need for such resolution techniques, particularly involving a nonunion contractor or subcontractor, practitioners may want to include provisions that obligate the contractor/subcontractor to work at times that are outside normal work hours (*e.g.*, evenings or weekends) when reasonably necessary.

In addition, practitioners representing owners should consider including clauses imposing penalties on contractors and subcontractors for failure to comply with reserved gate configurations, providing for termination of a contract, and/or providing for indemnification and compensation for delay damages.

## XI. [8.36] OSHA FEDERAL SAFETY REQUIREMENTS

The Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §651, *et seq.*, and the rules and standards of the Secretary of the United States Department of Labor issued pursuant thereto control the federal safety requirements imposed on those working at construction sites. Everyone in the construction field is familiar with the acronym “OSHA.”

In 1969, Congress amended the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. §327, *et seq.* (repealed by Pub.L. 107-217, 116 Stat. 1316 (2002), now found at 40 U.S.C. §3701, *et seq.*), by adding what is commonly known as the Construction Safety Act of 1969 (CSA), 40 U.S.C. §333 (now found at 40 U.S.C. §3704), to provide employees in the construction industry with a safer work environment. It shall be a condition of each federally assisted construction contract that the contract

**must provide that no contractor or subcontractor contracting for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions that are unsanitary, hazardous, or dangerous to health or safety, as determined under construction safety and health standards the Secretary of Labor prescribes by regulation.** 40 U.S.C. §3704(a)(1).

CWHSSA applies to federally assisted construction contracts over \$100,000.

In 1970, Congress enacted OSHA and authorized the Secretary of USDOL to adopt established federal standards issued under other statutes, including the Construction Safety Act of 1969, as occupational safety and health standards. The Secretary adopted the construction standards that had been issued under the Construction Safety Act of 1969 in 29 C.F.R. pt. 1518 as OSHA standards in accordance with §6(a) of OSHA, 29 U.S.C. §655. In 1971, the USDOL Safety and Health Regulations for Construction were redesignated as 29 C.F.R. pt. 1926.

In the case of a basic construction site where only one contractor is performing the work, the issue of OSHA compliance is pretty straightforward, and the construction contract obligations to comply with OSHA laws and rules are easily applied. The basic obligation of a contractor, as set forth at 29 U.S.C. §654(a)(1), is to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.” The more difficult circumstance is presented, as is often the case on a construction site, when there are multiple contractors, and hence multiple employers, working at the construction site.

Until 2007, the Secretary of USDOL addressed this issue by implementing a policy known as the “controlling-employer doctrine.” This policy was published in OSHA’s FIELD INSPECTION REFERENCE MANUAL (FIRM) and subsequently OSHA’s FIELD OPERATIONS MANUAL, Ch. 3, §VII.J (eff. Nov. 9, 2009) (FOM), available at [www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-00-148.pdf](http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf) (case sensitive). Under this doctrine, the general contractor was responsible for safety violations by subcontractors at the construction site, even though the general contractor neither created the safety hazard nor exposed its own employees to the hazard, because the general contractor was deemed to have some level of both contractual and practical control over the construction site. See OSHA Instruction CPL 2-0.124 (eff. Dec. 10, 1999), clarifying OSHA’s “Multi-Employer Citation Policy,” originally set forth in OSHA’s FIRM of September 26, 1994, and available at [www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=2024](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024) (case sensitive). The USDOL believed, by keeping the general contractor subject to OSHA liability for the conduct of its subcontractors, that the general contractor would take steps to better manage safety at the construction site.

In *Secretary of Labor v. Summit Contractors, Inc.*, No. OSHRC 03-1622, 2007 WL 2265137 (Apr. 27, 2007), the Occupational Safety and Health Review Commission (OSHRC), the body that administers the OSHA law and rules, reversed its prior rulings and rejected the controlling-employer doctrine. OSHRC ruled that a general contractor cannot be held liable under OSHA if the general contractor neither created the hazard nor exposed its employees to the hazard. However, the Eighth Circuit Court of Appeals, in a two-one decision, reversed the decision of OSHRC in *Solis v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009). The Eighth Circuit held the plain language of 29 C.F.R. §1910.12(a), which addresses the scope of OSHA construction standards, did not preclude the Secretary of Labor from citing controlling employers, in part because the OSHA regulation requiring only that an employer protect “each of his employees” also requires each employer to protect the “places of employment of each of his employees.” The federal court found that such “places” also can include the employees of another employer. The federal court stated that to be subject to a multiemployer citation, an employer must have employees at the cited work site. In other words, a contractor must protect a place of employment, including others who work at the place of employment, as long as the contractor also has employees at that place of employment. The single dissenting judge observed that the ruling placed even a sophisticated contractor dealing with specialized subcontractors into a very difficult position to recognize safety violations by these specialized subcontractors.

The practitioner should also take note of the OSHA regulation at 29 C.F.R. §1926.16(a), which provides that although a prime contractor and its subcontractors “may make their own

arrangements with respect to obligations which might be more appropriately treated on a jobsite basis rather than individually,” the subcontractors are relieved “from the actual, but not any legal, responsibility.” The regulation further provides:

**To the extent that a subcontractor of any tier agrees to perform any part of the contract, he also assumes responsibility for complying with the standards in this part with respect to that part. Thus, the prime contractor assumes the entire responsibility under the contract and the subcontractor assumes responsibility with respect to his portion of the work. With respect to subcontracted work, the prime contractor and any subcontractor or subcontractors shall be deemed to have joint responsibility.** 29 C.F.R. §1926.16(c).

Last, this regulation provides that “[w]here joint responsibility exists, both the prime contractor and his subcontractor or subcontractors, regardless of tier, shall be considered subject to the enforcement provisions of the Act.” 29 C.F.R. §1926.16(d).

Even though a contractor cannot discharge its responsibility by contract, care should be taken in drafting applicable safety provisions in construction contracts to address safety responsibility on multiemployer construction sites in order to ensure that the provisions in the construction contract give sufficient and adequate authority to general contractors to deal with safety problems created by others at a work site, including inspection, documentation, reporting, correction, and enforcement. Owners can require general contractors to contractually commit to specified safety standards and to submit safety plans for approval. General contractors can require subcontractors to likewise commit to the same specified safety standards and to submit safety plans for approval. General contractors also should include in their subcontracts specific language requiring the subcontractors to indemnify the general contractor for any liability or exposure related to the subcontractors’ OSHA violations and language that specifically requires the subcontractors to be responsible for any penalties issued to the general contractor as a direct result of the subcontractors’ OSHA violations.

Subcontractors must also be concerned, for if they are deemed a “controlling employer” for purposes of the employees of others with whom they work, then the subcontractors also have OSHA responsibility and require sufficient and adequate terms in their subcontracts to manage this responsibility. Moreover, a subcontractor is not relieved of OSHA safety responsibility simply because the general contractor also may be responsible under the controlling-employer doctrine. A subcontractor remains responsible for the safety of its own employees and for hazards to which those employees may be exposed.

Practitioners representing project owners also must consider whether the OSHA controlling-employer doctrine may result in OSHA liability of the owner, who, like the general contractor, can control safety at the work site as a whole. Consideration, therefore, must be given to the inclusion of contract language similar to that suggested above for insertion in the contractors’ and subcontractors’ agreements.

NOTE: OSHA does not have an impact on other legal principles that bear on contractor responsibility for workplace safety such as Illinois tort law, building codes, and insurance considerations. OSHA explicitly declares that it shall not

**be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.** 29 U.S.C. §653(b)(4).

## **XII. [8.37] INDEPENDENT CONTRACTOR VS. EMPLOYEE ISSUES**

Practitioners advising clients engaged in the construction industry, whether the clients are employees or independent contractors, must conduct a careful review of numerous factors. How the parties characterize the employment relationship and, more importantly, how the courts and agencies classify it will determine whether potential liability is likely to attach under a number of federal and state labor and employment laws.

The use of independent contractors can lead to savings in labor, tax, administrative, and overhead costs. True independent contractors who are not employees generally are not covered by federal and state labor and employment laws, and thus the use of nonemployee relationships can avoid liability under workers' compensation, unemployment, and state and federal discrimination laws. Similarly, collective-bargaining agreements only cover employees, and thus independent contractors are not subject to a labor agreement's provisions relative to wages, fringe benefits, and other working conditions.

It is vitally important, however, to define these relationships correctly. An employer, believing it is dealing with an individual as an independent contractor but who is actually an employee under the law, is left open to potential liability under numerous state and federal employment laws. Similarly, such an employer could be liable under any applicable labor agreements for any rates of pay or benefits that should have been paid to employees, including contributions to pension and health and welfare funds (along with resulting penalties and interest). It is easy to see that the potential savings in using independent contractors can easily be wiped out if the relationship is incorrectly identified.

The discussion in §§8.38 – 8.43 below makes it clear that the determination of whether an individual is properly classified as an “employee” or as an “independent contractor” is largely fact specific. Thus, it is critical that the practitioner advising a client on this topic thoroughly investigate the client's relationship with its workforce and of those individuals performing service or labor for the client.

### **A. Independent Contractor Status Under Federal Statutes**

#### **1. [8.38] National Labor Relations Act**

The National Labor Relations Act, 29 U.S.C. §151, *et seq.*, specifically excludes independent contractors from its coverage. Section 2(3) of the Act provides in pertinent part that the “term ‘employee’ . . . shall not include any individual . . . having the status of independent contractor.”

