

**PHILADELPHIA ORDINANCE LIMITS
EMPLOYER HIRING PRACTICES**

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On June 30, 2000, a new law takes effect in Philadelphia that will impact employers in the hotel, building-management and health-care fields. The Displaced Contract Workers Ordinance ("DCWO") limits the ability of contractors in the janitorial, maintenance, security, health-care and food-and-beverage service industries to select their own workforce in certain circumstances. In addition to providing severe penalties for employers who violate the ordinance, the DCWO makes it easier for unions to infiltrate these employers' workplaces.

When Does the DCWO Apply?

The ordinance applies to situations in which an owner of a business (an "awarding authority") replaces one contractor who supplies covered services with another contractor. It also applies when a company acquires a business and decides to switch contractors. The new contractor *must hire* the previous contractor's employees for a "90-day transition employment period." During this probationary period, the employer may only terminate an employee for "cause." If the contractor decides to use fewer employees at the covered site, it must retain employees by seniority within each job classification. The contractor also must maintain a preferential hiring list comprised of the employees not retained.

It is important to distinguish a situation that is not covered by the new ordinance. Business owners wishing to outsource duties currently performed by their *own employees* are not subject to the requirements of the new law. The DCWO applies only when one contractor is replaced with another -- and not when the owner outsources work in the first instance.

Who Does the DCWO Cover?

The DCWO covers the following types of employees, without limitation:

- employees hired by a contractor as food-service workers in a hotel, restaurant, cafeteria, apartment building, hospital, nursing care facility, or similar establishment;
- employees hired by a contractor to perform janitorial, security or building maintenance services in an office building, institution, or similar establishment;
- and employees hired by a contractor to perform health care or related support services in a hospital, nursing care facility, or similar establishment, including registered nurses.

The DCWO does not cover:

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·managerial, supervisory, or confidential employees, including those defined as such under the Fair Labor Standards Act;

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- employees who work fewer than 15 hours a week;
- employees employed for fewer than eight months with the prior contractor; and
- contractors that employ fewer than 10 individuals.

How Will the DCWO Affect Employers?

The ordinance places regulatory hurdles in front of both contractors and business owners. For instance, the business owner must give advance notice to the current contractor before terminating the agreement. In addition, the owner must notify in advance the union representing the contractor's employees. The terminated contractor, within three days of this notice, must provide to the new contractor a list of its employees, their dates of hire and job classification at each site covered by the contract. Later, when the contract ends, the terminated contractor must update this information.

Although the DCWO dictates who the new contractor must hire, it allows the new employer to set the terms and conditions of employment - at least in a non-union setting. The offer of wages, hours and benefits must be made in a letter prescribed by the ordinance. The letter must be hand-delivered to each employee of the terminated contractor. The letter serves as an offer of employment and informs the employees of their rights under the DCWO, including their right to sue. The letter must be written in the employee's native language; the ordinance provides English and Spanish examples.

Is the DCWO Preempted by the National Labor Relations Act?

Because the DCWO regulates labor-management relations, it raises the question whether it is preempted by the National Labor Relations Act ("NLRA"). While a challenge to the DCWO can be expected, the only Circuit Court of Appeals to interpret a similar ordinance has ruled that the NLRA does not preempt this type of employment preservation law. Although not binding authority in other circuits, this decision, *Washington Service Contractors Coalition v. District of Columbia* (D.C. Cir. 1995), may be persuasive to another court.

This is a critical issue for contractors who may be forced by the DCWO to inherit a unionized work force. Under the "successorship doctrine," an employer found to be a "successor" has a duty to recognize and bargain with the union that represented the predecessor's employees. The general rule is that an employer is a "successor" where (1) there is "substantial continuity" between the old and new enterprises; (2) a majority of the new employer's employees were

employed by the predecessor employer; and (3) the bargaining unit for the old employer remains appropriate for the new employer. The National Labor Relations Board ("NLRB") makes this determination looking at the "totality of the circumstances," although the continuity between the workforces of the predecessor and successor companies is by far the most important factor that the NLRB considers.

If the DCWO is enforceable, a successor contractor would be forced to inherit the predecessor's unionized employees, thereby risking a finding that it is a "successor employer" under the NLRA that is obligated to recognize and bargain with the union representing the predecessor's employees. Indeed, after the *Washington Services* decision, the NLRB ruled that an employer who hired most of his predecessor's union employees - because of the District of Columbia's employment preservation law - was a "successor" and required to bargain with and recognize the union. The administrative law judge refused to modify the new employer's obligation even though the law dictated the employment relationship. The clear implication of these rulings is that Philadelphia contractors may have to assume the terms of their predecessor's collective bargaining agreements.

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Even where the work force is non-unionized, the 90-day probationary period will afford unions the opportunity to organize, as employees who know they may be dismissed at the conclusion of the 90-day period will be more motivated to vote for a union.

How is the DCWO Enforced and What are the Penalties?

The DCWO vests responsibility for its enforcement with the Philadelphia Labor Standards Unit. The Unit will investigate all complaints against any contractor, subcontractor or awarding authority. It has the power to subpoena witnesses, books and records. A hearing is not required, but employers may request one. The Unit will refer meritorious complaints to the Department of Licenses and Inspections "for revocation of the offending person's business privilege license." If found in violation of the ordinance, an employer will be subject to a fine of \$50 to \$100 dollars per day, *per employee*. In addition, an employee may sue the contractor, subcontractor or awarding authority, jointly or severally, for back pay, including the value of benefits, and reinstatement. If the employee succeeds in court, the employer is liable for attorney's fees and costs. The DCWO expressly provides that an employee's right to bring a wrongful termination claim is not proscribed.

The Labor and Employment Law Practice Group at Morgan, Lewis & Bockius LLP has substantial experience advising employers about the requirements of employment preservation laws and limiting their impact. If you have any questions about the Displaced Contract Workers

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