

Union Organizing at Retail and Food Service Businesses Gets Boost from New York City “Labor Peace” Executive Order

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Summary of the Executive Order

New York City retail and food service unions got a boost recently when Mayor Bill de Blasio signed an Executive Order titled “[Labor Peace for Retail Establishments at City Development Projects](#).” Subject to some thresholds for the size and type of project and the amount of “Financial Assistance” received for a “City Development Project,” Executive Order No. 19 mandates that developers agree to a “labor peace clause.” In turn, the labor peace clause will compel the developer to require certain large retail and food service tenants to enter into a “Labor Peace Agreement” prohibiting their opposition to a “Labor Organization” that seeks to represent their employees.

A. *Applicability to Certain Financial Assistance Recipients and Certain Tenants*

The Executive Order applies to developers of a City Development Project having a “Project Agreement” with a “City Economic Development Entity” to receive at least \$1 million in “Financial Assistance”—defined broadly to include an array of direct and indirect cash and non-cash payments, grants, abatements, exemptions, waivers, reductions, or write-downs received from the City or a City Economic Development Entity. A City Development Project subject to the labor peace clause obligation must be larger than 100,000 square feet or more than 100 residential units and have a purpose of improvement or development of real property, economic development, job retention or growth, or some similar purpose. City Development Projects authorized, or Financial Assistance awarded, prior to the Executive Order’s July 14, 2016, effective date are exempt.

A tenant operating a retail or food service establishment on the premises of a City Development Project and expected to employ 10 or more employees and occupy in excess of 15,000 square feet is considered a “Covered Employer” required to enter into a Labor Peace Agreement.

B. *Labor Peace Agreement Components*

The “Labor Peace Agreement” required by the Executive Order is defined as an enforceable agreement that complies with the National Labor Relations Act (“NLRA”) and has, “at a minimum,” two components. Primarily, each Covered Employer must agree to maintain a

“neutral posture” with respect to efforts by a Labor Organization to “represent” its regular full-time and regular part-time “Covered Employees” whose principal place of work is, or will be, at such an establishment; only “supervisors” and “professional employees,” as those terms are defined in the NLRA, are excluded. In exchange for the Covered Employer’s neutrality, the Labor Organization must commit for itself and its members to refrain from picketing, work stoppages, boycotts, or other economic interference.

C. *Executive Order Compliance*

To accomplish compliance, the Executive Order specifies that terms to carry out its requirements must be incorporated in all contracts and agreements related to City Development Projects, a directive that City agencies and Economic Development Entities will heed in drafting their Project Agreements with Financial Assistance recipients. Among the express inclusions is a provision granting a contracting Housing Agency or City Economic Development Entity the discretion to impose remedies for breach of a Financial Assistance recipient’s obligation to require a Covered Employer to enter into Labor Peace Agreement. A Project Agreement’s labor peace clause must remain in effect for longer of the term of the City’s Financial Assistance or 10 years from the later of the date of commencement of the project or the date the project commences operations.

The Executive Order further provides that the mayor will designate one or more officials who will be responsible for monitoring compliance with the requirements of the Executive Order and recommending “appropriate remedies” for any breach. An improbable exemption is available if a deputy mayor with jurisdiction over a City Development Project makes a specific finding that a particular project contributing to the economic well-being of the City cannot reasonably be achieved consistent with the labor peace requirements.

How a Labor Peace Agreement Tilts the Scale for Unions

In principle, employees making the decision on whether to have union representation would be benefited by receiving balanced information, before voting in union representation elections, about the pros and cons of a particular union, its leadership, governance, and bargaining experiences and performance on behalf of its membership, as well as the collective bargaining process. With the marked decline of private sector unionization, from a national high of 24.2 percent to today’s current 6.7 percent, unions have lobbied and engaged in self-help to obtain legally enforceable restraints on employer opposition, even by means of communication of truthful information. A Labor Peace Agreement is one such device, now codified in the New York City Executive Order.

Executive Order Terms Create Ambiguity

Cornerstone terms of the contemplated Labor Peace Agreement—central to expectations of unions and employers alike, as well as enforceability—are left ambiguous by the Executive Order. The trigger for a Covered Employer’s “neutral posture” is “efforts by the Labor Organization to represent Covered Employees.”

A. *What Is a “Labor Organization” and How Will Competing Claims Be Reconciled?*

Adopting the NLRA definition of the term “Labor Organization,” the Executive Order may open a door to unanticipated instability. The labor peace clause treats all Labor Organizations

equally, and it does not favor unions having established collective bargaining relationships with mainstream employers and industry groups. The NLRA defines a “labor organization” as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” Because any existing or newly formed entity could self-declare its intent to operate as a Labor Organization, the Executive Order does not favor the conventional structure of prevailing union jurisdiction, and even newborn, fringe, or renegade organizations will have equal standing to invoke Executive Order rights to a Labor Peace Agreement. Indeed, to the chagrin of established unions considered beneficiaries of the Executive Order, the race to obtain unopposed representation rights may be won by the most nimble Labor Organization quickest in contacting employees and convincing them to sign authorization cards. Also, the prospect of multiple claims by competing Labor Organizations, each demanding a Labor Peace Agreement and its full array of benefits, is not mentioned in the Executive Order (and may not have been contemplated by its drafters), but it is a potential real-world issue for landlords that are Financial Assistance recipients and their retail and food service tenants that are Covered Employers.

