WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM

Project Labor Agreements ("PLAs")

A "project labor agreement" is a particular type of labor-relations agreement between construction contractors and labor organizations. Commonly referred to as a "PLA," this type of agreement is recognized and allowed under federal law for privately-owned construction projects. The use of a PLA for **public** construction projects has been addressed and found to be allowed under a U.S. Supreme Court decision, but other developing issues have not been directly addressed by a court with jurisdiction over Wisconsin.

The open questions include whether a PLA is permitted under a "right-to-work" law, and whether a governmental unit may implement a general policy on the use of PLAs in public works projects.

This Information Memorandum briefly describes PLAs, the federal preemption analysis that is applicable to the use of PLAs in public works projects, and the few court decisions from other jurisdictions that have analyzed those developing issues.

PROJECT LABOR AGREEMENT

A PLA is a specific type of collective bargaining agreement between one or more building contractors and one or more labor organizations. It applies to a specific construction project, is agreed-upon before workers are hired for the project ("prehire"), and is in effect only for the duration of the project. [Mayer, Gerald, *Project Labor Agreements*, Congressional Research Serv. Rep. No. R41310 (July 1, 2010).]

NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act (NLRA), as amended, explicitly permits employers in the construction industry, but not other industries, to enter into such prehire agreements with unions, and permits subcontractors to be bound by the general contractor's agreement. [29 U.S.C. s. 158 (e) and (f).]

FORM AND CONTENT OF A PLA

Typically, a PLA may do any of the following:

- Prohibit strikes and lockouts.
- Establish uniform work rules covering overtime, working hours, and dispute resolution.

- Prescribe wages.
- Require hiring through union referral systems or union hiring halls.
- Require all workers on the project to be or become union members.
- Require all contractors and subcontractors to abide by the agreement.
- Supersede all other collective bargaining agreements.

Among these provisions, a PLA could require a contractor to recognize the union or group of unions as the exclusive collective bargaining agent for all covered employees. [*Master Builders of Iowa v. Polk County*, 653 N.W.2d 382 at 389 (Iowa 2002); and *SE La. Bldg. & Constr. Trades Council, AFL-CIO v. La. ex rel. Jindal*, No. 13-370 Sect. "K" (5), at 15-16 (E.D. La., May 27, 2015).]

In a public works project, a governmental unit may call for contractors and labor organizations to enter into a PLA for the project. While not necessarily itself a party to the agreement, a governmental unit may, among the bid specifications or by other methods, require the use of a PLA for the project.

RIGHT-TO-WORK LAWS

As described more fully below, federal law under the NLRA generally preempts state law. However, the NLRA specifies that state law may govern a specific clause of collective bargaining agreements referred to as "union security," "all-union," "maintenance of membership," or "fair share" agreements.

Under this provision of the NLRA, if a state law specifies that agreements requiring membership in a labor organization, as a condition of employment, are prohibited, the federal law does not preempt state law on that issue. As a result, a state may prohibit such clauses under what is commonly referred to as a "right-to-work" law. [29 U.S.C. s. 164 (b).]

Wisconsin enacted a right-to-work law that took effect on March 11, 2015.[1] Under this law, a private sector employer may not enter into an agreement with a labor organization that requires identified types of employees to be members of a labor organization as a condition of employment. [ss. 111.04 (3) and 111.06 (1) (e), Stats.; 2015 Wis. Act 1.]

Courts in two states with right-to-work laws have reviewed the validity of PLAs under their laws. The Supreme Courts of both states, Nevada and Iowa, found the use of a PLA on a project of public works to be allowable in their states. In both cases, the Courts held that the PLA must conform with the state's right-to-work law, and with competitive bidding laws that are applicable to public works projects. [*Associated Builders & Contrs., Inc. v. S. Nev. Water Auth.*, 115 Nev. 151 (1999); and *Master Builders of Iowa v. Polk County*, 653 N.W.2d 382 (Iowa 2002).]