29 U.S.C. §152(3). The NLRB and courts interpreting the NLRA use general agency principles in determining whether an individual is an employee or an independent contractor and look predominantly at the right-to-control test.

In its simplest form, the right-to-control test can be summarized in this fashion: If the entity for which the services are performed retains the right to control the manner and the means by which a result is achieved, the person who performs the services is an employee. Conversely, if only the results are controlled, and the means and methods of achieving the results are left up to the individual performing the services, such individual is an independent contractor. *California Oilfield Maintenance, Inc.*, 311 N.L.R.B. 1079, 1083, 145 L.R.R.M. (BNA) 1239 (1993). Determinations are made on a case-by-case basis and are very fact specific. The factors considered by the NLRB and the courts include

- a. the individual's
  1. control over hours of work;
  2. authority to hire, fire, and direct employees or assistants without the consent of the entity for which services are performed;
  3. control over opportunities for earnings and profits;
  4. opportunity to perform work for other entities.; and
- b. the extent of supervision or control of day-to-day activities by the entity for whom the services are being performed. *Peno Trucking, Inc. v. Commissioner of Internal Revenue*, 296 Fed.Appx. 449 (6th Cir. 2008).

None of these factors is singularly dispositive, but all must be balanced in making a determination of employee vis-à-vis independent contractor status. *Weber v. Commissioner of Internal Revenue Service*, 60 F.3d 1104, 1110 (4th Cir. 1995).

The District of Columbia Circuit affirmed the NLRB's use of the common-law agency test but disagreed with and reversed the Board's finding that certain route drivers were employees under the NLRA. *FedEx Home Delivery v. National Labor Relations Board*, 563 F.3d 492 (D.C.Cir. 2009). The court held the NLRB's emphasis on the right-to-control test was misplaced. Rather, according to the court, the proper test was whether the putative independent contractors had significant entrepreneurial opportunity for gain or loss.

## 2. [8.39] Fair Labor Standards Act

The Fair Labor Standards Act of 1938, 29 U.S.C. §201, *et seq.*, governs minimum wage and overtime payments to employees falling within its purview (*i.e.*, nonexempt employees). The statutory definition of an "employee" under the FLSA is not particularly helpful: "any individual employed by the employer." 29 U.S.C. §203(e)(1). However, most courts, including the Seventh

Circuit Court of Appeals, use the economic-realities test in determining whether an individual is an employee or an independent contractor for FLSA purposes. Under this test, the factors considered are

- a. the nature and degree of control over the manner in which work is to be performed;
- b. the individual's opportunity for profit or loss depending on the individual's managerial skills;
- c. the individual's investment in tools or equipment and ability to hire employees or assistants necessary to complete the work;
- d. the determination of whether the services to be rendered by the individual require some special skills;
- e. the degree of permanency and duration of the relationship between the individual and the entity for whom the work is being performed; and
- f. the extent to which the services being performed by the individual are an integral part of the business of the entity for which the services are being rendered. *Secretary of Labor, United States Department of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987).

In considering the above six factors, the penultimate determination for the court is the degree to which the individual is economically dependent on the entity for which the services are being performed. 835 F.2d at 1538. The question is, does the individual have other readily available opportunities to earn a living if he or she stopped working for the entity for which services were rendered? If so, it is likely that the individual is considered an independent contractor rather than an employee.

It is noteworthy that the courts consider, as part of their analysis, whether there is a signed contract in which the individual is designated as an independent contractor, but this factor is not dispositive. Under the FLSA, an individual is not permitted to waive employee status. *Baker v. Barnard Construction Co.*, 860 F.Supp. 766, 772 (D.N.M. 1994).

As with other statutes being discussed (see §§8.37, 8.38, 8.40 – 8.43), a misidentification of employee status could prove costly, as the FLSA allows an employee to recover up to two years of wages or overtime payments due (three years in the case of willful violations), plus interest and costs. In addition, an entity that mistakenly believes it is using an independent contractor is not likely to keep records of hours worked by the individual, thereby running afoul of the FLSA's record-keeping requirements for employees.

### **3. [8.40] Federal Discrimination Statutes**

The definition of “employee” found in the Fair Labor Standards Act of 1938, “an individual employed by an employer” (29 U.S.C. §203(e)(1)), has been adopted by all of the following:

- a. §701 of the Civil Rights Act of 1964, 42 U.S.C. §2000e(f);
- b. §11 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §630(f)
- c. §101 of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12111(4); and
- d. §111 of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §2611(3).

In determining whether an individual is an employee or an independent contractor under these statutes, the Seventh Circuit uses the same economic-realities test used under the FLSA. *Knight v. United Farm Bureau Mutual Insurance Co.*, 950 F.2d 377, 380 (7th Cir. 1991).

The determination of whether an individual is an employee or an independent contractor under these statutes is important for two reasons. First, it must be determined if the individual is an employee protected under the appropriate statute and thereby afforded the rights and protections of the statute. Second, each of the statutes has minimum requirements for coverage (e.g., 15 employees under Title VII and ADA; 20 employees under ADEA).

## **B. Independent Contractor Status Under State Laws**

### **1. [8.41] Workers' Compensation**

The term “employee” is broadly defined under §1(b)(2) of the Illinois Workers' Compensation Act, 820 ILCS 305/1, *et seq.*, to mean “[e]very person in the service of another under any contract of hire, express or implied, oral or written.” 820 ILCS 305/1(b)(2). In determining whether an employee-employer relationship exists, the courts consider the following factors:

**the right to control the manner in which the work is done; the method of payment; the right to discharge; the skill required in the work to be done; who provides tools, materials, or equipment; whether the workman's occupation is related to that of the alleged employer; and whether the alleged employer deducted for withholding tax.** *Young American Realty v. Industrial Commission*, 199 Ill.App.3d 185, 556 N.E.2d 796, 798, 145 Ill.Dec. 178 (4th Dist. 1990).

No one factor is dispositive, but the right to control is given the most weight by the courts. *Id.*

### **2. [8.42] Illinois Human Rights Act**

A different definition of “employee” is given under the Illinois Human Rights Act, 775 ILCS 5/1-101, *et seq.* For purposes of this antidiscrimination statute, an employee is “any individual performing services for remuneration within this State for an employer.” 775 ILCS 5/2-101(A)(1). The Illinois Human Rights Commission has held that the right-to-control test is the determinative factor as to whether an individual is an employee or an independent contractor. *See In re Dehne & Middle American Express, Inc.*, Charge No. 1986SF0738, 1992 WL 721944 (Oct. 5, 1992).

### 3. [8.43] Illinois Employee Classification Act

For practitioners with clients in the construction industry in Illinois, one of the more significant developments is the passage of the Employee Classification Act (ECA), 820 ILCS 185/1, *et seq.* The stated purpose of the Act is to address the practice of misclassifying employees as independent contractors. 820 ILCS 185/3. The Act applies to any legal entity that engages in construction within Illinois and includes owners, general contractors, and subcontractors. 820 ILCS 185/5.

The definition of “construction” is extremely broad and encompasses all conceivable activities related to the construction, alteration, repair, remodeling, improving, or demolition of any project, development, structure, real estate, or improvement. 820 ILCS 185/5. “Construction” is also defined to include “moving construction related materials on the job site to or from the job site.” *Id.*

The Act establishes a presumption that any individual performing services in the construction industry is an employee rather than an independent contractor unless one of two narrowly defined exceptions is met. 820 ILCS 185/10(a). The first exception, found in §10(b), provides that an individual will be deemed to be an employee unless each of the following conditions is met:

- (1) the individual has been and will continue to be free from control or direction over the performance of the service for the contractor, both under the individual’s contract for service and in fact;**
- (2) the service performed by the individual is outside the usual course of services performed by the contractor; and**
- (3) the individual is engaged in an independently established trade, occupation, profession or business; or**
- (4) the individual is deemed a legitimate sole proprietor or partnership under subsection (c) of this section. 820 ILCS 185/10(b).**

The second exception, found in §10(c), sets out the test for whether an individual is deemed to be a legitimate sole proprietor or partnership. To meet this test, the following conditions must be met:

- (1) the sole proprietor or partnership is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the for whom the service is provided to specify the desired result;**
- (2) the sole proprietor or partnership is not subject to cancellation or destruction upon severance of the relationship with the contractor;**
- (3) the sole proprietor or partnership has a substantial investment of capital in the sole proprietorship or partnership beyond ordinary tools and equipment and a personal vehicle;**

- (4) the sole proprietor or partnership owns the capital goods and gains the profits and bears the losses of the sole proprietorship or partnership;**
- (5) the sole proprietor or partnership makes its services available to the general public or the business community on a continuing basis.**
- (6) the sole proprietor or partnership includes services rendered on a Federal Income Tax Schedule as an independent business or profession;**
- (7) the sole proprietor or partnership performs services for the contractor under the sole proprietorship's or partnership's name;**
- (8) when the services being provided require a license or permit, the sole proprietor or partnership obtains and pays for the license or permit in the sole proprietorship's or partnership's name;**
- (9) the sole proprietor or partnership furnishes the tools and equipment necessary to provide the service;**
- (10) if necessary, the sole proprietor or partnership hires its own employees without contractor approval, pays the employees without reimbursement from the contractor and reports the employees' income to the Internal Revenue Service;**
- (11) the contractor does not represent the sole proprietorship or partnership as an employee of the contractor to its customers; and**
- (12) the sole proprietor or partnership has the right to perform similar services for others on whatever basis and whenever it chooses. 820 ILCS 185/10(c).**

Failure to meet any one of the twelve conditions set forth above will lead to a finding that the individual performing services for the contractor was not a legitimate sole proprietor or partnership but rather an individual who must meet the test set forth in §10(b) to avoid a finding of an employee-employer relationship.

