Labor & Employment
ALERT
Fox Rothschild LLP
ATTORNEYS AT LAW
July 2016

NYC Mayor de Blasio Issues Controversial 'Labor Peace' Order Affecting Certain Development Projects in New York City

By Robert C. Nagle

On July 14, 2016, New York City Mayor de Blasio issued Executive Order No. 19, titled "Labor Peace for Retail Establishments at City Development Projects," which is designed to facilitate union organizing at retail and food service establishments within city development projects that receive financial assistance from the City of New York. While the stated aim of the order is to ensure "labor peace" at development projects in which the city has a financial or propriety interest, the law runs roughshod over the rights of covered employers and employees to make their own decisions regarding union representation.

Key Concepts/Mechanics of the Order

The order applies to: (i) developers who receive certain kinds of financial assistance in connection with "City Development Projects;" and (ii) employers who operate retail or food service establishments within such projects that employ, or are anticipated to employ upon opening, 10 or more employees and who occupy in excess of 15,000 square feet on the premises of the project ("covered employers").

A "City Development Project" is a project subject to an agreement between the New York City Department of Housing Preservation and Development or a "City Economic Development Entity," on the one hand, and a developer that receives at least $1 million of financial assistance from the city, on the other hand, where the project is expected to be larger than 100,000 square feet, or, in the case of a residential project, larger than 100 units.

The order states that any developer within the ambit of the order must agree to a "labor peace clause," binding it to require each covered employer operating on the premises of a City Development Project to enter into a "Labor Peace Agreement" with a union seeking to represent "covered employees" working on such premises. "Covered employees" include all full-time and part-time employees of the covered employer, excluding supervisors or professional employees.

The Labor Peace Agreement between the covered employer and union must, at a minimum, require that the union and its members agree to refrain from picketing, work stoppages, boycotts and other economic interference, and that the covered employer maintain a "neutral posture" with respect to efforts by the union to represent covered employees. In other words, the Labor Peace Agreement prevents covered employers from advocating against the unionization of their covered employees.

Policy Rationale/Impact Upon Covered Employers

As noted above, the asserted objective of the order is to prevent disruption at "City Development

Projects" and protect the city's proprietary interests in such projects. While this may be true, the requirement that covered employers adopt a "neutral posture" with regard to organizing efforts by a union seeking to represent their employees all but guarantees that such employees will unionize, at which point the employer will lose the ability to deal directly with its employees regarding wages, benefits, hours of work and other terms and conditions of employment. Unsurprisingly, organized labor strongly encouraged the Mayor to enact the order.

Elements of the law appear to conflict with the National Labor Relations Act (NLRA), the federal labor law governing labor-management relations in the private sector. Among other things, the NLRA protects the right of employees choose their own representatives for collective bargaining – or to eschew union representation altogether. By mandating that covered employers enter into a Labor Peace Agreement with a union even before the employer has hired any employees, the law would seem to interfere with employees' right to choose their own representatives.

However, the National Labor Relations Board and the federal courts have upheld so-called neutrality agreements in other contexts. Moreover, at least one federal court of appeals has upheld a local law requiring developers to secure "labor peace" on projects receiving taxpayer incentive financing as a condition of receiving such financing.[1] Additionally, the State of New York has its own "labor peace" law covering hotels and convention centers in which a state agency asserts a proprietary interest.

Immediate Effect/Long Term Ramifications

The order takes effect immediately, although it does not apply to projects authorized, or financial assistance provided, prior to July 14, 2016. Developers' obligations under the labor peace clause shall remain in effect for a minimum of 10 years from the commencement of the project or the term of financial assistance provided by the city, whichever is longer. Barring a successful legal challenge to the order, which is by no means assured, retail and food service businesses planning on opening in new development projects should prepare for "labor peace" on the terms imposed by Mayor de Blasio.

For more information about this alert, please contact Carolyn D. Richmond at crichmond@foxrothschild.com or 212.878.7983, Robert C. Nagle at rnagle@foxrothschild.com or 215.299.2064, Glenn S. Grindlinger at ggrindlinger@foxrothschild.com or 212.905.2305 or any member of the firm's Labor and Employment Department.

[1] *Hotel Employees & Restaurant Employees, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 219 (3d Cir. 2004)

Fox Rothschild LLP
ATTORNEYS AT LAW