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LABOR & EMPLOYMENT ISSUES
IN FOCUS
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## ALJ RULES DONNING BLM GEAR IS NOT PROTECTED SPEECH

On December 20, 2023, an Administrative Law Judge ("ALJ") for the National Labor Relations Board ("NLRB" or "Board") ruled that wearing clothing in support of Black Lives Matter ("BLM") is not sufficiently tied to working conditions to be considered protected speech under the National Labor Relations Act ("NLRA" or "Act"). Section 7 of the Act protects employees' right to "engage in concerted activity" for "mutual aid or protection," which includes the right to speak out about workplace issues. The ALJ did not buy General Counsel Jennifer Abruzzo's argument that wearing BLM attire at work is "the functional equivalent of expressing the message, 'Black Lives Matter *here in the workplace*.'"

The case consolidated about 28 charges filed around the country against Whole Foods Market alleging that the grocery giant violated Section 8(a)(1) of the Act by prohibiting BLM gear during working hours and disciplining workers who violated the rule. Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" employees in the exercise of Section 7 rights. Each of the Plaintiffs was ordered by management to either remove a face mask displaying support for the BLM movement or clock out for the day. Some were fired after multiple violations.

Because most of the facts in the case were undisputed, the major question was whether Whole Foods' policy as applied violated the Act. To help answer this question, the ALJ heard testimony from two expert witnesses: Dr. Keeanga-Yamahtta Taylor, a well-known professor of African American studies at Princeton University who specializes in 20th century African American history and has written extensively on the BLM movement, and Dr. Donald Davison, a professor of political science at Rollins College, whom Whole Foods commissioned to investigate what the public identifies to be the goal of the Black Lives Matter movement. Dr. Davidson conducted a survey asking people to describe in a few words what they "believe or understand to be the goals or purpose of the Black Lives Matter movement." Only 27 survey participants out of 1785 mentioned employment-related issues.

Ultimately, the ALJ found that, although the employees were acting concertedly, voicing support for the social movement was too tenuously related to employment

issues to trigger protection, and consequently, was not protected by Section 7 of the Act.

## BIG WIN FOR WORKERS:
## NEW RULE REVOLUTIONIZES FEDERAL CONSTRUCTION CONTRACTS

In a groundbreaking move, the Biden administration has set a new standard for federal construction contracts, reshaping the landscape of labor and employment in public construction projects. This change, spearheaded by Acting U.S. Department of Labor Secretary Julie Su and other officials, mandates pre-hire collective bargaining agreements with unions for all large-scale federal infrastructure projects exceeding $35 million. This rule, a direct outcome of President Joe Biden's February 4, 2022 executive order regarding the "Use of Project Labor Agreements for Federal Construction Projects" ("Order"), is not just a policy shift as it will have a significant impact and empower approximately 200,000 workers nationally to be covered by project labor agreements ("PLAs").

The General Services Administration's final rule amends the Federal Acquisition Regulation requiring PLAs for substantially funded federal projects. PLAs are designed to set uniform terms and conditions for all workers on specific federal projects, ensuring stability and consistency. President Biden emphasized that this move will expedite projects and provide taxpayers with more value for their money. This will ensure workers receive better wages, benefits, job security, and more importantly, stronger health and safety protections.

This rule has the potential to change the tide for employees working on certain federally funded construction projects. By standardizing contract terms for skilled workers and addressing labor supply issues, PLAs can prevent work stoppages and protect worker classifications. They also play a crucial role in enhancing health and safety standards on construction sites. For the workers, this translates into more secure, well-paying jobs and a more predictable working environment. However, business groups and some Republicans argue that it could discriminate against non-union contractors and inflate the costs of federal projects. In particular, the Associated Builders and Contractors is considering legal action, citing concerns over increased project costs and limited competition. Unions, on the other hand, have lauded the rule. They contend that PLAs have repeatedly proven their worth in ensuring efficient use of taxpayer money. By fostering labor-management cooperation and standardizing terms and conditions for these workers, PLAs can lead to direct cost savings, safer worksites, and more efficient project completion.