The Act provides that all subcontractors and lower-tiered contractors are subject to the Act. 820 ILCS 185/10(e). However,

**[a] contractor shall not be liable under this Act for any subcontractor's failure to properly classify persons performing services as employees, nor shall a subcontractor be liable for any lower tiered subcontractor's failure to properly classify persons performing services as employees. 820 ILCS 185/10(f).**

Any entity for which one or more individuals not classified as an employee perform services is required to post in a conspicuous place at each jobsite a notice prepared by the Illinois Department of Labor, in English, Spanish, and Polish, summarizing the requirements of the Act. 820 ILCS 185/15.

Any interested party may file a complaint with the IDOL based on a reasonable belief that the Act is being violated. If the IDOL determines after an investigation that the Act has been violated, it may (a) issue a cease-and-desist order; (b) take affirmative steps to eliminate the effects of the violation; (c) collect the amount of any wages, salary, employment benefits, or other compensation denied or lost by the misclassified individual(s); and (d) assess civil penalties as allowed by the Act. 820 ILCS 185/25. A civil penalty not to exceed \$1,500 per violation can be assessed for violations found in the first audit of the contractor performed by the IDOL. Thereafter, the civil penalty is increased to a maximum of \$2,500 for each repeat violation within a five-year period. Civil penalties may be recovered by a lawsuit filed in any county either by the IDOL or by an interested party. If initiated by an interested party, such party is awarded 10 percent of any recovery, with the balance submitted to the IDOL. 820 ILCS 185/40.

For willful violations, the penalties double, and additionally the contractor will be liable to the misclassified employee for punitive damages in an amount equal to the penalties assessed. Moreover, an entity that willfully violates the Act commits a Class C misdemeanor; if a second or subsequent violation is committed within a five-year period, a Class 4 felony is committed. 820 ILCS 185/45.

As noted above, any interested party may file suit for violations of the Act without the need to exhaust any administrative procedures. A successful litigant may be awarded (a) the amount of any wages, salary, employment benefits, or other compensation lost to the person as a result of violations of the Act, plus an equal amount in liquidated damages; (b) compensatory damages in an amount up to \$500 for each violation of the Act; (c) in the case of unlawful retaliation prohibited by the Act, all legal or equitable relief as may be appropriate, and (d) attorneys' fees and costs. 820 ILCS 185/60.

In addition, any contractor who violates the Act a second or subsequent time within a five-year period of an earlier violation will be added to the Department of Labor's debarment list, and no state contract will be awarded to such contractor until four years have lapsed since the date of the last violation. 820 ILCS 185/42.

Finally, it should be noted that there shall be no waiver of any provisions of this Act and that any employer who attempts to induce an individual to waive any provision of the Act commits a Class C misdemeanor. 820 ILCS 185/70.

### **XIII. [8.44] IMMIGRATION LAW**

In 1986, Congress reformed United States immigration laws with the passage of the Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat 3359. The purpose of the reform was to ensure that only those legally working in the United States are hired by employers. Those legally permitted to work in the United States are citizens and nationals of the United States, lawful permanent residents, and aliens with current work authorizations. 8 U.S.C. §1324(b)(2).

IRCA also provides sanctions against employers who violate the immigration laws. As discussed below in more detail, depending on the circumstances, the sanctions can be civil, criminal, or both. Thus, practitioners who represent employers in the construction industry must advise their clients that compliance with the immigration laws is critical. Such compliance is particularly important in times when regulatory and enforcement agencies indicate that compliance efforts are focusing more on employers rather than work sites as they have in the past.

Generally, an employer is required to verify the employment eligibility of each individual it hires to perform labor or services in the United States in exchange for wages or other remuneration. 8 U.S.C. §1324a(b). Employment verification is not required for persons who are

- a. hired prior to November 7, 1986, who have continued in employment since that date and have a reasonable expectation of continuing to work for the employer;
- b. employed for casual domestic work in a private home on an intermittent or sporadic basis;
- c. independent contractors (see §§8.37 – 8.43 above for a more thorough discussion of independent contractor relationships);
- d. providing labor or services to the contractor or subcontractor but who are employed by a contractor providing contract services (*e.g.*, employee leasing or temporary agencies); or
- e. not physically working in the United States.

The employment verification process is achieved by the completion of an I-9 Form by the employee and the employer. See [www.uscis.gov/files/form/i-9.pdf](http://www.uscis.gov/files/form/i-9.pdf) for an I-9 Form. Section 1 of the form is to be completed by the employee at the time of hire. Section 1 asks for the employee's name, address, birth date, and Social Security number. The entry of the Social Security number is voluntary unless the employer is enrolled in the United States Citizenship and Immigration Service's E-Verify program. In §1, the employee attests to his or her citizenship or immigration status and certifies that the information provided is, to the best of his or her knowledge, true and correct.

Thereafter, but within three business days of the date of hire, the employee is required to provide to the employer original documentation establishing the employee's identity and employment authorization. Form I-9 lists examples of the types of documents that may be produced by the employee. Some documents, such as a valid and current U.S. passport, establish both identity and employment eligibility (see Form I-9, List A). Some documents only establish identity (see Form I-9, List B), such as a driver's license. Other documents, such as an employment authorization document issued by the Department of Homeland Security (DHS), may only establish employment eligibility (see Form I-9, List C).

Employers may not specify which documents an employee must present, nor can the employer insist that the employee produce a document bearing a Social Security number (unless

such employer is part of the E-Verify program). Rather, the employer must accept any document from Lists A through C produced by the individual, so long as the documents appear on their face to be genuine and to relate to the person presenting the documents. 8 U.S.C. §1324a(b)(1)(A). Only if the documents do not appear to be genuine may the employer inquire further as to the documentation; to do otherwise would be to risk running afoul of the antidiscrimination provisions of IRCA.

After reviewing the documentation, the employer completes §2 of Form I-9. The employer records the documents reviewed, enters the date employment began, and attests that the documents presented by the employee appear to be genuine and relate to the employee presenting the documents.

Employers should photocopy the front and back of any documents accepted from the employee to establish identity and employment eligibility and attach the copies to the completed Form I-9. Employers are required to retain completed I-9s for all employees for three years after the date of hire or one year after the date employment terminates, whichever is later. 8 U.S.C. §1324a(b)(3)(B). The records may be retained in paper, microfilm, microfiche, or electronic formats but must be available for inspection by the DHS, the U.S. Department of Labor, or the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) on three days' notice.

As noted previously, employers do not need to fill out I-9s for independent contractors or their employees. Nor does an employer need to verify the employment eligibility of individuals employed by a leasing company or staffing agency. However, practitioners should advise their clients that the responsibility for employment verification should be spelled out clearly in any contract with a leasing or staffing agency and with subcontractors, for in "co-employment" situations, both the staffing agency and the co-employer client can be held responsible for any violations of the immigration laws.

Similarly, employers can be in violation of immigration laws if they knowingly enter into any contract or subcontract to circumvent the law against hiring illegal aliens. 8 U.S.C. §1324a(a)(4). Thus, it would be an IRCA violation, for example, for a contractor to hire a subcontractor to provide laborers that the contractor knows are not authorized to work in the United States.

In this regard, the practitioner should be aware of a 2005 settlement between Wal-Mart and the Immigration and Customs Enforcement (ICE) Division of the Department of Homeland Security. During a four-year investigation of cleaning contractors, ICE arrested some 300 illegal aliens working for independent contractors cleaning Wal-Mart stores in locations in 21 states. As a result of this investigation and the resulting arrests, ICE alleged that Wal-Mart, through the use of independent contractors, knowingly employed illegal aliens in violation of IRCA. ICE did not allege that Wal-Mart was the employer of the illegal aliens, but instead relied, at least in part, on §1324a(a)(4) of IRCA, which relates to an employer's use of independent contractors, and which reads in pertinent part:

**[A] person or other entity who uses a contract, subcontract or exchange ... to obtain the labor of an alien in the United States knowing that the alien is an**

**unauthorized alien . . . with respect to performing such labor, shall be considered to have hired the alien for employment in the United States.**

Wal-Mart never admitted that it had knowledge that the employees of the independent contractors were illegal aliens. In fact, in the settlement with ICE, the parties agreed that “Wal-Mart did not have knowledge, at the time the independent contractors initially were hired, that the independent contractors knowingly hired, recruited or employed [undocumented workers].” John A. Pearce II, *The Dangerous Intersection of Independent Contractor Law and the Immigration Reform and Control Act: The Impact of the Wal-Mart Settlement*, 10:3 Lewis & Clark L.Rev. 597, 601 (2006), [http://legacy.lclark.edu/org/lclr/objects/LCB10\\_3\\_Pearce.pdf](http://legacy.lclark.edu/org/lclr/objects/LCB10_3_Pearce.pdf) (case sensitive). However, in order to avoid threatened criminal prosecution, Wal-Mart decided to settle the matter. It paid \$11 million in civil penalties and agreed, among other things, to (a) establish a procedure to verify that its independent contractors take reasonable steps to comply with immigration laws, and (b) provide all current and future store managers with training regarding their legal obligations to prevent the knowing hiring, recruitment, or continued employment of unauthorized aliens. *Id.*