Of course, the Executive Order does not displace the National Labor Relations Board (“NLRB”) as the arbiter of union representation rights, employer bargaining obligations, and unfair labor practices concerning unlawful interference with employee or union rights or employer assistance to unions or favoritism.

B. *How Expansively Will Representation Rights Be Applied to the Neutrality Obligation?*

Winning employer neutrality to gag employer opposition to organizing is an objective that unions have campaigned and lobbied to obtain, and the Executive Order appears to have initial union organizing and union efforts to *gain* representation as its focus. However, by requiring a Covered Employer to “maintain a neutral posture with respect to efforts by the Labor Organization to represent Covered Employees,” the Executive Order does not expressly distinguish gaining recognition from the various aspects of employment in which unions represent employees once recognition has been obtained. An apparently unintended broad application of the Executive Order to employer neutrality on such conventional representational functions as collective bargaining, contract administration, and advocacy in grievance procedures and arbitrations would have intolerable consequences and result in a prompt legal challenge.

C. *How Will Compliance Be Refereed?*

The parties to the contemplated Labor Peace Agreements will be retail and food service establishments and one or more Labor Organizations seeking to represent their employees. New York City and its Economic Development Entities, and the Financial Assistance recipients having contractual relations with them, will not be parties. Nevertheless, in matters subject for the most part to the exclusive jurisdiction of the NLRB, the Executive Order makes the Financial Assistance recipient responsible to require each “current and future Covered Employer operating on the premises of its City Development Project” to enter into a Labor Peace Agreement. While lease agreements with tenants may track the enforcement provisions and remedial terms required by the Executive Order and the Financial Assistance recipient’s Project Agreement for a City Development Project, landlords have not been deputized by

Congress to displace the NLRB in enforcing federal labor law as it relates to either employee representation rights or the NLRA's statutory grant allowing employers to express their views and opinions in a non-coercive manner.

Furthermore, if the consideration for a Covered Employer's commitment to neutrality is the Labor Organization's promise for itself and its members to refrain from picketing, work stoppages, boycotts, and other economic interference that could disrupt a City Development Project, a mechanism, not identified in the Executive Order, must be created for the Financial Assistance recipient and/or its retail or food service tenants to enforce the Labor Organization's bargain. While the Executive Order does not mention agreements between a Financial Assistance recipient and Labor Organizations, it is not likely landlords will have—or want—agreements with Labor Organizations to police their activities as they seek to represent the Covered Employees of retail and food service tenants.

Can the Executive Order Accomplish What It Promises?

If the objective of the Executive Order is to assure labor peace by way of insulation from picketing, work stoppages, boycotts, or other economic interference, it is not clear how its selective targeting of retail and food service tenants occupying more than 15,000 square feet of space—and the exclusion of other tenants and union relations—delivers on its promise. There are multiple non-covered tenants and events that could occasion such on-site disruptions as picketing, work stoppages, off-site boycotts, or other economic interference.

As a threshold matter, there is no particular reason why a labor dispute with a tenant occupying space shy of 15,000 square feet—among them high-profile national businesses—somehow is less disruptive to the tranquility of a City Development Project than one directed at a tenant whose business model requires larger space.

Also, the Executive Order does not address the rights or responsibilities of either landlords or their tenants that are Covered Employers bound to accept a Labor Peace Agreement when faced with union demands for neutrality that go beyond the Executive Order's "minimum" neutrality requirements. There could be a dispute over initial labor peace terms if a union, dissatisfied that the Executive Order's Labor Peace Agreement secured only a Covered Employer's "neutral posture" concerning representation efforts, were to protest to obtain more ambitious and advantageous commitments that are coveted objectives of union neutrality demands, such as:

- access to the employer's premises;
- delivery of employee names, email and residence addresses, and mobile phone numbers;
- a non-disparagement agreement;
- an agreement to "card check" recognition upon presentation of authorization cards signed by a majority of bargaining unit employees, accompanied by waiver of an NLRA secret ballot election;
- mandatory interest arbitration to set initial contract terms if a collective bargaining agreement is not negotiated within a specified time; and

- the extension of employer neutrality to other, unrelated business locations.

Additionally, if the Executive Order is intended to address only initial union organizing, as its purpose indicates, the labor peace obligations do not take account of the possible disruptions flowing from an inability to agree upon varied provisions for wages, hours, and other terms and conditions of employment addressed in union negotiations for incorporation into an initial or renewal collective bargaining agreement. After all, unopposed recognition of a union does not equate with a blank check to accept a union's economic and noneconomic demands, even if they reflect a prevailing industry standard obtained through other negotiations.