The decisions in Nevada and Iowa instruct that a PLA may contain the provisions described above, but may not contain a provision that requires membership in a labor organization as a

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[1] If a collective bargaining agreement was in effect on March 11, 2015, and contained a provision that was inconsistent with the "right-to-work" law, the law applies to the agreement upon any renewal, modification, or extension of the agreement that occurs on or after March 11, 2015.

condition of employment on the project. While those decisions do not govern the implementation of Wisconsin law, if the use of a PLA were to be challenged as being contrary to Wisconsin's right-to-work law, a court in this state would use a similar analysis and could likely reach the same conclusion.

PUBLIC WORKS PROJECTS

Collective bargaining between private sector employers and employees is largely governed by federal law under the NLRA, as amended. As mentioned above, under this structure, federal law generally preempts state law. However, the NLRA, as amended, does not itself contain an explicit provision to preempt state laws on private sector labor relations. Rather, the preemption principles have developed through case law under the Supremacy Clause of the U.S. Constitution. [*Bldg. & Constr. Trades Council v. Associated Builders & Constr.*, 507 U.S. 218 at 224 (1993) ("*Boston Harbor*").]

The U.S. Supreme Court addressed whether preemption applies to the use of a PLA in a public works project in a seminal case referred to as the "*Boston Harbor*" decision. In that case, the Massachusetts Water Resources Authority, an independent government agency, was ordered by a federal court to clean up Boston Harbor and to build sewage-treatment facilities. The court order required the project to proceed without interruption from causes such as labor disputes, and the project was expected to take over 10 years to complete. [*Id.* at 220-221.]

The Authority selected an engineering firm as its project manager. The firm recommended that a PLA be negotiated that would assure labor and management stability over the life of the project, and the Authority accepted that suggestion. The agreement included specific methods for resolving labor-related disputes, a union security provision that required workers to become union members when hired, a provision that required use of the union hiring halls, and a 10-year no-strike commitment. Adherence to the agreement was then incorporated as a condition in the bid specifications for all contractors and subcontractors on the project. [*Id.* at 221-222.]

In its analysis, the Court summarized two preemption principles that apply under the NLRA, which are described below.

GARMON PREEMPTION

The first preemption principle summarized by the U.S. Supreme Court in the *Boston Harbor* opinion is known as "*Garmon* preemption" from the name of a U.S. Supreme Court decision detailing the principle. Under this principle, regulation of activities that the NLRA protects or prohibits is preempted by the federal law. Accordingly, states and local governmental units are prohibited from setting standards of conduct that are inconsistent with the substantive requirements of the NLRA, and are also prohibited from regulating conduct that is arguably covered under the NLRA's "integrated scheme" of regulation. [*Id.* at 224-225.]

MACHINISTS PREEMPTION

The second principle, known as "*Machinists* preemption" from another U.S. Supreme Court decision, prohibits states and local governmental units from regulating areas that have been left by the NLRA to the "free play" of economic forces. For example, state laws may not prohibit certain concerted actions by union members to create economic pressures when such activities are not designated as an unfair labor practice under the NLRA, and also may not condition occupational licensing on settlement of labor disputes. In other words, a state or local

governmental unit cannot apply its own standard for "balanced" bargaining power. [*Id.* at 225-226.]

PROPRIETOR'S EXCEPTION TO PREEMPTION

The U.S. Supreme Court noted that, in certain cases applying the preemption principles, a distinction had been acknowledged between government acting as a regulator and government participating in the market as a proprietor. In the *Boston Harbor* decision, the Court fully affirmed this distinction, concluding that the preemption doctrines apply only to state regulation, and do not apply when a state owns and manages property. [*Id.* at 227-230.]

As applied to the *Boston Harbor* case, the Court held that the bid specification requiring adherence to the PLA constituted proprietary conduct, with the Authority acting in the role of purchaser of the construction services. In that role as a proprietor, rather than as a regulator of market forces, the Authority was permitted to condition its purchasing of construction services on participation in the PLA. [*Id.* at 232-233; and followed by *Colfax Corp. v. Ill. State Toll Hwy. Auth.*, 79 F.3d 631 (7th Cir. 1996).]

