GO Item 2
July 9, 2018
Worksession

MEMORANDUM

July 5, 2018

TO: Government Operations and Fiscal Policy Committee

FROM: Robert H. Drummer, Senior Legislative Attorney

SUBJECT: Bill 6-18, Contracts – Labor Peace Agreements – Displaced Service Workers – Amendments

PURPOSE: Worksession – Committee to make recommendations on Bill

Expected attendees:
Patty Bubar, Acting Director, DEP
Robin Ennis, DEP
Cherri Branson, Director, Office of Procurement
Grace Denno, Office of Procurement

Bill 6-18, Contracts – Labor Peace Agreements – Displaced Service Workers - Amendments, sponsored by Lead Sponsors Councilmembers Elrich and Hucker and Co-Sponsors Rice and Council Vice President Navarro, was introduced on March 6, 2018. A public hearing was held on April 3.

Bill 6-18 would amend the County procurement laws to:

(1) require certain County contractors to enter in to a labor peace agreement with a labor organization;
(2) establish minimum requirements for a labor peace agreement;
(3) require certain County multi-term contracts to include a minimum price increase provision; and
(4) add certain workers performing services under a County residential solid waste collection contract to the County Displaced Service Workers Protection Act.

Background

Bill 6-18 has 3 main components.

1. Labor Peace Agreement

Bill 6-18 would authorize the Chief Administrative Officer (CAO) to require a contractor awarded a covered contract to enter into a labor peace agreement with a labor organization. A

covered contract is defined as a County contract to "provide services directly to County residents with a value equal to or greater than $250,000." A "labor peace agreement" means:

> a written contract between an employer and a labor organization that represents or is seeking to organize that employer's employees that includes a provision:
> (a) prohibiting the labor organization and all employees covered by the agreement from engaging in any concerted economic action with the employer for the duration of the County contract;
> (b) prohibiting the employer from engaging in a lock-out of the employees performing services under a County contract for the duration of the County contract; and
> (c) requiring that all labor disputes be resolved through final and binding arbitration.

If the CAO requires a labor peace agreement in the contract documents, the contractor awarded the contract must comply within 60 days after the later of receipt of the notice of award or the receipt of a notice from a labor organization that represents its employees or seeks to represent its employees requesting a labor peace agreement. The contractor can satisfy this requirement by:

1. executing a preliminary labor peace agreement;
2. executing a comprehensive collective bargaining agreement; or
3. documenting that no labor organization has requested a labor peace agreement.

2. Mandatory price increase provision.

Bill 6-18 would also require a multi-term contract that requires a labor peace agreement to include an annual contract price increase after the first year of at least the increase in the appropriate Consumer Price Index.

3. Add County trash hauling contracts to the Displaced Service Workers Protection Act.

Bill 19-12, enacted by the Council on September 18, 2012 and signed by the Executive on September 21, 2012, established the Displaced Service Workers Protection Act. The law applies to a service contract awarded by a private company or the County to provide security, janitorial, building maintenance, food preparation, or non-professional health care services in a facility located in the County, such as a multi-family residential building with more than 30 units or a commercial building with more than 75,000 square feet. The law requires a new contractor to offer employment to the former contractor's non-management employees for at least 90 days. It is based on testimony that a contractor in this industry who is awarded a new contract often does not have enough employees to provide the service and must immediately hire new employees.

Bill 6-18 would add this requirement for a new contractor who is awarded a contract by the County for residential solid waste, recycling, or yard waste collection and disposal. The new contractor would have to offer employment to the old contractor's non-management employees for at least 90 days.

Public Hearing

Five of the six witnesses supported the Bill as an important measure to increase the wages and benefits paid to the workers providing trash hauling services under County contracts. Kim Propeack, representing CASA, argued that the County has a responsibility to ensure that the low wage workers providing trash hauling service to the County receive reasonable wages and benefits. See ©10-11. Jhunio Medina, representing LiUNA Local 11, the union representing some of the workers providing trash hauling service under County contracts, supported the Bill because it would help its members. See ©12. Gabriel Acevero, representing the Association of Black Democrats, and Elbridge James, representing Progressive Maryland (©13) also supported the Bill as a positive step to ensure the trash haulers working on County contracts are paid fairly. We also received similar written testimony supporting the Bill from Amy Millar of UFCW Local 1994 (©14) and Chris Wilhelm (©15). Several of these speakers requested an amendment that would mandate an annual price increase in a multi-year contract to increased expenses due to collective bargaining with the union representing the workers to the extent the increase is comparable to the increase in wages negotiated by the County with its own labor unions.

Cherri Branson, Director of Procurement, testifying on behalf of the Executive, opposed the Bill in its current form (©16-17). Ms. Branson explained that the Bill is overbroad because it would apply the labor peace agreement to a potential 666 County service contracts when the purpose was to support the workers on the County trash hauling contracts. Ms. Branson also opposed the mandatory annual CPI increase because it would unnecessarily increase the price for these contracts. Ms. Branson pointed out that the trash hauling contracts permit the contractor to seek a price increase after the first year if the contractor can show its costs increased. Ms. Branson also testified that the Bill would increase costs to potential vendors and thereby deter well-qualified vendors from bidding. Finally, Ms. Branson pointed out that the County Attorney felt that the requirement for a contractor to remain neutral in a union organizing campaign may be preempted by the NLRA and violate the employer's 1st Amendment free speech right.

Issues

1. What is the County's history of strikes affecting contracted services?

The purpose of a labor peace agreement is to ensure that the contractual services are not interrupted by a strike by the contractor's employees or a lockout of the contractor's employees due to a labor dispute. Therefore, the County's history of strikes affecting a County service contract is relevant.

The County currently has 13 different trash hauling or recycling contracts covering 13 different areas of the County. These 13 different contracts are held by 4 different contractors. Over the last 5 years, the County has experienced 4 labor disruptions of service on its trash hauling and recycling contracts. The contractor servicing Areas 1 and 4 had a labor disruption in September and October of 2013. The company continued service with non-striking workers working overtime. A different contractor servicing Areas 2, 3, 5, & 7 had a labor disruption in October 2013 and December 2014 to January 2014. This contractor brought in other workers to replace the striking workers from their parent company.