Potential Legal Challenges to Executive Order Enforceability

While the NLRA prohibits unlawful employer assistance to unions, various forms of neutrality agreements are allowed by the NLRB's current construction of the law. However, another line of attack continues to be litigated, with uncertain prospects for success, on the theory that contractual neutrality agreements violate Section 302 of the Labor Management Relations Act, which prohibits employers from giving a labor organization seeking to represent its employees a "thing of value."

Different from challenges to contractual lawfulness and enforceability of neutrality clauses are the lawsuits asserting that state or local government action imposing neutrality agreements is an unauthorized intrusion into the field of labor relations, preempted by the NLRA. Such challenges have been predicated on Congressional placement of exclusive oversight of labor-management relations with the NLRB. While the NLRA does not contain an express preemption provision, the U.S. Supreme Court has relied upon two distinct preemption doctrines to analyze whether state or municipal regulations that infringe upon the integrated uniform federal labor relations scheme set forth by Congress in the NLRA are preempted. The first doctrine prohibits states or local governments from regulating activities "that are potentially subject to federal regulation" and "involve[] too great a danger of conflict with national labor policy."¹ A second form of preemption recognized by the courts holds that state and local governments may not regulate conduct if it is within a zone of activity that Congress intended to leave open to the free play of economic forces.²

In assessing whether state or local government action is preempted, the Supreme Court, in the "Boston Harbor case,"³ has recognized a critical distinction between governments acting lawfully in their capacity as purchasers of goods and services capable of setting terms they will require in contracts, and governments stepping outside of a lawful role and acting unlawfully as regulators of preempted labor activities. The theory of the Boston Harbor case has guided federal courts addressing whether governmental authorities have engaged in attempted regulation of labor relations that is preempted. While the language of the Executive Order is couched in terms of the City's financial and proprietary interest, an examination of the history, purpose, and coverage of the Executive Order indicates that interests of established unions with traditional jurisdiction in retail trade and food service are likely influences on the Executive Order's attempted regulation of the labor policies of businesses having no direct contractual relations with the City.

¹ *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959).

² *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 144 (1976).

³ *Building & Construction Trades Council (Metropolitan District) v. Associated Building & Contractors of Massachusetts/Rhode Island*, 507 U.S. 218 (1993).

Additionally, to the extent the Executive Order targets only those tenants that operate a specific class and type of retail or food service business, there may be challenges that its limited, or arbitrary, requirement of a Labor Peace Agreement for retail and food service establishments occupying more than 15,000 square feet of space lacks a rational basis and violates the constitutional guarantee of equal protection. Also, the Supreme Court has recognized that an attempt to regulate an employer's non-coercive speech may be preempted.⁴

What New York City Employers Should Do Now

A. *Financial Assistance Recipients*

- Determine whether the exemption for projects authorized, or Financial Assistance awarded, prior to the July 14, 2016, effective date of the Executive Order applies to all or part of a development project and its retail and food service leases.
- Analyze terms of Project Agreements and drafts to understand how terms for Financial Assistance negotiated by New York City and its Economic Development Entities impact a development project and the marketability and lease terms of retail and food service space.
- Review retail and food service lease agreements and drafts for compliance with the Executive Order and enforcement and remedial provisions applicable to a tenant's or subtenant's breach of the labor peace mandate.
- Assess the impact of unionization or post-recognition disruptions during collective bargaining or contract administration of a retail or food service tenant that is a Covered Employer, as well as the potential for any spill-over effect on smaller retail, food service, and other tenants and prospective tenants.
- Review no-trespass and no-solicitation rules for lawfulness and enforcement.

B. *Retail and Food Service Businesses*

- Determine whether the amount of space and type of activity located at a City Development Project places business operations within the requirements of the Executive Order.
- Assess the economic and institutional impact of Executive Order compliance on operations located at a City Development Project, as well as the impact on existing and planned retail and food service operations in other locations that could be affected by an agreement to labor neutrality or unionization at a City Development Project.
- Determine the feasibility of scaling operations to fall below the Executive Order threshold by leasing less than 15,000 square feet of space in City Development Projects.

⁴ *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-69 (2008) (an employer's non-coercive speech is both explicitly and implicitly protected by the NLRA, and Congress intended to leave non-coercive speech *unregulated*).

- Set a negotiating position for inclusion of terms in a Labor Peace Agreement that will secure protection from interference from picketing, work stoppages, boycotts, and other economic interference.

C. Landlords and Tenants

- Watch for compliance, enforcement, and remedy guidance and clarification from the City and the official to be designated as responsible for monitoring Executive Order compliance, as well as from any City Economic Development Entity through which Financial Assistance is negotiated.
- Monitor activity indicating whether a deputy mayor has exercised discretion to exempt specific employers from Executive Order compliance.
- Be alert to modifications expanding the reach of the Executive Order.

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