The Wal-Mart case indicates that DHS and ICE will continue to expect that employers and their independent contractors are diligent in complying with their obligations under the immigration laws. Thus, practitioners should address this issue in drafting language in construction contracts with independent contractors and subcontractors. Language such as the following is suggested:

#### **Subcontractor Agreement — Immigration Compliance**

**[Name] is committed to compliance with all applicable immigration laws, including but not limited to the Immigration Reform and Control Act of 1986.**

**[Name] also requires compliance with all applicable immigration laws by its contractors and subcontractors on any of [Name’s] work sites. During the term of this Agreement, Subcontractor shall not place any employee of Subcontractor, nor shall Subcontractor allow any of its subcontractors to place any of their employees, to perform any work on behalf of [Name] at any of its work sites, without first ascertaining that all such employees or employees of such subcontractors are in fact lawfully authorized to work in the United States.**

**Subcontractor warrants and agrees as follows:**

- 1. It has established and follows a procedure to verify the work authorization of each of its employees.**
- 2. It has verified the work authorization of each of its employees who will or may work at any of [Name’s] work sites.**
- 3. It has no knowledge of any fact that would render any employee of Subcontractor, or any employee of its contractors and subcontractors, ineligible to work legally on any of [Name’s] work sites.**

**4. It has complied, and shall continue to comply, with all requirements of the Immigration Reform and Control Act of 1986, and all other laws related to immigration, including any and all verification and record-keeping requirements imposed by any such laws.**

**Subcontractor further agrees that it shall cooperate fully in all respects with any audit, investigation, inquiry, or inspection conducted by the Department of Homeland Security, its division of Immigration Control and Enforcement, or any other agency charged with enforcement of immigration laws.**

**Subcontractor understands and agrees that failure to comply with all applicable immigration laws will be considered a breach of this agreement and that upon such breach, [Name] may immediately terminate the agreement with Subcontractor.**

**Subcontractor further agrees that all of its contractors or subcontractors performing work at any of [Name's] work sites on behalf of [Name] shall be required to agree to be bound as set forth herein prior to being awarded any subcontract for any such work.**

A final word of caution, practitioners should advise that if clients become aware that their contractors or subcontractors are employing undocumented aliens, the client should either (a) insist on immediate and verifiable compliance with the immigration laws by the contractor and/or subcontractor, or (b) terminate the contract with the contractor and/or subcontractor. Failure to do one of these two actions could result in prosecution for knowing violation of the immigration laws.

As noted previously, IRCA provides civil and criminal sanctions against employers who violate the Act. Civil penalties may be assessed for hiring or continuing to employ unauthorized aliens (8 U.S.C. §1324a(e)(4)), or for failing to comply with the Form I-9 completion and retention requirements set out above (8 U.S.C. §1324a(e)(5)). Criminal penalties, including fines and imprisonment, may be sought against employers who engage in a pattern or practice of knowingly hiring (or continuing to employ) unauthorized aliens or who engage in fraud in the employment verification process. 8 U.S.C. §1324a(f). In determining the amount of the penalties within the statutorily mandated minimums and maximums, the DHS will consider (a) the number of violations, (b) the size of the company, (c) the good-faith efforts of the employer to comply with the law, (d) the seriousness of the violation, and (e) the employer's history of prior violations.

In addition to the above requirements, IRCA prohibits the following conduct:

- a. document abuse during the I-9 process, such as requiring a "foreign" looking individual to produce more documentation than is required by Form I-9;
- b. citizenship or immigration status discrimination, including favoring citizens over noncitizens with valid work authorizations;

- c. national origin discrimination, when an employer treats employees differently in regard to hiring, firing, or recruitment based on the individual's actual or perceived national origin; and
- d. retaliation, when an employer intimidates, threatens, coerces, or otherwise retaliates against an individual who has asserted a charge of immigration-related employment discrimination or otherwise asserts his or her rights under the Act.

Practitioners and their clients in the construction industry should bear in mind that individuals without proper work authorization, although in violation of the federal immigration laws, may be covered as “employees” under federal labor and employment laws. *Sure-Tan, Inc. v. National Labor Relations Board*, 467 U.S. 883, 81 L.Ed.2d 732, 883 S.Ct. 2803 (1984). However, whether such illegal aliens are entitled to a remedy for violation of such statutes depends on whether the remedy is for time actually worked or for periods during which the individual did not work.

For example, in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 152 L.Ed.2d 271, 122 S.Ct. 1275 (2002), the Supreme Court reaffirmed that illegal aliens are employees entitled to the protections afforded by the National Labor Relations Act. Thus, the Court found that the employer violated the NLRA when it terminated the undocumented workers for activities protected by the Act. However, the Supreme Court further held that an award of backpay to the undocumented workers would be contrary to the goals of IRCA and ruled that the undocumented workers were not entitled to backpay for time not worked (*i.e.*, from the time of their termination).

Although *Hoffman* remains good law, it has not been followed in cases in which the undocumented individuals actually performed work. For example, in *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), the court of appeals held that the Fair Labor Standards Act of 1938 (dealing with minimum wage and overtime) applied to illegal aliens. Courts have held that *Hoffman* does not bar an undocumented worker from recovering unpaid wages for work actually performed. *Flores v. Albertsons, Inc.*, No. CV0100515AHM(SHX), 2002 WL 1163623 (C.D.Cal. Apr. 9, 2002). This approach has been endorsed by the U.S. Department of Labor in FLSA cases in which undocumented workers claim unpaid wages for hours actually worked. See Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Fact Sheet # 48, *Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division*, [www.dol.gov/whd/regs/compliance/whdfs48.pdf](http://www.dol.gov/whd/regs/compliance/whdfs48.pdf).

Many employers, in their efforts to comply with the immigration laws, have enrolled in the federal E-Verify program. E-Verify is a voluntary program established by the federal government in 1997 that allows registered employers to determine if new employees are authorized to work in the United States. E-Verify may not be used to determine the authorization status of current employees or potential employees. It may be used only for new hires after they have been offered employment. Under the program, employers submit certain documents (*e.g.*, documents submitted must contain a photograph of the new employee) electronically to E-Verify. Based on information in its databases, the federal government either (a) confirms that the employee is

authorized to work in the United States, or (b) tentatively provides non-confirmation of the employee's work authorization status. If tentative non-confirmation is received, the employee must secure the necessary work authorizations that are then resubmitted to E-Verify for a final determination of whether the employee is authorized to work in the United States.

There have been problems, however, with the accuracy of the databases that support the E-Verify program. Many individuals who in actuality have authorization to work in the United States have been unable to confirm this through the E-Verify databases, and many of those employees have been terminated from employment by employers wary of running afoul of the immigration laws.

As a result of these problems, in 2007, the Illinois legislature enacted P.A. 95-138 (eff. Jan. 1, 2008), at 820 ILCS 55/12. The law, which was to become effective on January 1, 2008, prohibited Illinois employers from participating in E-Verify until such time as the DHS and Social Security Administration databases used by E-Verify were able to make a determination on 99 percent of the tentative non-confirmation notices issued to employers within a three-day period. However, prior to the law's effective date, the federal government filed a lawsuit to declare the law invalid. The federal government argued that since E-Verify was made available to all employers nationwide, Illinois' attempt to restrict the program's availability to Illinois employers conflicted with federal law and was thus invalid under the Supremacy Clause. Illinois agreed that it would not enforce the law while the lawsuit was pending.

In March 2009, the Central District of Illinois ruled in favor of the federal government. *United States v. State of Illinois*, No. 07-3261, 2009 WL 662703 (C.D.Ill. Mar. 12, 2009). The court ruled that as Congress had determined all employers should be allowed to voluntarily participate in E-Verify, Illinois' attempted restrictions on its employers' use of the program was indeed violative of the Supremacy Clause. It thus ruled the Illinois law was invalid. Illinois did not appeal the decision.

Therefore, employers in Illinois are free to enroll in E-Verify if they so choose. There are advantages and disadvantages to the use of E-Verify. Practitioners should analyze these issues carefully before advising their clients as to whether enrollment in E-Verify is the right decision.

#### **XIV. [8.45] EMPLOYMENT DISCRIMINATION AND AFFIRMATIVE ACTION ISSUES**

While affirmative action and discrimination statutes impose a broad range of requirements on contractors relative to general personnel management, the impact on drafting construction agreement documents is less clear. Generally, such statutes may come into play when contracting with public bodies or when federal funds are involved. Depending on the nature of the agreement, there may need to be general affirmations of compliance with EEO laws, including the Illinois Human Rights Act.

Familiarity with discrimination and affirmative action laws is necessary for any practitioner drafting construction-related contracts.

## A. Federal Statutes Addressing Employment Discrimination

### 1. [8.46] Civil Rights Acts

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer

**to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.** 42 U.S.C. §2000e-2(a)(1).

The Pregnancy Discrimination Act, Pub.L. 95-555, 92 Stat. 2076 (1978), extended the scope of Title VII to prohibit employers from discriminating against women due to pregnancy, childbirth, or medical conditions due to pregnancy or childbirth. Title VII also makes it illegal for an employer to discriminate or retaliate against an employee for bringing charges under Title VII or testifying, assisting, or participating in enforcement procedures. 42 U.S.C. §2000e-3. Title VII also created the Equal Employment Opportunity Commission (EEOC), the federal agency charged with administering Title VII, promulgating rules and regulations, and governing its enforcement. 42 U.S.C. §2000e-4.