There have been no other labor strikes affecting trash hauling or recycling contracts since January 2014. Procurement could not identify any other County service contracts that were disrupted by labor disputes in the last 5 years.

2. Does the National Labor Relations Act preempt the County from requiring a labor peace agreement on its service contracts?

The labor peace agreement mandated in Bill 6-18 would require a contractor and the contractor's employees to resolve all labor disputes through binding arbitration instead of a strike or lockout. The National Labor Relations Act (NLRA) protects the right of an employer or an employee to use "self-help" economic tools, such as a strike or lockout, to resolve a labor dispute. The Supreme Court held that the NLRA preempts a state and local law that interferes with these rights. See, *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132, 148–51 (1976). The NLRA also protects an employee's right to join or not join a union and prohibits an employer from supporting a union. The Supreme Court held that the NLRA preempts a state or local law that regulates these employer or employee rights in *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959).

The Supreme Court carved out an exception to these preemption cases in situations where the state or local government is acting as a market participant rather than as a regulator in *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc. (Boston Harbor)*, 507 U.S. 218 (1993). Local laws mandating a labor peace agreement have been struck down as preempted in certain situations and have been upheld in other situations.

The Courts have used a two-part test to determine if a local government is acting as a market participant or as a regulator. Is the local law designed to further the government's proprietary interest in a project or investment? If so, is the local law narrowly drawn to only further the government's proprietary interest or is it so broad to be considered regulatory. For example, the Court struck down a city law that provided a developer of a project in certain designated areas a tax exemption or abatement if they entered into a labor peace agreement in *Associated Builders and Contractors, Inc, New Jersey Chapter v. Jersey City*, 836 F.3d 412 (3rd Cir. 2016). However, the Court upheld a local law requiring all contractors providing services at a city-owned airport to enter into a labor peace agreement in *Airline Service Providers Association v. Los Angeles World Airports*, 873 F.3d 1074 (9th Cir. 2017). The Court held that the city had a proprietary interest in the operation of the airport and was acting as a market participant when it mandated a labor peace agreement to avoid potential strikes or lockouts that could adversely affect the operation of the airport. The Court noted with approval that the local law only applied to city contractors providing services at the airport and not to all city contracts.

The labor peace requirement in Bill 6-18 is like the local law that was upheld in *Los Angeles World Airport* to the extent it applies to a County trash hauling contract where a strike or lockout has in recent years disrupted an important service to County residents. However, to the extent it applies to all County service contracts greater than $250,000, it would cover more than 600 contracts, many of which are non-competitive contracts awarded by HHS that have never been disrupted by a strike or lockout. Bill 6-18 does not mandate a labor peace agreement for all service

contracts. The Bill would authorize the CAO to approve the requirement based upon the following factors:

(a) *Determination.* Before issuing a solicitation for a covered contract, the Director must determine if a labor peace agreement would be in the best interest of the County after considering:
(1) the duration of the contract;
(2) the adverse financial or economic impact of any disruption in services;
(3) the cost associated with finding replacement services;
(4) the risk of disruption of services; and
(5) any other factors affecting the public interest.

See lines 74-82 of the Bill at ©4-5.

For all of these reasons, we believe the labor peace provision is not preempted by the NLRA because the County is acting as a market participant. Although recognizing that this analysis is not free from doubt, the County Attorney's Office agreed with our opinion on this issue. The July 3 County Attorney Bill Review Memorandum is at ©20-31. The County Attorney recommended the following amendments to strengthen the argument that the County is acting as a market participant rather than a regulator:

Amend the definition of a labor peace agreement on lines 55-65 as follows:

Labor peace agreement means a written contract between an employer and a labor organization that represents or is seeking to organize that employer's employees that includes a provision:

(a) prohibiting the labor organization and all employees [[covered by the agreement]] performing services under a covered contract from engaging in any concerted economic action with the employer for the duration of the County contract;

(b) prohibiting the employer from engaging in a lock-out of the employees performing services under a [[County]] covered contract for the duration of the County contract; and

(c) requiring that all labor disputes between the employer and the employees performing services under a covered contract be resolved through final and binding arbitration.

Amend lines 100-109 as follows:

(2) The contractor may satisfy this requirement by executing a:

(A) preliminary Labor Peace Agreement covering labor disputes over the representation of employees performing services under a covered contract by a labor organization, such as a neutrality agreement, that is designed to be supplanted by a comprehensive collective bargaining agreement;

Council staff recommendation: to strengthen the argument that the County is acting as a market participant, Council staff recommends approving the amendments suggested above by the County Attorney and adding the following factor after line 81 between (4) and (5) for the CAO to consider before requiring a labor peace agreement:

(5) The history of strikes or lockouts disrupting County services provided by the contract.

3. Does the use of a "neutrality agreement" conflict with the LMRA?

Bill 6-18 would permit a contractor required to enter into a labor peace agreement to satisfy the requirement by entering into a neutrality agreement with a labor union. This provision raises a slightly different, but related legal issue under a related Federal labor law. Section 302(a) of the Labor Management Relations Act, makes it a crime for an employer "to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value" to a labor union that represents or seeks to represent its employees. 29 U.S.C. § 186(a)(2). A neutrality agreement generally provides that the employer will remain neutral in a union organizing campaign, will provide the union access to nonpublic areas for organizing, and provide a list of employee names and contact information for organizing purposes. The courts have split on if this type of agreement is a "thing of value" given to a union in violation of §302(a) of the LMRA. In *Mulhall v. Unite Here Local* 355, 667 F.3d 1211 (11th Cir. 2012), the Court held that this type of neutrality agreement may be a thing of value and therefore could violate the LMRA. Other Circuit Courts have held the opposite.

The Supreme Court granted certiorari in *Mulhall*, but ultimately dismissed the writ as improvidently granted. Justice Breyer, joined by Justices Sotomayor and Kagan, wrote a dissent arguing that the Court should hear this case to resolve the split in the Circuit Courts. See, *Unite Here Local 355 v. Mulhall*, 134 S.Ct. 594 (2013). How the current Supreme Court would resolve this issue is difficult to predict.