This move is in line with President Biden's long-standing support for labor. By requiring PLAs in federal construction projects, the administration aims to staff these projects with union workers, thereby bolstering the middle class and ensuring fair labor practices. The rule is set to take effect 30 days after its publication in the Federal

Register. While it marks a significant victory for labor unions and workers, the potential legal challenges and the rule's impact on project costs and competition will be pivotal in determining its success.

## INTENT IS NOT INJURY SO NON-UNION CONTRACTORS LACK STANDING TO CHALLENGE UNION-FRIENDLY BIDDING LAWS

Atlantic and Camden Counties in New Jersey enacted local legislation requiring public works contract bidders to recognize a union and hire through the union's job-referral system. The non-union employers' association, the Associated Builders and Contractors ("ABC"), and certain contractors sued alleging that these local laws prevented them from working on such projects. The United States District Court for the District of New Jersey dismissed the action with prejudice because ABC had not pled actual injury, but ABC appealed to a United States Court of Appeals for the Third Circuit panel of two Trump appointed judges and one George W. Bush appointee.

The panel vacated the District Court and remanded with instructions to dismiss the case without prejudice, *Earle Asphalt Co. v. Country of Atlantic*, No. 22-03166 (3d Cir. 12/18/23) and *Earle Asphalt Co. v. Country of Camden*, No. 22-02648 (12/18/23).

"A policy does not hurt you just because you think it is wrong," began Judge Bibas, joined by Judges Porter and Fisher. The Court assumed an "imminent" injury because the local laws made non-unionized bidding futile. However, neither ABC nor the individual contractors pled that they actually did or intended to bid as opposed to "likely to bid" or "ready and able to apply for that work." Such a "bare statement of intent ... nothing more than an abstract generalized grievance," does not create Article III standing, ruled the unanimous Third Circuit panel.

These cases are interesting because they resulted in a pro-union decision by a panel facially unfriendly to unions. Clearly, the panel believed its Article III jurisdictional integrity more critical than the identities of the parties. This suggests that while policy arguments may be more exciting, conservative jurists are better approached with fundamental principles, such as standing, for unions and their friends to prevail.

## HOCHUL'S HALT: NYS NONCOMPETE AGREEMENT SAGA CONTINUES

In a dramatic turn of events, New York Governor Kathy Hochul vetoed N.Y.S. Senate Bill S3100 ("Bill") right before the Christmas Holiday, a move that is sending ripples through the labor and employment law landscape. The Bill aimed to impose a near-total ban on noncompete agreements in New York and was the center of controversy and debate, highlighting the delicate balance between protecting workers' rights and preserving business interests.

The Bill was passed by the State legislature in June 2023 and sought to add a new section to the New York Labor Law, effectively banning almost all noncompete agreements across the state. It caused concern for business groups because, as

drafted, it lacked exceptions, even in generally universally accepted scenarios including the sale of a business.

The Bill's language also caused concern from business groups, claiming that if passed as is, the Bill could inadvertently ban other types of agreements, such as non-solicitation and non-disclosure agreements. The business community and employers throughout the State argued that the Bill would strip employers of a vital tool to protect their legitimate interests, such as confidential information, trade secrets, and customer relationships. They claimed that without noncompete agreements, highly-compensated employees could easily jump laterally to competitors, taking with them valuable intellectual property and business strategies.

Governor Hochul's veto came after failed negotiations over a compromise. The Governor's office attempted to introduce a threshold for agreements to be used above a minimum annual income. However, the proposed $250,000 threshold became a sticking point, with disagreements over its calculation and adequacy, leading to the eventual veto. Despite the veto, the debate is far from over as the Bill's sponsor has already indicated plans to reintroduce similar legislation in the next session. Furthermore, the Federal Trade Commission's proposed rule to limit non-competes nationwide remains a significant development to follow.

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