Employers found guilty of intentionally violating Title VII may be enjoined from engaging in unlawful practices and ordered to take appropriate affirmative action, including reinstatement or hiring employees with or without backpay. Backpay cannot accrue more than two years preceding the filing of the charge. 42 U.S.C. §2000e-5(g).

The Civil Rights Act of 1991, Pub.L. 102-166, 105 Stat. 1071, was passed in response to a series of United States Supreme Court cases limiting the rights of employees who had sued their employers for discrimination. Sections 102 and 103 of the 1991 Act amended Title VII to permit jury trials, to ease the burden of proof for cases of disparate treatment, and to allow recovery of compensatory and punitive damages. Note, however, that punitive damages cannot be recovered from a government or government agency.

### 2. [8.47] Americans with Disabilities Act

Title I of the Americans with Disabilities Act of 1990 prohibits employers in the private and public sectors from discriminating against a “qualified individual with a disability,” defined as

**an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.** 29 C.F.R. §1630.2(m).

Title I also prohibits retaliation against an individual for complaining about discrimination, filing a charge of discrimination, or participating in an employment discrimination investigation or lawsuit. Further, employers must reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability as long as doing so does not pose undue hardship to the operation of the employer's business.

Similar to Title VII, the Civil Rights Act of 1991 amended the ADA to allow recovery of compensatory and punitive damages from employers who intentionally violate Title I. However, punitive damages cannot be recovered from a government or government agency. The Americans with Disabilities Act Amendment Act of 2008 (ADAAA), Pub.L. 110-325, 122 Stat. 3553, revised provisions of the ADA to make it easier for an individual to qualify for its protections as individual with a disability.

### **3. [8.48] Age Discrimination in Employment Act of 1967**

The Age Discrimination in Employment Act of 1967 originally applied only to private employers; however, its scope was extended to public employers in 1974. Under the ADEA, individuals aged 40 and over are protected from discrimination due to age. The ADEA also prohibits employers from retaliating against employees who complain about age discrimination, file a charge of age discrimination, or participate in an age discrimination investigation or lawsuit.

### **4. [8.49] Equal Pay Act of 1963**

Similar to the Illinois Equal Pay Act of 2003, the federal Equal Pay Act of 1963 prohibits an employer from paying different wages to men and women who perform equal work in the same workplace. This requirement does not apply if the wage difference is based on (a) a seniority system, (b) a merit system, (c) a system measuring earnings by quantity or quality of production, or (d) factors other than gender. The EPA also prohibits employers from retaliating against employees who complain about wage discrimination, file a charge of wage discrimination, or participate in a wage discrimination investigation or lawsuit.

### **5. [8.50] Federal Statutes Imposing Affirmative Action Requirements**

For contracts that are federally funded, practitioners should be aware of the affirmative action provisions of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §4212. Both Acts require the inclusion of equal employment opportunity and affirmative action clauses.

## **B. [8.51] Illinois Statutes Addressing Employment Discrimination and the Illinois Human Rights Act**

Article I, §17 of the Illinois Constitution provides that “all persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer.” Redress for any violations of §17, however, is available through the Illinois Human Rights Act, 775 ILCS 5/1-101, *et seq.* 44 Ill.Admin. Code pt. 750.

The IHRA prohibits unlawful employment discrimination and mandates affirmative action to “assure equality of employment opportunity and eliminate the effects of past discrimination.” 775 ILCS 5/2-105(A)(1). In doing so, employers must comply with procedures and requirements of the Illinois Department of Human Rights (IDHR), including making information available for investigations. Illinois employers must have written sexual harassment policies that include information regarding

1. the illegality of sexual harassment;
2. the definition of sexual harassment;
3. a description of sexual harassment that uses examples;
4. the employer's internal complaint process and penalties;
5. the legal recourse and investigation and complaint process available through the IDHR and the Illinois Human Rights Commission (IHRC);
6. the directions on how to contact the IDHR and IHRC; and
7. protection from retaliation. 775 ILCS 5/2-105(A)(4).

The Illinois Administration Code requires that all contracts with Illinois public bodies include an extensive statement concerning nondiscrimination. 44 Ill.Admin Code §750.10. The clause is set forth in Appendix A to 44 Ill.Admin Code pt. 750. The following example is compliant with the §750.10 requirement.

#### **Human Rights Act**

**To the extent required by law, Contractor shall comply with the terms and procedures of the Illinois Human Rights Act, 775 ILCS 10/0.01 *et seq.* To the extent required by law, Contractor agrees as follows:**

**1. That it will not discriminate against any employee or applicant for employment because of race, color, religion, sex, marital status, national origin or ancestry, age, physical or mental handicap unrelated to ability, or an unfavorable discharge from military service, and further that it will examine all job classifications to determine if minority persons or women are underutilized and will take appropriate affirmative action to rectify any such underutilization.**

**2. That if it hires employees in order to perform this Contract or any portion thereof, it will determine the availability (in accordance with the Department's Rules and Regulations) of minorities and women in the area(s) from which it may reasonably recruit and it will hire for each job classification for which employees are hired in such a way that minorities and women are not underutilized.**

**3. That in all solicitations or advertisements for employees placed by it or on its behalf, it will state that all applicants will be afforded equal opportunity without discrimination because of race, color, religion, sex, marital status, national origin or ancestry, age, physical or mental handicap unrelated to ability, or an unfavorable discharge from military service.**

**4. That it will send to each labor organization or representative of workers with which it has or is bound by a collective-bargaining or other agreement or understanding a notice**

**advising such labor organization or representative of the Contractor's obligations under the Illinois Human Rights Act and the Department's Rules and Regulations. If any such labor organization or representative fails or refuses to cooperate with the Contractor in its efforts to comply with such Act and Rules and Regulations, the Contractor will promptly so notify the Department and the Contracting Agency and will recruit employees from other sources when necessary to fulfill its obligations thereunder.**

**5. That it will submit reports as required by the Department's Rules and Regulations, furnish all relevant information as may from time to time be requested by the Department or the Contracting Agency, and in all respects comply with the Illinois Human Rights Act and the Department's Rules and Regulations.**

**6. That it will permit access to all relevant books, records, accounts, and work sites by personnel of the Contracting Agency and the Department for purposes of investigation to ascertain compliance with the Illinois Human Rights Act and the Department's Rules and Regulations.**

**7. That it will include verbatim or by reference the provisions of this clause in every Subcontract it awards under which any portion of the Contract obligations are undertaken or assumed, so that such provisions will be binding on such Subcontract. In the same manner as with other provisions of this Contract, the Contractor will be liable for compliance with applicable provisions of this clause by such Subcontractors; and further it will promptly notify the Contracting Agency and the Department in the event any Subcontractor fails or refuses to comply therewith. In addition, the Contractor will not utilize any Subcontractor declared by the Illinois Human Rights Commission to be ineligible for Contracts or Subcontracts with the State of Illinois or any of its political subdivisions or municipal corporations.**

An example of a contract clause addressing sexual harassment is as follows:

#### **Sexual Harassment**

**The Contractor by submitting its bid certifies that it has a written sexual harassment policy which includes (i) the illegality of sexual harassment; (ii) a definition of sexual harassment (iii) a description of sexual harassment, utilizing examples; (iv) an internal complaint process including penalties; (v) the legal recourse, investigative, and complaint process through the Illinois Department of Human Rights; (vi) directions on how to contact the Department and Commission; and (vii) protection against retaliation for exercising rights under the policy in accordance with 775 ILCS 5/2-15.1.1 The School District, and other parties to this Contract, are subject to the rules and regulations of the Illinois Department of Human Rights and the statutory requirements thereof.**

All state agencies must comply with IDHR procedures and requirements and must establish, maintain, and carry out an affirmative action plan. 775 ILCS 5/2-105(B). Affirmative action plans must include race and national origin categories mandated by the IHRA, including "African American, Hispanic or Latino, Native American, Asian and any other category as required." Affirmative action plans must include a current and detailed status report that

1. indicates, by position, the number, percentage, and average salary of individuals employed by race, national origin, sex, and disability;
2. identifies all positions in which the percentage of people employed by race, national origin, sex, and disability is less than four fifths of the percentage of each of those categories in the state workforce;
3. specifies the goals and methods for increasing the percentage of employees by race, national origin, sex, and disability;
4. indicates progress and problems toward meeting equal employment opportunity goals; and
5. establishes a numerical hiring goal for the employment of qualified persons with disabilities in the agency as a whole. 775 ILCS 5/2-105 (B)(3).

Further, agencies with 1,000 or more employees must “appoint a full-time Equal Employment Opportunity officer.” 775 ILCS 5/2-105(B)(4).

The Public Works Employment Discrimination Act, 775 ILCS 0.01, *et seq.*, makes the IHRA applicable to all state contracts for “any work or service of any kind, by, for, on behalf of, or for the benefit of this State, or of any department, bureau, commission, board, or other political subdivision or agency thereof.” 775 ILCS 10/1(a).