4. Does the use of a "neutrality agreement" violate the First Amendment rights of the contractor?

The County Attorney concluded that the Bill's requirement that a contractor enter into a "neutrality agreement" to satisfy a labor peace requirement would violate the contractor's First Amendment right to free speech under the unconstitutional conditions doctrine. See the County Attorney Memorandum at ©28-31. To the extent that the Bill would require a contractor to remain neutral to union organizing, it would violate the contractor's First Amendment right to free speech.

A non-union contractor awarded a contract requiring a labor peace agreement may be forced into a neutrality agreement that unconstitutionally restricts the contractor's free speech. However, the Bill cites a "neutrality agreement" as an example of a preliminary labor peace agreement that would satisfy the contractual requirement and does not require it in all cases. **Council staff recommendation:** amend the Bill to delete the definition of a "neutrality agreement" and remove the use of the term as an example of a preliminary labor peace agreement on line 103 of the Bill.

5. How many service contracts does the County have with a value equal to $250,000 or greater?

The Bill would authorize the CAO to require a labor peace agreement on service contracts "that provide services directly to County residents with a value equal to or greater than $250,000." Procurement identified 666 service contracts with a value equal to $250,000 or greater. Ms. Branson testified that approximately 110 of these service contracts are non-competitively awarded by DHHS to nonprofit organizations that have never experienced a strike or lockout. While some of the 666 service contracts may not provide services directly to County residents, Procurement has not reviewed each contract to determine the scope of services provided. Ms. Branson also argued that the phrase "provide services directly to County residents" is undefined and unclear.

Council staff believes this phrase is clear, but agrees that the application of the Bill is too broad. If the purpose of the Bill is to protect County services from a disruption due to a strike or lockout, the Bill should be limited to those service contracts with a history of these disruptions. According to Procurement, the only 2 strikes affecting a County service contract in recent years occurred on a trash hauling contract. **Council staff alternatives:**

1. amend the Bill to limit the labor peace agreement requirement to a County trash and recycling contract; or
2. amend the Bill to include only competitively awarded contracts.

6. Should all County multi-year contracts requiring a labor peace agreement include an automatic contract price increase based on an increase in the consumer price index?

Due to the upfront equipment costs required by trash hauling and recycling contracts, the County has chosen to award multi-year contracts to permit the contractor to recoup these upfront equipment costs over time. Trash hauling contracts have either a 5-year term with 2 one-year optional extensions or a 7-year term with 2 one-year optional extensions. The contracts do not contain an automatic price increase to cover an increase in the consumer price index (CPI). The contractor is permitted to seek a price increase by submitting an expense audit report to justify an increase after the first year. Bill 6-18 would require the County to include an automatic CPI price increase clause in each multi-year contract.

Trash hauling contractors have used this provision to gain a contract price increase after the first year. A list of price increases granted by Procurement on multi-year trash hauling contracts after the first year for the last 5 years is at ©18-19. A mandatory CPI clause would remove the contractor's need to show increased costs and obligate the County to increase the contract price without evidence of increased costs. The Executive opposes this provision arguing that this would unnecessarily increase the price of these multi-year contracts and not guarantee

that the increase would be passed on to the workers. **Council staff recommendation:** remove the provision mandating an increase of the contract price after the first year in all multi-year contracts. See lines 24-32 of the Bill at ©2-3.

7. Would a mandatory labor peace agreement reduce competition for contracts?

The only strikes to disrupt County services in recent years involved contractors providing trash hauling and/or recycling contracts. The cost of these contracts has increased by 33.2% over the last 3 years. Here are the most recent 3 years of prices for these contracts based on the Executive's recommended FY19 operating budget.

Solid Waste Collection Contract Cost Trends

	Budget FY17	Budget FY18	CE FY19	Increase from FY18 $*	Increase from FY18 %
Refuse Collection	4,795,358	4,888,684	7,212,038	2,323,354	47.5%
Recycling Collection	18,250,315	18,278,852	23,654,966	5,376,114	29.4%
Total	23,045,673	23,167,536	30,867,004	7,699,468	33.2%

*as presented in the CE's FY19 Recommended Operating Budget (page 64-3)

It is difficult to determine if requiring a labor peace agreement would reduce competition on a contract. For example,[1] the County currently has a contract with 5 different trash hauling contractors. Ecology Services, Inc. has 8 of the 15 contracts. Ecology is a non-union shop. Republic Services of Frederick has a contract to serve 1 area beginning on July 1, 2018. Republic has union representation in other areas, but not at their Frederick unit. Potomac Disposal, Inc. has 2 contracts and its employees are represented by LiUNA. The Goode Companies has 1 contract to share Area 4 with Potomac. Unity Disposal and Recycling, LLC has 4 contracts (Area 7 contract moves to Republic on July 1) and its employees are represented by LiUNA. None of these contractors testified at the public hearing.

A non-union contractor who is awarded a contract requiring a labor peace agreement must enter into either a neutrality agreement or a preliminary labor peace agreement if a union requests it within 60 days after receiving the award. This requirement may require a prospective non-union contractor to reconsider bidding on the contract if other work is available. Reducing the number of prospective bidders may increase the bid prices.

The Executive opposes this requirement as potentially deterring well-qualified vendors from bidding on these contracts. The Executive also pointed out that the County Wage Requirements Law requires the contractor to pay workers at least the County Wage Requirements rate. Effective July 1, 2018, the Wage Requirements rate will be $14.75 through June 30, 2019.

8. Would adding trash hauling contracts to the County Displaced Service Workers Protection Act affect bidding?

[1] Since the only strikes disrupting a County service contract in recent years involved trash hauling, it is unlikely that a labor peace agreement would be required by the CAO for other service contracts until the history of strikes affecting County contracts changes.

The County displaced service workers protection only applies to a service contract awarded by a private company or the County to provide security, janitorial, building maintenance, food preparation, or non-professional health care services in a large facility located in the County, such as a multi-family residential building with more than 30 units or a commercial building with more than 75,000 square feet. The law requires a new contractor to offer employment to the former contractor's non-management employees for at least 90 days.

Although several County chambers of commerce opposed the Displaced Service Workers Protection Act, all 4 cleaning contractors who sent in written testimony supported the Bill. The testimony indicated that private sector building owners routinely switch cleaning and maintenance contractors with little notice and that new contractors often must quickly staff up to service the new contract.