Because the *Boston Harbor* decision applied only to a single project, it did not explicitly address whether a blanket rule on the use of PLAs in public works projects would be considered government action as a regulator or as a proprietor. The Court noted, however, that as a single project, there was no basis to distinguish the market "incentives" on the public works project from incentives at work in other projects in the construction industry. [*Boston Harbor*, at 232.]

This Information Memorandum next describes the limited number of decisions from other courts that have directly addressed the question of whether a blanket rule regarding the use of PLAs may be applied.

HOLDING: BLANKET RULE IS NOT ALLOWED

One court decision has struck down a state law that had blanket application to the governmental use of PLAs.[2]

In 2002, the Supreme Court of Ohio stated that a blanket prohibition against PLAs precludes any determination as to the "benefits or advantages" of utilizing a PLA on a particular project, and was therefore tantamount to regulation. The Court noted that the preamble to the law referred only to labor policy, without discussion of any proprietary activity when purchasing construction services. The Court therefore held that the state law, which prohibited governmental units from requiring PLAs on public works projects, was preempted by the PLA provisions of the NLRA. [*Ohio State Bldg. & Constr. Trades Council v. Cuyahoga County Bd. of Comm'rs*, 98 Ohio St. 3d 214 at pars. 95-96 (2002).]

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[2] Another decision, by the U.S. District Court for the District of Idaho, struck down a state law that prohibited the state and governmental units from requiring the use of PLAs on public works projects, concluding that the law did not have a narrow scope, did not have a purpose of furthering the state's interest in the efficient procurement of goods and services as a market participant, blocked prehire agreements that are permitted under the NLRA, and restricted the free play of economic forces. [*Idaho Bldg. & Constr. Trades Council v. Wasden*, 836 F. Supp. 2d 1146 at 1162-1163 and 1165-1166 (D. Idaho 2011).] However, this decision has been vacated and remanded for dismissal on this issue, for lack of standing. [*Idaho Bldg. & Constr. Trades Council v. Wasden*, No. 11-35985 (9th Cir., Sept. 16, 2015).]

HOLDING: BLANKET RULE IS ALLOWED

Various court decisions have upheld executive orders and certain state laws that have across-the-board application to the governmental use of PLAs.

EXECUTIVE ORDER NO. 13,202

In a decision upholding a blanket rule on the federal use of PLAs, the U.S. Court of Appeals for the District of Columbia determined that the federal government was acting as a proprietor. This decision has been influential on the later decisions described below.

President George W. Bush had issued Executive Order No. 13,202, which specified that the federal government could neither require nor prohibit the use of a PLA on a federal or federally-funded construction project.[3] The court of appeals noted that the executive order did not prohibit a contractor from entering into a PLA with a labor organization, and only prevented the contracting authority from specifying that the use of a PLA for a project was required or prohibited. [*Bldg. & Constr. Trades Dept. v. Allbaugh*, 295 F.3d 28 at 30 (Ct. App. D.C. 2002).]

The court of appeals in that case held that the policy expressed in the executive order applies only to work on projects that are funded by the government, in which the government has a proprietary interest. The court concluded that application of the order to federally-funded projects, not just government-owned projects, is consistent with the federal government's concern that its financial backing be used efficiently. [*Id.* at 35-36.]

In discussing the effect of having a blanket rule, the court of appeals stated that a "consistent practice" regarding the use of PLAs does not change the character of the action as a market participant. Accordingly, the court held that a consistent procurement policy does not make the government action regulatory in nature. [*Id.*]

NEW JERSEY

In an earlier decision, the Supreme Court of New Jersey had come to a similar conclusion, finding that state law may prohibit a PLA specification in public contracts without preemption by the NLRA (but holding that the PLA resolution at issue was prohibited on other grounds under state law). The Court stated that such a law is "merely one way" in which a state may choose to act as a market participant, and is simply "defining" its role as a purchaser of construction services. [*George Harms Constr. Co. v. N.J. Turnpike Auth.*, 137 N.J. 8 at 26-27 (1994).]

