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CAN LOCAL AND STATE GOVERNMENTS TIE TAX INCENTIVE FINANCING (TIF) TO PRO-UNION CONCESSIONS?

In large part, unions are attempting to reverse their declining ability to organize workers the "old-fashioned way" (through secret ballot elections run by the federal government). As such, they are focusing on new techniques to get hotel and hospitality employees into their dues-paying ranks. Among these are card check agreements, so-called "union neutrality" clauses, and laws tying meaningful tax incentives to union-friendly arrangements. But are they legal?

...by MICHAEL L. SULLIVAN, DAVID E. MORRISON and JEFFREY B. DUNLOP

AS EVIDENCED BY RECENT LABOR NEGOTIATIONS in Chicago, many unions believe that so-called union neutrality and card check agreements are key to helping them reverse their lengthy trend of attrition. It's important to understand these organizing strategies. Instead of employees selecting union representation through government-supervised elections, unions prefer pre-negotiated contractual requirements specifying management neutrality during any union campaign and, possibly, allowing union representation to be selected if enough employees sign authorization cards. Recently, local and state governments have passed laws and regulations mandating such agreements for hotels and other employers seeking state funds or tax incentives. Such provisions, however, raise a number of legal issues regarding their conflict with and preemption by federal labor law.

The benefits of neutrality and card check agreements are fairly clear from a union's point of view: they lead to increased union representation. Several studies compiled during the late 1990s and early 2000s, analyzed by Prof. James Brudney in *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, highlight this fact. For example, unions were successful in obtaining employee representation as follows:

- 37% union victories, for elections involving labor units of more than 500 employees;
- 42% union victories, for elections involving labor units with 100 to 499 employees;

versus:

- 78%, union victories for union organizing campaigns where the parties pre-negotiated for both

employer neutrality and card check union authorization.

Neutrality and card check agreements are an increasingly common reality. The AFL-CIO, for example, reported organizing upwards of three million workers between 1998 and 2003 with only about 20% of this number being added through the National Labor Relations Board's formal election process.

Although labor-management and union related issues are traditionally reserved to the National Labor Relations Board, local and state governments have increasingly attempted to enter the arena — especially when their own money is on the line.

But what do tax incentives have to do with unions?

Of particular interest to hotels is the increasing frequency with which local and state governments use tax increment financing, or a TIF, to jumpstart economic development. A TIF enables a municipality, for example, to issue bonds secured by tax revenues generated from the expected increase in property values. In other words, TIFs use the additional future tax revenues generated by a current development project to finance the current development project at a lower cost.

Increasingly, labor-friendly state and local governments tack conditions onto these TIFs, requiring neutrality and/or card check agreements from those who receive these benefits. Such provisions, however, may conflict with federal labor law which broadly prohibits state and local regulation of private labor law. If so, the corresponding neutrality or card check agreement may be void for a hotel or developer taking advantage of the TIF. Millions of dollars may lie in the balance of this high-stakes legal contest.

Uncertainty in the legal landscape...

The National Labor Relations Act identifies and regulates employees' rights to join or not to join unions. The Supreme Court has held that local or state regulation in this field is preempted and void unless it falls into one of a few narrow exceptions. One such exception applies where a state or local government acts as a market participant rather than a market regulator.

Judicial determination of which hat the government is wearing, however, is complex and at times difficult even for courts to determine. For example, compare the following different outcomes in two recent federal court decisions:

- **TIF Requirements Unlawful:** In the 2005 case of *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*, a business association challenged a county ordinance requiring certain contractors who received more than \$250,000 in county funds to sign so-called "labor peace agreements." Such an agreement prohibited an employer who signed it from taking a position against any union that tried to organize its employees. Because the agreements covered all employees, and not just those doing work for the county, the court held this was an attempt to regulate labor relations and thus preempted by the NLRA.
- **TIF Requirements Lawful:** In the 2004 case of *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources LLC*, a municipality required a hotel to sign a neutrality agreement in order to take advantage of a TIF in developing a new hotel. The court held that the municipality had a narrow and direct investment in the project and was therefore a market participant in the project. This ordinance, therefore, was not preempted by the NLRA.