## **XV. [8.52] MINORITY BUSINESS ENTERPRISE, WOMEN’S BUSINESS ENTERPRISE, AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS**

The power of a public entity to contract for the construction of public works carries with it the power to affect social and economic change. This is reflected in the fact that governmental bodies at all levels have enacted programs designed to increase the participation in public construction projects by minority-owned and women-owned businesses, as well as businesses owned by other identified disadvantaged groups. These groups are commonly referred to as minority business enterprises (MBEs), women’s business enterprises (WBEs) and disadvantaged business enterprises (DBEs). These efforts are an outgrowth of the affirmative action programs evolving from federal efforts in the 1940s to impose nondiscrimination provisions in federal contracts. This federal effort culminated in Executive Order No. 11,246 (Sept. 24, 1965), 30 Fed.Reg. 12,319 (Sept. 28, 1965), by President Lyndon Johnson. This executive order expanded the nondiscrimination edicts in federal procurement laws to all federally assisted construction contracts and mandated that contractors and subcontractors take affirmative action in the employment of construction workers.

These affirmative action efforts were expanded in 1978 when Congress enlarged the Small Business Administration set-aside program to encompass both socially and economically disadvantaged persons. 15 U.S.C. §631, *et seq.* The use of public procurement to foster these

social goals was dramatically spearheaded in the construction field in 1980 when the Carter administration issued a comprehensive and complex MBE/WBE/DBE program for all recipients of federal transportation funds administered by the U.S. Department of Transportation. This USDOT program required (a) overall annual program goals, (b) specific goals for individual construction projects, and (c) contract awards to the lowest responsible bidder meeting the specified goals and also permitted some construction contracts to be set aside for the MBEs/WBEs/DBEs. In later years this USDOT program included provisions allowing public entities to award contracts to the lowest responsible bidder, even if the bidder does not meet the specified MBE/WBE/DBE project goal, provided the bidder can demonstrate that it made good-faith efforts to secure minority or women subcontractor participation. See 49 C.F.R. pts. 23, 26.

It is also the public policy of the State of Illinois to promote and encourage the economic development of businesses owned and operated by minorities and women and their participation in the state's procurement process as both prime contractors and subcontractors. To that end, practitioners should be aware that the state has enacted the Business Enterprise for Minorities, Females and Persons with Disabilities Act (MFPDA), 30 ILCS 575/0.01, *et seq.*, to implement this policy by prescribing goals for the awarding of state contracts to such disadvantaged entities.

When MBE/WBE/DBE requirements are imposed by federal law, the MFPDA provides that federal law will control. 30 ILCS 575/7(4). The MFPDA provides:

**Notwithstanding any provision to the contrary in this Act, any State agency or State university which administers a construction program, for which federal law or regulations establish standards and procedures for the utilization of minority, disadvantaged, and female-owned business, shall implement a disadvantaged business enterprise program . . . using the federal standards and procedures for the establishment of goals and utilization procedures for the State-funded, as well as the federally assisted, portions of the program. 30 ILCS 575/6(d).**

Thus, under §6(d), even state-funded construction contracts use federal standards and procedures to implement the goals and utilization procedures for the applicable state construction programs.

Note should also be taken of the Civil Administrative Code of Illinois, which provides:

**To the extent permitted by any applicable federal law or regulation, all State construction projects funded from amounts . . . made available under . . . the American Recovery and Reinvestment Act of 2009 and . . . appropriated to the Illinois Department of Transportation, shall comply with the Illinois Business Enterprise for Minorities, Females, and Persons with Disabilities Act. 20 ILCS 2705/2705-585(a).**

Thus state transportation construction projects assisted by the 2009 federal stimulus package, will, by reason of the Illinois Act, be subject to the federal standards and procedures for DBE participation. These federal standards and procedures can be found in the regulations of the U.S. Department of Transportation at 49 C.F.R. pt. 26 and apply to highway, transit, and airport projects.

When the state solicits bids for a state construction project to which these goals apply, the state will include within the documents constituting the invitation to bid the requirements that a contractor must meet to obtain the affirmative action goal or to demonstrate good-faith efforts to earn an exemption from this contract condition. In addition to goals that are satisfied by a contractor subcontracting a portion of its contract work to a minority/women/disabled entity, at times the state sets aside a fair proportion of its construction contracts for award to such entities as are deemed to be small businesses as defined by state law. 30 ILCS 500/45-45.

The City of Chicago has established affirmative action goals to assist DBEs to participate in construction contracts that have an estimated contract value of \$100,000 or more and that are directly supervised by the City of Chicago. Chicago Municipal Code §2-92-390. The Chicago ordinances define a “construction contract” to mean

**a contract, purchase order or agreement (other than a lease of real property) for the construction, repair or improvement of any building, bridge, roadway, sidewalk, alley, railroad or other structure or infrastructure, awarded by any officer or agency of the city other than the city council, and whose cost is to be paid from funds belonging to the city.** Chicago Municipal Code §2-92-670(e).

Another municipal affirmative action program for businesses owned by minorities and women is that of the City of Springfield. This is set forth in Chapter 38 of Title III of the City of Springfield ordinances at §38.62 and is applicable to all City of Springfield construction contracts funded exclusively by the city and not subject to state or federal reimbursement. The City of Springfield has set forth, as a policy, the awarding of 12 percent of the total amount of city contracts to businesses owned by minorities and women. The Springfield ordinance spells out guidelines to be followed by contractors regarding their good-faith efforts to meet the goals of the policy.

The requirements for these programs are complex and require detailed construction clauses in order to ensure their implementation. An example that the practitioner can review and from which the practitioner can draw can be found among those used by the Illinois Department of Transportation in their contracts, entitled *Special Provision: Disadvantaged Business Enterprise Participation* (eff. Sept. 1, 2000, rev. Jan. 1, 2010), available at [www.dot.state.il.us/desenv/specialprovisionfordbe.pdf](http://www.dot.state.il.us/desenv/specialprovisionfordbe.pdf). Federal provision for federally assisted contracts can be found in the regulations of the federal funding agency.

## **XVI. MISCELLANEOUS CONSIDERATIONS**

### **A. [8.53] Employment of Illinois Workers on Public Works Act and Similar Local Resident Worker Preference Ordinances and Rules**

A significant consideration in drafting a construction contract is the source of the labor that will be employed to perform the construction work. This consideration takes on heightened significance in difficult economic times when there is a pressing need to put unemployed local residents back to work. In the case of public construction projects, this concern is reflected in the

use of contract provisions that mandate a preference for hiring local resident workers. Drafters of public construction contracts need to be familiar, therefore, with state and local laws, ordinances, and rules that require hiring local resident workers in preference to workers from other geographic areas. The readers should note that the Public Works Preference Act, 30 ILCS 560/0.01, *et seq.* (giving preference for employment in the construction of public works projects and improvements to United States citizens who had resided in Illinois for one year), was held unconstitutional in 1984 by *People ex rel. Bernardi v. Leary Construction Co.*, 102 Ill.2d 295, 464 N.E.2d 1019, 80 Ill.Dec. 36 (1984). The Illinois Supreme Court held that the Public Works Preference Act violated the Privileges and Immunities Clause of the United States Constitution as there was no showing that nonresident laborers were a cause of unemployment in Illinois. *See also W.C.M. Window Co. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984) (also holding Illinois preference law unconstitutional).

The Employment of Illinois Workers on Public Works Act, 30 ILCS 570/0.01, *et seq.*, was enacted in 1990 to ensure the hiring of Illinois residents on public works projects in times of excess unemployment. This Act is applicable to all public works or improvement projects in Illinois for the State of Illinois or for any political subdivision, municipal corporation, or other governmental unit, including projects for the cleanup and on-site disposal of hazardous waste. 30 ILCS 570/3. The Illinois Procurement Code makes this Act expressly applicable to state construction contracts. 30 ILCS 500/30-45(5). The Act provides, for public projects or improvements where federal aid funds are involved, that the Act “shall not be enforced in such manner as to conflict with any federal statutes or rules and regulations.” 30 ILCS 570/5(a).

As part of this law, the Illinois General Assembly made specific findings that unemployment in Illinois has traditionally tended to be higher in those counties that border other states and that overutilization of out-of-state laborers on public works projects or improvements for the state is a contributing factor to higher levels of unemployment in both the border counties and throughout Illinois. This Act requires that when there is a period of excessive unemployment in Illinois (defined by the Act to mean any month immediately following two consecutive calendar months during which the state’s unemployment level exceeds five percent as measured by the U.S. Bureau of Labor Statistics), contractors must employ only persons who have resided in Illinois for at least 30 days and who intend to remain an Illinois resident, provided such laborers are available and capable of performing the particular type of work involved. A contractor must certify when such laborers are unavailable, and the contracting officer must approve the certification to excuse compliance with the law. A contractor may, however, place no more than three regularly employed nonresident executive and technical experts.

Section 3 of the Act expressly provides that “every contract let by any such person shall contain a provision requiring that such [Illinois] labor be used.” 30 ILCS 570/3. As an example of the implementation of this law at the state level, the Illinois Capital Development Board Standard Documents for Construction (Jan. 2009), available at [www.cdb.state.il.us/forms/download/sdc2009.pdf](http://www.cdb.state.il.us/forms/download/sdc2009.pdf), 42.2F incorporates this Act in §00 73 42.2F of its standard construction contract provisions. Section §00 73 42.2F expressly requires that contractors on Capital Development Board (CDB) projects must conform specifically to the Employment of Illinois Workers on Public Works Act.