Bill 6-18 would add County trash hauling contracts to the Displaced Service Workers Protection Act. Unlike private building maintenance contracts, County trash hauling contracts go through a long public bid process. We do not know if the successful bidder typically needs to staff up to service the contract. The answer to this question is probably mixed. A bidder who has significant work in other jurisdictions or on other County expiring contracts, may already have enough workers to staff the new contract. Other bidders may not. Requiring bidders to retain the existing workforce for at least 90 days may discourage some bids and thereby reduce competition. **Council staff recommendation:** amend the Bill to remove this requirement for trash hauling contracts.

9. What is the fiscal and economic impact of the Bill?

OMB and Finance had not completed the Fiscal and Economic Impact Statement for this Bill at the time this went to print. We understand that Finance and Procurement are still working on the analysis and will submit it as soon as it is complete.

10. Technical amendments.

The County Attorney suggested several technical amendments that Council staff recommends. The recommended changes are:

Line 53: "principle" should be "principal."

Line 68-69: use the defined term "labor organization" rather than introducing a different term ("labor union").

Section 11B-91(c)(1)(B) (lines 91-99):

> (1) If the covered contract documents require a labor peace agreement, the contractor awarded the contract must execute a labor peace agreement with a labor organization within sixty (60) days after the later of:

(A) receiving the notice of award from the County; or

(B) receiving a request for a labor peace agreement from a labor organization that already represents [[its employees]] or seeks to represent the employees performing [[the work]] services under the [[County]] covered contract.

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Bill No. 6-18
Concerning: Contracts – Labor Peace Agreements – Displaced Service Workers - Amendments
Revised: April 3, 2018 Draft No. 7
Introduced: March 6, 2018
Expires: September 6, 2019
Enacted:
Executive:
Effective:
Sunset Date: None
Ch. ____, Laws of Mont. Co. ____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsors: Councilmembers Elrich and Hucker
Co-Sponsors: Councilmember Rice and Council Vice President Navarro

AN ACT to:

(1) require certain County contractors to enter in to a labor peace agreement with a labor organization;
(2) establish minimum requirements for a labor peace agreement;
(3) require certain County multi-term contracts to include a minimum price increase provision;
(4) add certain workers performing services under a County residential solid waste collection contract to the County Displaced Service Workers Protection Act; and
(5) generally amend the laws governing County service contracts.

By amending
Montgomery County Code
Chapter 11B, Contracts and Procurement
Section 11B-23
Montgomery County Code
Chapter 27, Human Rights and Civil Liberties
Section 27-64
By adding
Montgomery County Code
Chapter 11B, Contracts and Procurement
Article XX, Sections 11B-89, 11B-90, and 11B-91

Boldface	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets]	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets]]	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Sections 11B-23 and 27-64 is amended and Sections 11B-89, 11B-90, and 11B-91 are added as follows:

11B-23. Multi-term contracts.

(a) *Specified period.* Unless otherwise provided by law or regulation, a contract for goods, services, or construction may be entered into for any period of time deemed to be in the best interest of the County. The term of the contract and conditions of extension should be included in the solicitation, if any. At a minimum, appropriated funds must be available for the first fiscal period at the time of entering the contract sufficient to defray the cost to which the County would become obligated under the contract. Payment and performance obligations for succeeding fiscal periods must be subject to the availability and appropriation of funds.

(b) *Determination prior to use.* Before using a multi-term contract, the Director must determine that:

(1) estimated requirements over the period of the contract are reasonably firm and continuing; and

(2) the contract will serve the best interests of the County by encouraging effective competition or otherwise promoting economies in County procurement.

(c) *Termination due to unavailability of funds in succeeding fiscal periods.* When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract must be terminated without further cost to the County.

(d) *Contract price increase provision.* A multi-term contract with a labor peace provision required by Section 11B-89 must include a price increase provision for each year of the contract beginning after the end of the first year of the contract. A price increase provision must require the County

to increase the contract price by at least the annual average increase, if any, in the Consumer Price Index for All Urban Consumers for the Washington-Arlington-Alexandria Core Based Statistical Area (CBSA), as published by the United States Department of Labor, Bureau of Labor Statistics, or a successor index, for the previous calendar year.

Article XX. Labor Peace Agreements.

11B-89. Purpose.

This Article is intended to prevent the interruption of services to County residents provided by private contractors due to concerted economic action or a lock-out during a labor dispute.

11B-90. Definitions.

In this Section, the following words have the meanings indicated:

Concerted economic action means an attempt to resolve a labor dispute using economic pressure against an employer initiated or conducted by a labor organization, or a group of employees acting in concert with a labor organization, including striking, picketing, or boycotting.

Covered Contract means a County contract to provide services directly to County residents with a value equal to or greater than $250,000.

Director means the Director of the Office of Procurement or the Director's designee.

Labor dispute means any dispute between an employer and its employees concerning wages, hours, and conditions of employment, or concerning the representation of employees for bargaining over wages, hours and conditions of employment.

Labor organization means an employee organization established for the principle purpose of engaging in collective bargaining with employers concerning wages, hours, and conditions of employment.

Labor peace agreement means a written contract between an employer and a labor organization that represents or is seeking to organize that employer's employees that includes a provision:

(a) prohibiting the labor organization and all employees covered by the agreement from engaging in any concerted economic action with the employer for the duration of the County contract;

(b) prohibiting the employer from engaging in a lock-out of the employees performing services under a County contract for the duration of the County contract; and

(c) requiring that all labor disputes be resolved through final and binding arbitration.

Lock-out means the temporary closing of a business or the refusal by an employer to allow employees to work until a labor dispute is settled.

Neutrality agreement means an agreement between an employer and a labor union where the employer promises to remain neutral to union organizing, grants union representatives access to the employer's property in exchange for the union's promise to forgo its right to picket, boycott, or otherwise pressure the employer's business.

11B-91. Labor Peace Agreement.

(a) *Determination.* Before issuing a solicitation for a covered contract, the Director must determine if a labor peace agreement would be in the best interest of the County after considering:

(1) the duration of the contract;

(2) the adverse financial or economic impact of any disruption in services;

(3) the cost associated with finding replacement services;

(4) the risk of disruption of services; and

(5) any other factors affecting the public interest.

