



Legal Q and A: PLAs and the Non-Union Contractor

The Construction Broadsheet
03.17.2022

The Legal Q and A column runs on every other Thursday. Each column will address a specific area of construction law, i.e., contracts, safety, payment, etc. Please submit your legal questions to editorial@tcbsheet.com. Space limitations prevent us from addressing every question. Names of those submitting questions will not appear in print and will be kept confidential.

The information provided here does not, and is not intended to, constitute legal advice but is for general, informational purposes. Please consult a qualified construction attorney in your state for advice specific to your situation.

James J. Terry, a partner at Zetlin & De Chiara LLP, is a successful litigator, negotiator, and advocate specializing in the resolution of complex design, development, and construction management disputes across the spectrum of the built environment.

In practice for more than four decades, his portfolio includes construction defect claims, bid protests, change orders, liquidated damages, delays, cumulative impact claims, lost productivity, acceleration, and inefficiency claims for national and international clients. Mr. Terry's expertise includes the

development and execution of project labor agreements (PLAs) that set labor compensation, work rules, schedules, and performance expectations upfront.

Q. I run a large subcontracting firm, and we would like to bid on a project that is covered under a project labor agreement (PLA) negotiated between the owner and a local union. We are not union members and don't want to be. Do we have to join the union and hire union workers to bid or perform work on the project?

A. Joining the union and hiring union workers is not a prerequisite to bidding or performing work on a PLA project. The Executive Order issued by the Biden Administration in February provides that any PLA must allow all subcontractors to compete for subcontracts "without regard to whether they are otherwise parties to collective bargaining agreements."

A project labor agreement is a one-off contract with a labor organization that will require adherence to certain work rules and compensation standards. However, it would not require a wholesale change in the manner in which a participating subcontractor conducts its business.

Q. We are a non-union shop working on a PLA. My employees keep being approached by the union workers on the project, telling them about union benefits and suggesting they unionize. Can we tell our workers to keep away from them?

A. Workers can be instructed to limit their interactions with union laborers on the project to those necessary to accomplish the work. While the extent of permissible communications can be a matter of some controversy, unions need to follow legally prescribed procedures if they endeavor to promote unionization of a non-union shop. The line between conversing with respect to the advantages of unionizing and engaging in proselytizing needs to be drawn on a case-by-case basis but nevertheless exists.

Q. Our PLA project requires that we take money out of our non-union employees' paychecks and pay into union-sponsored benefit programs. Our employees will never be able to tap any of this money in the future. Can we get these contributions that we have made as a company and the employee deductions back at the end of the project?

A. This is a question that may be ripe for legal adjudication in view of the U.S. Supreme Court's 2018 Janus decision. There, the Court ruled that, under the First Amendment, non-consenting employees on a public project cannot be compelled to pay union "agency fees," which are charged to non-members in lieu of membership dues; accordingly, a PLA cannot impose such fees upon non-union-members who withhold consent. Whether benefit payments can be effectively distinguished from agency fees is the nub of the issue. If so, the PLA should be precisely worded so as not to run afoul of

constitutional law.

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