The Illinois Department of Labor published an emergency rule and a proposed rule governing the use of Illinois resident labor. 43 Ill.Reg. 15,988 (Nov. 20, 2009). The emergency rule became immediately effective for a 150-day period. At the same time, the Illinois Department of Labor proposed the actual rule IDOL planned to implement that is identical to the text of the emergency rule. The rule implements P.A. 96-37, art. 80, the FY2010 Budget Implementation (Capital) Act, and is codified at 56 Ill.Admin. Code pt. 330. The rule was authorized by the following:

1. §605-390 of the Department of Commerce and Economic Opportunity Law, 20 ILCS 605/605-390;
2. §805-350 of the Department of Natural Resources (Conservation) Law, 20 ILCS 805/805-350;
3. §1905-12 of the Department of Natural Resources (Mines and Minerals) Law, 20 ILCS 1905/1905-12;
4. §2705-260 of the Department of Transportation Law, 20 ILCS 2705/2705-260;
5. §10.17 of the Capital Development Board Act, 20 ILCS 3105/10.17; and
6. §4 of the Environmental Protection Act, 415 ILCS 5/4.

Each of these laws provides:

**To the extent permitted by any applicable federal law or regulation, for all work performed for State construction projects which are funded in whole or in part by a capital infrastructure bill enacted by the 96th General Assembly by sums appropriated to the [named state department], at least 50% of the total labor hours must be performed by actual residents of the State of Illinois.**

Each of these laws defines “actual residents of the State of Illinois” to mean persons domiciled in the State of Illinois.

The constitutionality of the Employment of Illinois Workers on Public Works Act has not been addressed by any court decision. For a discussion of the constitutional issues, see, *e.g.*, Werner Z. Hirsch, *State Residency Laws: Their Constitutionality Under the Privileges and Immunity Clause*, UCLA Department of Economics Working Paper No. 591 (May 1990), available at [www.econ.ucla.edu/workingpapers/wp591.pdf](http://www.econ.ucla.edu/workingpapers/wp591.pdf). See also *W.C.M. Window Co., supra* (discussing Commerce Clause and Privileges and Immunities Clause issues as applied to preference laws); *E&E Construction Co. v. State of Illinois*, 674 F.Supp. 269 (N.D.Ill. 1987) (ruling at motion stage regarding constitutional challenges to Illinois Preference Act).

Public entities and contractors seeking public contracts may also want to refer to *J.F. Shea Co. v. City of Chicago*, 992 F.2d 745 (7th Cir. 1993). This case involved an out-of-state construction contractor that sued the City of Chicago to challenge the city’s award of a contract to

a local contractor under its local business preference rule. The Seventh Circuit noted that under *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 93 L.Ed. 865, 69 S.Ct. 657 (1949), the Commerce Clause of the United States Constitution prohibits state and local governments from protecting local economic interests unless the state or local government is participating in the market and exercising the right to favor its own citizens over others. The Seventh Circuit further noted that in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 75 L.Ed.2d 1, 103 S.Ct. 1042 (1983), the U.S. Supreme Court held when a state or local government acts as a market participant and uses only its own funds to hire a contractor, the state or local government can impose a local business preference requirement. In *White*, the City of Boston was found to be a market participant because it used its own funds in making contracts for public projects and thus could validly impose a requirement that the contractor's workforce be at least 50-percent Boston residents.

Practitioners involved with construction contracts subject to local government ordinances need also to be aware of local hiring preference requirements. An example of such a local hiring preference requirement can be found in Chicago Municipal Code §2-92-330(a), which provides:

**For any construction project advertised, or if not advertised, awarded, after the effective date of this ordinance having an estimated contract value of \$100,000.00 or more, and where not otherwise prohibited by federal, state or local law, the total hours worked by persons on the site of the construction project by employees of the contractor and subcontractors shall be performed at least 50 percent by actual residents of the City of Chicago.**

Chicago Municipal Code §2-92-330(b) provides that all contracts and subcontracts include the following language:

**The contractor and all subcontractors that perform work on the site on the construction project undertaken pursuant to this contract shall comply with the minimum percentage of total worker hours performed by actual residents of the City of Chicago as specified in Section 2-92-330 of the municipal code of Chicago.**

The Chicago ordinance goes on to set forth specific record-keeping requirements by which contractors and subcontractors document compliance with the ordinance.

It is unclear whether the federal courts construe the Commerce Clause to strike down a state law mandating that local governments give preference to local residents for public contracts. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 25 L.Ed.2d 174, 90 S.Ct. 844, 847 (1970) (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose be found, then the question becomes one of degree.” [Citation omitted.]

## **B. [8.54] Veterans Preference Act**

Section 1 of the Veterans Preference Act, 330 ILCS 55/0.01, *et seq.*, requires that in hiring to fill positions in the “construction, addition to, or alteration of all public works undertaken or

contracted for by the State, or by any political subdivision thereof,” preference is to be given to military veterans who have served under one or more of the conditions set forth that Act. The Act requires that “[e]very contract for such work shall contain a term providing for the preference” given by the Act. 30 ILCS 55/2. As an example, the Illinois Capital Development Board Standard Documents for Construction (Jan. 2009) incorporate this Act in §00 73 42.2B of its standard construction contract provisions, expressly requiring contractors on Capitol Development Board projects to conform specifically to the Veterans Preference Act. See [www.cdb.state.il.us/forms/download/sdc2009.pdf](http://www.cdb.state.il.us/forms/download/sdc2009.pdf).

### C. [8.55] Manpower Utilization Clauses

Public construction contracts may contain provisions requiring a contractor to maintain and submit forms setting forth a projection and breakdown of their intended workforce, including a projection of minority and women employees, utilized in all job classifications on the construction project. Often, these forms are required to be submitted at the time bid. After award, the forms may be required to be submitted periodically for the duration of the project. An example of such a form is Illinois Department of Transportation, Bureau of Construction Form BC 1256, available at [www.dot.state.il.us/constructionmanual/formsandreports.html](http://www.dot.state.il.us/constructionmanual/formsandreports.html). Another such form is the IDOT, Bureau of Small Business Enterprises Form SBE 956, also available at [www.dot.state.il.us/constructionmanual/formsandreports.html](http://www.dot.state.il.us/constructionmanual/formsandreports.html). This form, the EEO Workforce Analysis, requires reporting (by the listed job categories) the number of employees, apprentices, and on-the-job trainees, by gender, as “Black, Asian/ Pacific Islander, American Indian/Alaskan Native, or Hispanic,” and the hours worked by each category. The Illinois Capital Development Board Standard Documents for Construction (Jan. 2009) at §00 43 38.3 require contractors to submit monthly workforce utilization reports on CDB prescribed forms. These CDB documents are available at [www.cdb.state.il.us/forms/download/sdc2009.pdf](http://www.cdb.state.il.us/forms/download/sdc2009.pdf).

The customary purpose of such forms is to allow the public owner to monitor the utilization of minorities and women in the various job classifications in order to monitor a contractor’s compliance with both equal employment opportunity clauses in the construction contract and the Illinois Human Rights Rules and Regulations for Public Contracts. 44 Ill. Admin Code pt. 750, particularly §750.110, requires contractors and subcontractors on public projects to monitor and rectify the underutilization of minority and women employees. The forms also allow the public owner to monitor compliance by the contractor with (1) federally required equal employment opportunity, and (2) minorities’ and women’s utilization requirements imposed on federally assisted construction projects. The forms also assist the public agency in reviewing the contractor’s utilization of apprentices and on-the-job trainees.

### D. [8.56] Jurisdictional Disputes

The term “jurisdictional dispute” in the context of labor relations is the term given to describe “a dispute between two or more groups of employees over which is entitled to do certain work for an employer.” *National Labor Relations Board v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers*, 364 U.S. 573, 5 L.Ed.2d 302, 81 S.Ct. 330, 334 (1961). At a construction site, employees working for one or more contractors may be covered by more than one collective-bargaining agreement. Under the

collective-bargaining agreements, the union representing the employees claims and defines the scope of work that falls under the jurisdiction of the union. At times, a particular item of work claimed by one union to be within its jurisdiction also falls within the scope of work that another union claims as its jurisdiction. Such a situation results in what is termed a “jurisdictional dispute.” The dispute is between the two unions claiming the work and is not a dispute between a union and a contractor. The dispute may be between unions representing various groups of employees working for a single contractor, or it may be between unions representing employees of different contractors. The dispute may also arise when work performed by nonunion employees is claimed by a union to be within its jurisdiction.

The National Labor Relations Act makes it an unfair labor practice for a union to strike, to picket, or to threaten, coerce, or restrain any person when the object of such union action is to force or require an employer to assign particular work to the employee members of such union rather than to the employee members of another union. 29 U.S.C. §158(b)(4)(D). It does not matter that performance of the work in question has not yet begun. *See International Longshoremen’s & Warehousemen’s Union, Local 8*, 233 N.L.R.B. 459, 461, n.6, 96 L.R.R.M. (BNA) 1561 (1977). The concern for project owners and contractors is that there be no disruption or stoppage of the construction work by reason of a jurisdictional dispute between the unions.