(b) *Approval.* If the Director finds that a labor peace provision is in the best interest of the County for this covered contract, the Director must recommend the inclusion of a labor peace provision to the Chief Administrative Officer in writing. If the Chief Administrative Officer approves a recommendation to include a labor peace provision in the contract, the Director must include a labor peace provision in the solicitation for bids or proposals.

(c) *Implementation.*

(1) If the covered contract documents require a labor peace agreement, the contractor awarded the contract must execute a labor peace agreement with a labor organization within sixty (60) days after the later of:

(A) receiving the notice of award from the County; or

(B) receiving a request for a labor peace agreement from a labor organization that already represents its employees or seeks to represent the employees performing the work under the County contract.

(2) The contractor may satisfy this requirement by executing a:

(A) preliminary Labor Peace Agreement covering labor disputes over the representation of employees by a labor organization, such as a neutrality agreement, that is designed to be supplanted by a comprehensive collective bargaining agreement;

(B) comprehensive collective bargaining agreement; or

(C) documenting that no labor organization requested a labor peace agreement or that a labor organization refused to negotiate a labor peace agreement in good faith.

(d) *Enforcement.* The Director may impose appropriate sanctions and remedies against a contractor for a violation of this Article as provided in applicable regulations or by contract, including termination for default.

27-64. Definitions.

(a) As used in this Article:

Awarding authority means any person that awards or enters into a service contract or subcontract with a contractor to be performed in the County. Awarding authority includes the County, but does not include a Federal, State, or municipal government, or a common ownership community, as defined in Section 10B-2(b).

Contractor means any person, including a subcontractor, which enters into a service contract to be performed in the County and employs more than 20 service employees in the entire company.

Director means the Executive Director of the Office of Human Rights and includes the Executive Director's designee.

Person means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ persons or enter into a service contract.

Service contract means a contract between an awarding authority and a contractor to provide security, janitorial, building maintenance, food preparation, or non-professional health care services in a facility located in the County which is used as a:

(1) private school;

(2) hospital, nursing care facility, or other health care provider;

(3) institution, such as a museum, convention center, arena, airport, or music hall;

(4) multi-family residential building or complex with more than 30 units; or

(5) commercial building or office building occupying more than 75,000 square feet.

Service contract also includes a contract awarded by the County for residential solid waste, recycling, or yard waste collection and disposal.

Service employee means an individual employed on a full or part-time basis by a contractor as a:

(1) building service employee, including a janitor, security officer, groundskeeper, door staff, maintenance technician, handyman, superintendent, elevator operator, window cleaner, or building engineer;

(2) food service worker, including a cafeteria attendant, line attendant, cook, butcher, baker, server, cashier, catering worker, dining attendant, dishwasher, or merchandise vendor;

(3) non-professional employee performing health care or related service; or

(4) a driver, helper, or mechanic performing services on a County contract for residential solid waste, recycling, or yard waste collection and disposal.

Service employee does not include:

(1) a managerial or confidential employee;

(2) an employee who works in an executive, administrative, or professional capacity;

(3) an employee who earns more than $30 per hour; or

(4) an employee who is regularly scheduled to work less than 10 hours per week.

Successor contractor means a contractor that:

(1) is awarded a service contract to provide, in whole or in part, services that are substantially similar to those provided at any time during the previous 90 days;

(2) has purchased or acquired control of a property located in the County where service employees were employed at any time during the previous 90 days; or

(3) terminates a service contract and hires service employees as its direct employees to perform services that are substantially similar, within 90 days after a service contract is terminated or cancelled.

(b) This Article does not limit the ability of an awarding authority to terminate a service contract or replace a contractor with another contractor.

Approved:

Hans D. Riemer, President, County Council Date

Approved:

Isiah Leggett, County Executive Date

This is a correct copy of Council action.

Megan Davey Limarzi, Esq., Clerk of the Council Date

LEGISLATIVE REQUEST REPORT

Bill 6-18

Contracts – Labor Peace Agreements – Displaced Service Workers - Amendments

DESCRIPTION: Bill 6-18 would:

(1) require certain County contractors to enter in to a labor peace agreement with a labor organization;

(2) establish minimum requirements for a labor peace agreement;

(3) require certain County multi-term contracts to include a minimum price increase provision; and

(4) add certain workers performing services under a County residential solid waste collection contract to the County Displaced Service Workers Protection Act.

PROBLEM: The potential interruption of services to County residents provided by private contractors due to concerted economic action or a lock-out during a labor dispute.

GOALS AND OBJECTIVES: The goal is to prevent concerted economic action or a lock-out that would interrupt a County service contract.

COORDINATION: Procurement, County Attorney

FISCAL IMPACT: To be requested.

ECONOMIC IMPACT: To be requested.

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: To be researched.

SOURCE OF INFORMATION: Robert H. Drummer, Senior Legislative Attorney

APPLICATION WITHIN MUNICIPALITIES: To be researched.

PENALTIES: Contract remedies.

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April 3, 2018

Testimony of CASA in SUPPORT of Bill 6-18

CASA writes to register testimony in support of Bill 6-18.

The largest immigrants' rights organization in the state of Maryland, CASA was founded in 1985 by community activists to address the human services needs of Central American refugees escaping wars and today serves almost 100,000 members, primarily Latino and West African, through a variety of programs and services. At CASA, we provide legal counsel and representation to low-wage immigrant workers in several areas, including labor and employment disputes. In addition, we operate six workers centers in Baltimore City, Montgomery, and Prince George's Counties to assist workers in gaining short-term and full-time employment.

Throughout the years, our staff attorneys have represented plaintiffs in hundreds of cases for unpaid wages, wage theft, involuntary servitude, and more. Our clients – low-wage workers many of whom do not speak English – are often taken advantage of and not paid properly for their work or misclassified as independent contractors. And, like trash hauling, they work in industries that represent the highest offenders for worksite industry in the country.