In addition, two widely publicized challenges to the validity of card check agreements are currently pending before the NLRB in *Atherholt v. UAW* and *Krug v. UAW & Metaldyne Corp.* In both cases, the employer signed an agreement with card check provisions. Under these provisions, the employers agreed to recognize unions as their employees' representatives if enough employees signed authorization cards, eliminating the step of a secret-ballot election. Using these card check provisions, Dana and Metaldyne both declared the United Auto Workers as their exclusive bargaining agent for employees at plants in Ohio and Pennsylvania, respectively. Soon after, employees at those plants signed petitions seeking decertification elections (35% of the employees at Dana and more than 50% at Metaldyne).

The NLRB Regional Directors, however, dismissed these employees' decertification petitions without even a hearing. Current NLRB policy presumes that majority union support exists until the passing of a

"reasonable time" to negotiate a collective bargaining agreement. In response, Dana and Metaldyne employees filed requests for review asking the NLRB to allow the petitions to proceed. These Dana and Metaldyne challenges are pending review before the full board of the NLRB and are being closely watched by employers and unions.

Practical implications for hoteliers:

Unions' press for neutrality and card check agreements, combined with local labor regulation for TIF developments and judicial ambiguity as to their legality, should lead any hotel considering development to ask a number of questions. Here are some general guidelines to consider when entering negotiations for upcoming hotel developments:

- Explore the "fine print" conditions for receiving any TIF or other local or state government financial incentive early on in your evaluation of a property. Don't get hypnotized by incentives without focusing on the entire financial effect of the deal. In the competitive universe of hotel development, unexpected costs such as unionization of employees; contentious, sustained labor picketing or boycotts; or the loss of TIF benefits can materially change the economics of any deal.
- If a TIF is involved, be alert for any potential local labor regulation. A typical TIF is created through a special taxing district that shares boundaries with the governing municipality or may itself be a small section of the city. This redevelopment authority, once established, may be a public agency with the power to enter into contractual agreements and sell TIF debt. Open lines of communication with such a redevelopment authority are essential to understanding a municipality's likely use of labor regulation.
- If a state or local government passes a law, ordinance or regulation requiring post-construction neutrality and/or card check agreements, seek legal advice regarding the effects and enforceability of such labor regulations. There are generally two important factors to begin your analysis. First, does the law serve to advance or preserve the locality's proprietary interest in a project or transaction, as an investor, owner, or financier? Second, is the scope of the regulation "specifically tailored" to the proprietary interest? If both of these can be answered in the affirmative, the regulation and underlying contract are more likely to be upheld.

Labor regulation by a state, county or municipality tied to TIF financing may be too tempting to pass up. Understanding the impact of such regulations from the beginning is critical to determining the economic viability of any upcoming hotel development project. >>

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LABOR + EMPLOYMENT HOTLINE

Washington, D.C.-based hospitality labor law practice Krupin O'Brien LLC operates a hotline for employers confronting labor and employment questions. *LODGING HR* subscribers have unlimited access to the Labor Employment Hotline via telephone (202-530-0700) or e-mail (lh-hotline@krupinobrien.com). Following is a recent query and response:

How must hoteliers accommodate their pregnant employees?

...by KARA M. MACIEL

Q: An employee just informed us that she is pregnant and, due to her medical restrictions, she can no longer lift guests' luggage. She has asked to work a modified duty assignment for the remainder of her pregnancy. As a hotelier, am I legally required to find another job for her?

A: No, not unless you also provide modified job assignments to other employees — male and female — who are similarly temporarily disabled from the job's lifting requirements.

Under the Pregnancy Discrimination Act (PDA), pregnancy is a protected category under Title VII, and employees affected by pregnancy, childbirth, or related medical conditions must be treated the same for all employment-related purposes as other non-pregnant employees similarly-situated in their ability or inability to work. Thus, while employers certainly cannot discriminate against pregnant employees or implement a policy adversely affecting pregnant employees, employers must also not treat pregnant employees differently than other similarly-situated employees injured off the job.

Under the PDA, an employer's only obligation is to treat pregnant employees in the same manner as it treats other temporarily disabled employees. Some employers provide employees, who become temporarily disabled due to an off-the-job injury, with modified tasks, alternative assignments, or disability leave. These same alternatives can also be provided to pregnant employees. But, if a pregnant employee cannot perform the required functions of her job, and if the employer does not have a policy allowing other employees who are similarly restricted due to an off-the-job injury, then the employer does not have to give preferential treatment to the employee just because she is pregnant.