Parties to a collective-bargaining agreement most often include a provision to address the procedural mechanism for resolving such jurisdictional disputes and to bar work stoppages in the event of such disputes. The AFL-CIO Building and Construction Trades Department, AFL-CIO, has established a plan for settlement of jurisdictional disputes in the construction industry (AFL-CIO Plan) that is binding on all local, national, and international unions affiliated with the AFL-CIO. The National Labor Relations Board has held that a collective-bargaining agreement that specifically references the Plan is sufficient to create a voluntary adjustment mechanism — the dispute resolution mechanisms set out in the Plan. *Operating Engineers Local No. 3 (Hawaiian Dredging)*, 297 N.L.R.B. 953, 955 (1990). The United Brotherhood of Carpenters and Joiners of America have not signed the Plan, and that union is not a member of the AFL-CIO Building and Trades Committee. Until 2009, the Carpenters, Laborers and Operators bound themselves through a collective-bargaining agreement entitled the National Construction Agreement (NCA) and its corresponding plan for settlement of jurisdictional disputes in the construction industry (NCA Plan). In 2009, the Laborers dropped out and returned to the AFL-CIO Plan. A new NCA plan for settlement of jurisdictional disputes (NCAII Plan) covers only the United Brotherhood of Carpenters and the International Union of Operating Engineers. The NCAII Plan does not apply to unions that are not parties to the NCAII Plan. When non-NCA unions are involved, the AFL-CIO Plan and the NLRB are the forums of recourse.

In Chicago and the Cook County area, there is a jurisdictional dispute resolution mechanism created by the Standard Agreement between the Chicago and Cook County Building and Trades Council and several local employer associations. Like the AFL-CIO Plan, the Standard Agreement is included in many of that area’s construction contracts. Such voluntarily assumed adjustment mechanisms govern the resolution of a dispute, and the NLRB refrains from acting to resolve such jurisdictional disputes until the parties have followed their agreed-to adjustment mechanism. *National Labor Relations Board v. Plasterers’ Local Union No. 79, Operative Plasterers’ & Cement Masons’ International Ass’n*, 404 U.S. 116, 30 L.Ed.2d 312, 92 S.Ct. 360, 372 (1971).

Of course, if there is an anticipated jurisdictional dispute, the matter can be discussed among the affected parties. A union may concede the work to another union by filing a disclaimer with the NLRB clearly and unequivocally renouncing its claim to the disputed work before the work is completed. See *Graphic Communications International Union, Local 79L*, 301 N.L.R.B. 195, 136 L.R.R.M. (BNA) 1107 (1991); *Pepper Construction Co. v. International Union of Operating Engineers, Local 150*, 749 F.2d 1242 (7th Cir. 1984).

The employer who is to assign the work must also be bound to the outcome of the voluntarily assumed adjustment mechanism. This means that even if the unions and general contractor involved in the dispute are parties to the adjustment mechanism, the NLRB would not enforce the result of the process if the subcontractor whose employees are performing the disputed work was not bound to the adjustment mechanism. *International Association of Bridge, Structural & Ornamental Iron Workers, Local No. 21*, 233 N.L.R.B. 1139, 1140 – 1141, 97 L.R.R.M. (BNA) 1042 (1977).

For the practitioner this means that it is important to ensure that subcontract agreements incorporate (either by reference, or by having imported by means of a flow-down clause) the voluntary adjustment mechanism to which the general contractor and the unions with which the general contractor is a signatory agreed, in order to bind the subcontractor to the same dispute resolution mechanism.

A sample clause to be inserted in a subcontract might read as follows:

**Jurisdictional Disputes and Labor Problems. Subcontractor shall supply only labor and/or materials, which will not cause labor disputes in the overall performance of Contractor's work. Subcontractor warrants that, with respect to any work covered by this Agreement, and to the extent permissible under applicable law, it and its subcontractors, visitors, and suppliers will at all times comply fully with the provisions of any collective-bargaining agreement, inclusive of the site Project Agreement, which apply to the Work performed under this Subcontract. Work assignments and the settlement of jurisdictional disputes shall conform with either the Rules, Regulations and Procedures of the Plan for Settlement of Jurisdictional Disputes in the Construction Industry, and any successor agreement thereto, or any other mutually established method of determining work assignments and settling jurisdictional disputes. In the event Subcontractor's workers are involved in a jurisdictional dispute with other crafts on the project, or such workers refuse to staff the project due to any other type of labor disputes or a picket line for any reason, Subcontractor shall immediately notify Contractor about the actual or potential dispute and of any relevant information with respect thereto, and Subcontractor, at Subcontractor's own cost, agrees to take immediate steps to resolve such disputes, and if same are not immediately resolved, Contractor may, at his option, invoke the \_\_\_ provisions of \_\_\_ of this Subcontract Agreement. Prior to the commencement of its work, Subcontractor shall notify Contractor of the collective-bargaining agreements to which it is signatory and shall provide a copy of all such agreements within [24] hours of a request by Contractor. Subcontractor shall provide Contractor with at least [30] days' notice of the anticipated expiration of each collective-bargaining agreement. If Subcontractor enters into**

**subsequent or new collective-bargaining agreements with any union during the course of this project, it will notify Contractor. The foregoing clause shall be inserted by Subcontractor in any contract it makes for the furnishing of labor or material from any lower-tier subcontractor or material supplier.**

A similarly worded clause can be used by a project owner in its contract with a prime contractor.

#### **E. [8.57] Double-Breasting Concerns**

Practitioners representing owners, contractors, and subcontractors need to be aware of the issue of “double-breasting” or “dual shops.” Sometimes a contractor works both a union shop on some projects and a nonunion or open shop on other projects. A contractor may accomplish this (1) directly by having two parallel operations, or (2) by maintaining a nonunion or open shop and subcontracting work to a union subcontractor. If the contractor “controls” both entities, then the circumstance is called “double-breasting” or operating a “dual shop.” There can be negative consequences when a contract is entered into with a nonunion or open-shop contractor, and then it is determined that the nonunion contractor is the alter ego of its union shop operation or is simply a single employer with a union shop operation. All of the economic and other obligations of the collective-bargaining agreement covering the contractor’s union shop may be imposed on the construction project work of the nonunion shop. If a union seeks to enforce the labor agreement against the contractor’s nonunion shop, this may, in turn, result in labor disputes that disrupt or delay project work at the jobsite. This also may result in the nonunion contractor being faced with an added financial burden that it is unable to meet, either in performing the contract work or otherwise. The result may also bring about delay or disruption to the construction work.

The National Labor Relations Board and the courts have historically permitted double-breasting when two entities with common ownership have different management, different equipment, different customers, and a legitimate business purpose. *Fallon-Williams, Inc.*, 336 N.L.R.B. 602, 606, 171 L.R.R.M. (BNA) 1502 (2001), citing *Crawford Door Sales*, 226 N.L.R.B. 1144, 94 L.R.R.M. (BNA) 1393 (1976); *Carpenters’ Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1275 (9th Cir.1984) (“The non-union company can bid competitively on jobs that do not require union contractors, while the union company continues to bid on jobs requiring union contractors.”). See *United Food & Commercial Workers International Union v. Cudahy Co.*, No. 84 C 1377, 1986 WL 4304 (N.D.Ill. Mar 27, 1986) (discussing *Carpenters’ Local Union No. 1478, supra*).

The National Labor Relations Act requires, however, that if there is a collective-bargaining agreement in place, it must be extended to all employees in the “unit” covered by the agreement. 29 U.S.C. §159. Concerned that some contractors would use double-breasted operations to avoid their collective-bargaining obligations, the NLRB has construed §8(a)(5) of the Act to prohibit an employer from transferring some unit work to an ostensibly separate company that is the same employer as the union company. To enforce this requirement, the courts and the NLRB have developed two related, but actually distinct, theories — “single-employer” and “alter-ego” — to guard against such abuse.

Under both theories, it must first be determined whether the two firms are a single employer by evaluating the degree of common ownership, management, operations, and labor relations. Under the single-employer theory, it next must be determined whether the employees of both the union and nonunion firms constitute an appropriate bargaining unit. Under the alter-ego theory, if the circumstances evidence the open shop was created purposefully to avoid and evade responsibilities under the NLRA rather than for the pursuit of legitimate business objectives, untainted by union animus, alter-ego status will be found. One company is said to be the alter ego of another if both companies exhibit substantially identical or common management, business purpose, operations, equipment, customers, supervision, and ownership. In addition, and perhaps the most significant factor is whether the circumstances demonstrate the company purposely tried to evade its responsibilities under the NLRA. No single factor is determinative, and not all of the indicia need to be present for the NLRB to make a finding of alter-ego status. If each of two companies is found to be the alter ego of the other, there is no requirement that a single appropriate bargaining unit exist in order to apply the labor agreement to both entities. The open-shop entity is automatically bound to the union contract. There are numerous NLRB and court decisions explaining these theories and how the factors are to be evaluated in determining the status of the businesses involved.

Why is double-breasting a concern in contracting? If an open-shop company is targeted as actually being a union shop company, the two companies may face unfair labor practice charges and grievances, trust fund collection actions, picketing, and legally mandated application of the union contract to both companies. If this occurs prior to or during a construction project, significant interruptions or delays at the project site are likely as is a significant increase in the cost of performance of the contract. This is a concern for both the targeted contractor and the owner whose project is affected. In the case of a double-breasted subcontractor, the general contractor also is affected by a determination of alter-ego status.

In order to protect against double-breasting, unions may insist that contractors or contractor associations include an anti-dual-shop or work-preservation clause in their collective-bargaining agreements to prevent double-breasting, as long as the purpose of the clause is to preserve union jobs when the contractor has control over the work. *Painters & Allied Trades District Council No. 151 of International Brotherhood of Painters & Allied Trades*, 321 N.L.R.B. 158, 152 L.R.R.M. (BNA) 1065 (1996). Thus, consideration of the language in a collective-bargaining agreement that ostensibly governs one side of the contractor's operations may have a significant impact on the nonunion side of the contractor's business.