Montgomery County has taken important first steps to ensure that its decision to contract out trash disposal contracts do not result in poverty wages. By adopting living wage legislation for county contractors, then initiating efforts in 2016 to make those rights real through enforcement, Montgomery County has been a leader in adopting baseline wage and benefits requirements to protect contracted workers in low-wage sectors. In doing so, you ensure that when the County contracts with private companies to provide services for the government, you create quality jobs.

There are many reasons why the plight of trash haulers in the County is particularly acute for our members. First, CASA members, hired through our worker centers, have taken jobs with the companies that contract to the County. But more broadly, all of our 41,000 lifetime Montgomery County members see trash haulers as the most conspicuous Montgomery county fundamental service. They may never step into a library or file for a permit to add an addition to their house, but every week

their trash is hauled away by a workforce that looks very similar to them and their friends and family. How Montgomery County ensures fair treatment for our hardest working service employees sends a strong message to Montgomery County residents and taxpayers regarding the fundamental justice we afford lower-wage workers of color in one of the richest counties in the country.

Bill 6-18 would expand the wage and benefits protections in the County's living wage legislation by ensuring that, should the County switch companies, that existing workers would be hired by the new contractor. In this way, workers will not be held liable for the failure of their employer to successfully compete for County contracts. Secondly, CASA supports the capacity of the Director of Procurement to make a determination, as we assume she would in this case, that the sanitation contract be subject to labor peace standards. We believe it is a fundamental principle that County contracting dollars should never be used to fight unionization. CASA, as you know, is a County contractor. And proudly union. Through workplace satisfaction, the quality of our work is improved. I urge you to watch a video with interviews of trash haulers who are LIUNA members; you will hear a similar pride in producing a great service. But in the sanitation context, labor peace (binding arbitration and no strikes or lock-outs) is particularly important given the community-wide impact of disruption of service.

But perhaps most critically, the legislation as introduced includes important provisions that annually raise the contracted amount to cover increases in expenses associated with pay and benefits increases. We support an amendment that would increase the contracted amount to cover collective bargaining at a rate up to the amount by which the County is increasing the pay of its own workforce. On average, trash haulers working in the County make $23,000 a year for a helper and less than $34,000 for a driver. We can and should have policy debates about the affordability of housing, childcare, and more in the County. And a good place to start all of those conversations is by increasing workers' pay.

Testimony of Jhunio Medina
Before the Montgomery County Council on Bill 6-18
April 3, 2018

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Thank you Council President Riemer for holding this hearing on Bill 6-18. On behalf of LiUNA Local 11, I am here to testify in support of this bill. We also express deep thanks to Councilmembers Elrich and Hucker for introducing Bill 6-18.

My name is Jhunio Medina. I am a business agent with LiUNA Local 11. Our members include the drivers and helpers at Unity and Potomac Disposal. In fact, several members from Unity are here with me today. We are putting together a video of statements from these workers, which we will email to each of you.

Please watch the video, and listen to how important this bill is to our members.

Day in and day out, our members pick up the solid waste generated by County residents. On a typical day, our members service hundreds of households. Our members who are helpers run behind the trucks, lifting and emptying trash cans that can weigh 50 pounds or more when filled to the brim with refuse. It is a hard, dirty, and dangerous job. According to the US government, sanitation workers are more likely to die on the job than police officers, construction workers, or miners. Despite the danger, starting drivers at Unity and Potomac Disposal earn less than $34,000 a year, and new helpers earn less than $23,000 a year.

Bill 6-18 will help our members by extending the Displaced Service Workers Protection Act to cover the County's contracted-out sanitation work force. Potomac Disposal recently lost its County contract, and our 20 members there will become unemployed on April 28th. If Bill 6-18 were law now, our members at Potomac Disposal would have the option to keep their jobs and work for Unity. Instead, they are looking for work, filling out job applications, and hoping that something comes through for them. They are worried about feeding their families and paying their bills.

Bill 6-18 also provides the Director of Procurement with the flexibility to avoid strikes on essential service contracts like solid waste collection. Since 2013, our members have had to go on strike **five** times to achieve better wages and benefits. During these strikes, trash piled up across the County, angering residents. The bill allows the Director to require a labor peace agreement on essential service contracts, and include an annual price adjustment to cover associated costs.

We at LiUNA would like to suggest some revisions to this section of the bill. The suggested language, and our rationale, are provided below, which I will not read, but submit for the record.

Thank you for the opportunity to testify in support of Bill 6-18.

Lines 27-32 of Bill 6-18, suggested edit:
The County shall grant an increase in the contract price sufficient to reimburse the contractor for increased employment expenses incurred due to collective bargaining in each year of the agreement with the County, provided that the increase in employment expenses incurred by the contractor due to collective bargaining is materially comparable to the increases in compensation that the County has agreed to give its own employees in the prior twelve months.

Rationale for suggested edit:
LiUNA is concerned that, as currently drafted, employers have to agree to the level of pay increase *before* they can request a contract modification from the County. If employers are uncertain of reimbursement, it will be very difficult to negotiate increases. LiUNA suggests tying future wage increases where labor peace agreements apply to the compensation increases of the County's public employees. This creates budget certainty for the County because it will know the level of increase for which it will be responsible.

Testimony of Elbridge James
Before the Montgomery County Council on Bill 6-18
April 3, 2018

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Thank you Council President Riemer for holding this hearing on Bill 6-18. My name is Elbridge James. I am the past President of Progressive Maryland's Board of Directors, and past Director of the Maryland Black Family Alliance. I am also a former Vice President both the State and Montgomery County NAACP.

I am here to testify in support of Bill 6-18. Many years ago, Montgomery County made the decision to outsource its collection of residential trash, causing these jobs to deteriorate and become poverty level jobs. As a result of a union campaign in 2013, we learned that many of these contracted employees had been systematically cheated out of their wages, had no health insurance or retirement plan, and were forced to take unnecessary risks throughout the day in order to meet quotas. These terrible working conditions remind me of those that led to the Memphis sanitation strike back in 1968.

Refuse collection is one of the top five most dangerous jobs in the United States. According to the Bureau of Labor Statistics, the fatal injury rate for sanitation workers is higher than the rate for police officers, construction workers, and miners.

