Unfair Competitive Advantage for Union Contractors Remains In Tact

Labor & Employment Law Update

By Beverly Alfon on September 25, 2015

Union job targeting programs, also known as "market recovery funds," are used by unions to provide a bidding advantage to union contractors. As part of these programs, unions collect voluntary deductions from members' wages, which are then used to subsidize union contractors' bids on building projects. With the union subsidy, the union contractor is able to successfully bid on projects that may otherwise go to nonunion contractors. The subsidy further allows employees to be paid at union scale, rather than the lower wages set forth in the contractor's bid. These programs are clearly aimed at ousting non-union contractors.

Job targeting has been criticized as unfair competition, and has been found to violate the Davis-Bacon Act under some circumstances where funding for the program has been derived, at least in part, from wages paid to union members under the Davis-Bacon Act. However, the National Labor Relations Board (NLRB) held in *J.A. Croson Company*, 359 NLRB No. 2 (Sept. 28, 2012) that, "union job targeting programs, including those funded in part by voluntary deductions from the wages of union members employed on State-funded public works projects, are clearly protected under Section 7 of the Act." The NLRB confirmed that the dues-checkoff provision, requiring employers to deduct and remit 1.75% of unit employee gross wages as "market recovery assessment," was protected under the National Labor Relations Act (NLRA).Furthermore, the NLRB held that the company violated the Act by maintaining a state court lawsuit challenging the job targeting program because it interfered with the protected operation of the program.

Last week, the federal Court of Appeals for the Ninth Circuit further cemented organized labor's continued ability to utilize job targeting programs. In *Idaho Bldg. & Constr. Trades Council, AFL-CIO v. Wasden, 2015 BL 298844, 9th Cir., No. 11-35985* (Sept. 16, 2015), the Idaho Legislature passed a bill in 2011 to ban unions' job targeting programs. The Idaho Fairness in Contracting Act placed misdemeanor penalties on unions and contractors that pay or receive job targeting subsidies. It included fines up to $100,000 per repeat offense. However, organized labor successfully obtained an injunction to stop the legislation from taking effect. Litigation over the validity of the bill continued and proceeded to the Ninth Circuit.

The Ninth Circuit determined that on projects that do not involve federal funds (Davis-Bacon Act), Idaho law is preempted by the NLRA regarding the use of union job targeting funds from members' wages earned on such projects because, "no NLRB case has held collective action by employees to subsidize wages on non-Davis-Bacon jobs by distributing funds to the workers or employers on those jobs is not protected concerted activity under § 7 because of the source of those funds." Based on this reasoning, the court held that the state's Fairness in Contracting Act was facially invalid because it interferes with the NLRB's interpretation and enforcement of the NLRA.

We will be watching closely regarding a possible appeal of the Ninth Circuit's decision to the U.S. Supreme Court.