IOWA

In 2011, the U.S. District Court for the Southern District of Iowa upheld a gubernatorial executive order that prohibited the state and local governmental units from entering into a PLA and from requiring the use of a PLA on a project of public works. Drawing on the decision regarding the presidential executive order, the district court concluded that the gubernatorial executive order

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[3] Executive Order No. 13,202 has been superseded by Executive Order No. 13,502. Issued by President Barack Obama in 2009, Executive Order No. 13,502 "encourages" federal agencies to consider requiring the use of a PLA on a project-by-project basis. The order states that it does not require nor preclude the use of a PLA on a project, but that in a large-scale construction project an agency may require the use of a PLA upon consideration of a number of factors, including economy and efficiency in procurement, labor-management stability, compliance with safety and health regulations, equal employment opportunity, labor and employment standards, and consistency with law.

established a funding condition that served the state's proprietary interest in projects and was narrowly tailored to state-funded or state-owned projects without regulating or influencing other projects. [*Cent. Iowa Bldg. & Constr. Trades Council, AFL-CIO v. Branstad*, No. 4:11-cv-00202-JAJ-CFB at 29-31 (S.D. Iowa, C.D., 2011).]

MICHIGAN

More recently, the U.S. Court of Appeals for the 6th Circuit upheld a Michigan law that bars governmental units from entering into PLAs, but also prohibits governmental units from discriminating against bidders on public works projects based on whether or not the bidder has entered into a PLA. The court noted that the law affects only the actions of state and local governmental units and does not forbid the use of PLAs by contractors and unions working on public works projects. [*Mich. Bldg. & Constr. Trades Council & Genesee v. Snyder*, 729 F.3d 572 at 576, 578 (6th Cir. 2013).]

In the Michigan case, the court of appeals concluded that it was not necessary to consider projects on a case-by-case basis to maintain the proprietary nature of the action, and that acting on all projects at once was not sufficient to make an action regulatory. The court noted that it was permissible for the Legislature to determine the use of public resources, and that in enacting that law the Legislature intended to effect an efficient use of those resources. [*Id.* at 578-579.]

LOUISIANA

In 2015, the U.S. District Court for the Eastern District of Louisiana held that the NLRA does not preempt a Louisiana law that prohibits governmental units from requiring bidders to enter into PLAs. The court used a two-part test to analyze, first, whether the legislation reflected the government's own interest in the efficient procurement of goods and services, and, second, whether the scope of the legislation was adequately narrow to defeat any inference that its primary goal was regulatory rather than proprietary. [*SE La. Bldg. & Constr. Trades Council, AFL-CIO*, at 44-64.]

Using that analysis, the district court held that in enacting the law the state was acting not as a regulator but as a market participant. The court first determined that the manifest purpose of the legislation was the efficient procurement of goods and services as a procurement policy by a consumer participating in the market. The court then determined that the scope was sufficiently narrow to defeat any inference of a regulatory goal because the law applies only to public works projects, does not forbid PLAs between private parties, and does not ban the use of PLAs by contractors and labor organizations on government projects. [*Id.*]

SUMMARY

In summary, federal law allows the use of PLAs in private construction projects, and the U.S. Supreme Court has upheld the use of a PLA when required for a particular public works project. Based on holdings from other states with right-to-work laws, it appears likely that the use of PLAs on individual construction projects in Wisconsin remains allowable if the PLA does not require union membership by workers on the project, and conforms with other laws that are applicable to public works projects.

Briefly, the courts that have approved a general rule governing the use of PLAs in public works projects have held that a blanket rule may be upheld if it is shown that the rule is intended to manage the use of PLAs as a procurement policy, rather than as a regulation on labor relations.

Ultimately, if challenged in a court, any questions about the applicability of the NLRA to PLAs under Wisconsin's right-to-work law or under a general policy regarding the use of PLAs would be decided on the particular facts and arguments presented.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

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