As a Montgomery County resident, community leader, and activist, I strongly support improving the pay and working conditions of our sanitation workers. It is appalling that we, in progressive and affluent Montgomery County, have not only contracted out these jobs, but also have allowed them to become low-paying ones that exploit brown and black workers.

Bill 6-18 is a step in the right direction. It extends Displaced Service Workers Protection Act to cover the County's contracted-out sanitation work force. This has two benefits. It will promote workplace safety and quality service delivery because the existing workforce is already trained and knows the routes. It also allows the sanitation workers the opportunity to keep their jobs and continue to provide for their families.

The bill also adds flexibility to the procurement system so that future sanitation strikes and other service disruptions can be avoided. Specifically, the bill grants the Director of Procurement the ability to determine whether a labor peace agreement with binding arbitration should apply to a County contract in order to avoid the disruption of essential services. If a labor peace agreement is required, then the contract would include an annual price increase to cover associated costs.

I would like to suggest that the language in this section of the bill be revised. As currently written, the workers and their representatives would need to convince an employer to agree to a pay increase *before* the contractor could request a contract modification. If the employer is not certain of reimbursement, it will be very difficult to obtain meaningful increases for these low wage workers. At the bottom of my testimony, for the record, I have included some suggested language that ties future wage increases where labor peace agreements apply to those collectively bargained by Montgomery County public employees.

Thank you for the opportunity to testify.

Suggested language for lines 27-32 of Bill 6-18:
The County shall grant an increase in the contract price sufficient to reimburse the contractor for increased employment expenses incurred due to collective bargaining in each year of the agreement with the County, provided that the increase in employment expenses incurred by the contractor due to collective bargaining is materially comparable to the increases in compensation that the County has agreed to give its own employees in the prior twelve months.

UFCW LOCAL 1994
Municipal & County Government Employees Organization

GINO RENNE PRESIDENT
YVETTE CUFFIE SECRETARY-TREASURER
NELVIN RANSOME RECORDER
WWW.MCGEO.ORG

Testimony of Amy Millar on MC 6-18, Contracts - Labor Peace Agreements - Displaced Service Workers

Thank you Council President Riemer for holding this hearing and Council members Elrich and Hucker for introducing Bill 6-18. My name is Amy Millar and I am submitting this testimony on behalf of the membership of UFCW Local 1994 MCGEO, which represents most of Montgomery County's general government employees. Over the last couple of years contract workers who work side have fought and organized to join our union. These workers clean County facilities and work side by side with County employees in HHS. We are now in protracted and often bitter negotiations with their employers fighting for better pay and benefits.

Contract employees are often seen as expendable and, when an awarded contract changes hands, many employees are displaced. Under the County's Displaced Workers Act, the County took a step in the right direction by requiring many of the County's contracts to offer protections to workers when a contract changes hands, but, the County can serve its contract workers better. Bill MC 6-18 is a necessary step in the right direction.

Contractors doing business with the County should be held to the highest standard. Labor Peace Agreements allow the County to ensure that its contractors are acting in the best interest of the County and to ensure that residents' tax dollars are not being spent on union avoidance activities, which are often coercive and deceptive.

This law would also protect County services and projects by insulating the employers from picketing, work stoppages, boycotts, or other economic interference from employees seeking representation while also ensuring that employers funded by the County negotiate with their employees in good faith. I can tell you that we are currently in negotiations with a contractor where we have had to file numerous Unfair Labor Practice charges with the National Labor Relations Board just to get the employer to the bargaining table.

I would like to echo suggestions that the bill be revised to tie future wages increases to those collectively bargained in our union contracts for Montgomery County employees.

The world exists on three things: truth, justice, and **peace**. ~ Hebrew Proverb

Local 1994 urges you to pass bill MC 6-18 with revision below.

The County shall grant an increase in the contract price sufficient to reimburse the contractor for increased employment expenses incurred due to collective bargaining in each year of the agreement with the County, provided that the increase n employment expenses incurred by the contractor due to collective bargaining is materially comparable to the increases in compensation that the County has agreed to give its won employees in the prior twelve months.

UNITED FOOD & COMMERCIAL WORKERS LOCAL 1994 600 SOUTH FREDERICK AVENUE SUITE 200 GAITHERSBURG, MD 20877 301-977-2447 800-948-0654 FAX 301-977-6752

VICE PRESIDENTS: FRANK BECKHAM JERRY BONAPARTE MARJORIE BROWN-NELSON MELBA CHAVARRIA JOSEPH DICKSON CASSANDRA HARPER TARA HUBER PAULETTE KEE-DUDLEY JAMES ROWE JOHN SMOAK MICHAEL TRIGIANI GILBERTO ZELAYA

Testimony of Chris Wilhelm
Montgomery County Council on Bill 6-18
April 3, 2018

My name is Chris Wilhelm and I am a proud union teacher with the Montgomery County Education Association. I am running for an At-Large seat on the Montgomery County Council to support workers and their struggles for higher wages, respect, and dignity. I would like to take the time to thank the Council for taking up such an important matter. Labor rights and the ability of workers to organize collectively has been under constant attack for nearly half a century.

It is fitting that this bill to improve the lives of sanitation workers is before the council at this time. We should all join together in honoring the 50th anniversary of the Memphis Sanitation Workers strike, a labor action that began after Echol Cole and Robert Walker were tragically crushed to death by a malfunctioning trash compactor while seeking shelter from the rain. The sanitation industry is still one of america's most dangerous professions, a problem made even worse by a lowest bid mentality in our contracting system that can all too often place profits over the needs of workers and the community at large. The Memphis strike is famous for its placards that stated "I Am a Man," with an explicit demand that the black sanitation workers should be treated with the same respect that any human deserves. The 1968 strike also became the final public appearance of Dr. Martin Luther King Jr. who was assassinated at his hotel room while standing in solidarity with those on strike. Sanitation workers have been at the forefront of movements for racial and economic justice for a very long time. I am proud to know that the workers of Potomac Disposal and Unity Disposal stand in that same tradition, though I am disappointed that we as a county have put them in a position where they have to do so.