Moreover, the PDA does not prohibit employment decisions based on employee conduct that may be caused by or related to pregnancy. For example, an employer's decision to discipline a pregnant employee for tardiness as the result of morning sickness has been upheld as lawful because the PDA does not require an employer to treat an employee with morning sickness any better than the employer would treat an employee who was equally tardy for some other health reason.

It is critical that hoteliers understand pregnant employees' rights and entitlements under both federal and state laws governing pregnancy discrimination. A lack of knowledge about such employee rights may also jeopardize hoteliers' best interest as they may refrain from taking any legitimate, non-discriminatory adverse actions against pregnant employees for fear of being subjected to a discrimination or retaliation charge. With women making up almost half of the workforce, pregnancy, as a protected characteristic, is an additional category about which hoteliers need to be thoroughly educated and cognizant, in order to protect themselves from having to defend against charges and lawsuits and potentially pay significant damages awards. >>

MORAL(E) OF THE STORY: PROACTIVE APPROACH PAYS

Hoteliers are generally found to have violated federal labor law if they decide to grant wage or benefit increases during a union organizing campaign. However, in a piece of good news for hoteliers with multiple properties, a hotelier facing union organizing at one property was able to implement wage and benefit increases at other properties lawfully because the hotelier was unaware of any organizing.

...by DONALD R. LEE

UNITE-HERE HAS STATED on the record that organizing new employees is its first priority. Other unions are following suit and pumping more money into organizing efforts than ever before.

Federal labor law often prohibits hoteliers and other employers from taking action designed to make employees more content and thereby reducing support for the union. For example, the Supreme Court has held that it is unlawful to confer benefits after a request for an election "for the purpose of inducing employees to vote against the union," because that interferes with the employees' right to organize. The rule against conferring benefits may also apply during union organizing activity before an election has even been requested. Likewise, employers often are not allowed to solicit employee concerns after becoming aware of union organizing.

In a recent case, the hotelier owned three separate properties clustered around an airport. The union began organizing employees at one property in March and April. The hotelier, who acknowledged a

concern that the organizing could spread to its other two properties, arranged small group meetings in early May where the employees of the other properties were asked to voice their concerns. Unbeknownst to the hotelier, the union began attempts to organize the two properties on May 20 by meeting with those employees.

Based on employee feedback from the group meetings in early May, the hotelier scheduled a meeting on May 25 to announce that wage increases and other benefits would be implemented on June 1. Toward the end of the May 25 meeting, after the changes were announced, several employees began to chant "union, union," which was the first time the hotelier became aware that there were organizing efforts at the two properties. On May 28, the union filed a request for an election at the properties.

After the request was filed, the hotelier notified its employees that the increases would be delayed pending the outcome of the election to avoid any appearance that the hotelier was attempting to influence employees in their decisions. While the hotelier did not implement the increases, the union charged that it violated federal labor law when it promised to increase wages and benefits on May 25.

The National Labor Relations Board held that the hotelier acted properly. The Board noted that it is not unlawful to promise or give wages as part of an effort to "keep unions out" so long as the employer is unaware that a union is actively seeking to organize. Put another way, a promise of benefits is lawful if the employer is unaware of organizational activity among its employees, even if the sole reason for granting the benefits is to stay "one step ahead" of the union by diminishing the appeal of unionization. Accordingly, because the hotelier was unaware of any organizing at the two properties when it announced wage and benefit increases on May 25, it did not violate federal labor law.

This case is a positive development for multi-property hoteliers, demonstrating that hoteliers are not automatically hamstrung in what they can do at their properties just because one or some of their properties are being organized. As a practical matter, however, just because a hotelier may promise wage increases at other properties does not necessarily mean it *should*. There is no one-size-fits-all approach. Granting a wage increase at one property when employees of another property are being organized is not always the best approach. If employees are aware that another property is being organized, they may interpret the increase as an attempt to "buy them off." Employees may not believe the hotelier is sincerely interested in making long-term changes, but may think they're only paying lip service to the idea until the threat of unionization goes away.

If you are a union-free hotelier, the most effective way to remain that way is by being proactive. Do not wait for organizing to take place at one of your properties before considering and making needed changes. Communication and respect are key. Congratulate employees on a job well done. Acknowledge anniversaries. Maintain an open door policy. Invite employees to share their concerns with you. A sincere effort to be a model employer goes a long way. >>

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