This county has a moral obligation to ensure that the positions it privatized are not actively perpetuating poverty within our community. If the profits of Potomac Disposal and Unity Disposal are exclusively the result of paying their workers starvation wages, then we should re-examine our county's reliance of privatizing essential public services. With starting salaries as low as $23,000, there is no question where their profits come from. We must ask ourselves what it says about us and our values as a county that we pay poverty wages to black and brown workers, many of whom can no longer afford to live in the county they work in.

While Bill 6-18 does not address all of the systemic issues that face our county's sanitation industry, it provides organizing workers with some tools to address their inequities.The Displaced Service Worker Protection Act provision within the bill is essential to providing job security and workforce continuity. Displaced worker measures are an important way to guarantee service is not interrupted and the dedicated employees that work to make this county a better place can continue to have jobs even if the name on their paycheck changes.

I also encourage the council to adopt the following amendment, which addresses the concerns that in the current draft of the bill employers would have to agree to wage increases before being able to reopen their contract negotiations. The suggested language included below would fix this issue and would better position workers for bargaining.

Lines 27-32 of Bill 6-18, suggested edit:
The County shall grant an increase in the contract price sufficient to reimburse the contractor for increased employment expenses incurred due to collective bargaining in each year of the agreement with the County, provided that the increase in employment expenses incurred by the contractor due to collective bargaining is materially comparable to the increases in compensation that the County has agreed to give its own employees in the prior twelve months.

Thank you for the opportunity to share my opinions on this matter. I wish the best of luck to both the Council and the workers in passing this crucial bill.

TESTIMONY ON BEHALF OF COUNTY EXECUTIVE ISIAH LEGGETT ON BILL 6-18, CONTRACTS – LABOR PEACE AGREEMENTS – DISPLACED SERVICE WORKERS - AMENDMENTS

Good Afternoon, Council President Reimer, and Members of the Council. My name is Cherri Branson. I am the Director of the Office of Procurement, and I am here today to testify on behalf of County Executive Isiah Leggett on Bill 6-18.

Bill 6-18 would require County contractors who provide direct services to County residents under contracts with a value of $250,000 or more to enter into a labor peace agreement with a labor organization. The Director of Procurement would be required, before issuing a solicitation, to determine whether a Labor Peace Agreement would be in the best interest of the County, and if so, recommend inclusion of such provision to the Chief Administrative Officer. If directed by the CAO, the provision must be included in the solicitation.

The Bill also would require multi-term contracts with a labor peace agreement to include an annual contract price increase of at least the annual average increase in the Consumer Price Index for the previous year. The Bill also adds trash hauling contracts to the Displaced Service Workers Protection Act.

The County Executive supports the right of workers to enter into collective bargaining agreements. Additionally, the County Executive supports the right of the employee of every County contractor to receive the wage required under the County's living wage law. That support has been demonstrated by the wage enforcement actions of the Office of Procurement. In FY16, the Office of Procurement recovered over $190,000 for 300 workers, and in FY17 $50,000 for 95 workers, who had been underpaid while working on County service contracts. Additionally, the Office of Procurement, has recovered $140,000 under the Prevailing Wage Law for workers on County construction contracts. Further, in recently awarded trash hauling contracts, four of the five new contracts were awarded to vendors who have collective bargaining agreements in place.

While the County Executive supports and enforces the right of each person who works on a County contract to earn a fair wage, have safe working conditions and organize to join a union, he cannot support this Bill in its current form.

Although it is our understanding that the Bill may have been directed to vendors with trash hauling contracts, the language in the Bill is so broad that it would apply to hundreds of County contracts. The Bill would apply to contracts "to provide services directly to County residents…". The Bill does not define "directly." Additionally, there is no minimum number of employees creating a threshold for application of the Bill, as is the case in most bills that affect the rights, duties or benefits of workers. The Office of Procurement has identified over 666 contracts that could be considered "covered" because these contracts are for services and have a "value equal to or greater than $250,000." Without further definition to narrow the scope, the Office of Procurement would have to undertake an analysis of each

of these 666 contracts to determine which contracts should be recommended for inclusion of a Labor Peace Agreement.

Further, by requiring the County to provide for an annual CPI increase for all contracts under a Labor Peace Agreement, the Bill will increase the cost of contracting for the County. Currently, there is no automatic price increase in County contracts. If a vendor, which has negotiated a price, finds that it can no longer provide the service at the negotiated price, the vendor may seek a price adjustment. The request for a price adjustment must be supported with documentation explaining the need for the price increase. Increased labor costs may be included in such documentation. The Bill, however, does not require that that automatic CPI price increases will be passed on workers.

It is also not clear how the automatic CPI increase would be funded. In FY18, DHHS has about 110 contracts with a value of $250k or greater, most of them with nonprofit organizations. In many instances, these are contracts that provide direct health and social support services to the most vulnerable members of our community. If the Bill goes into effect, DHHS and every other agency will face budgetary pressure to increase the CPI in contracts each year without a guarantee that the County budget can deliver an increase in appropriations. An automatic CPI without an increased appropriation for every agency that has service contracts may require internal agency funding shifts that adversely affected service delivery.

In our view, this Bill will likely increase costs to potential vendors, and thus possibly deterring well-qualified vendors from bidding. This could reduce the already small pool of vendors, in the case of trash haulers, drive up costs to the County. If the intent of this legislation is to offer worker protections such as wages, benefits and employment security, those could be extended by making them requirements of the contract.

The Bill also would amend definitions contained in certain provisions of the Displaced Service Workers Protection Act with the intent of including the employees of trash collection companies within the group of workers who may seek to be retained if a service contract is terminated or cancelled. It is unclear, however, whether this definitional change will also entitle this new group of workers to seek other forms of relief through the Office of Human Rights. Effective enforcement is difficult without clear legislative direction.

Finally, the County Attorney Office has some legal concerns. A number of federal courts have struck down state and local laws that broadly required government contractors to enter into labor peace agreements with their employees as preempted by the National Labor Relations Act. In addition, the requirement that a contractor "remain neutral" to its employees' union organizing may also violate the First Amendment.

Thank you for the opportunity to present the County Executive's position on the Bill. We look forward to working with the Council to modify this Bill to clarify its coverage and eliminate the potential of negative collateral impacts on the County's ability to retain a competitive pool of vendors, maintain predictable contract prices, and assure service delivery to county residents.

CPI for Refuse/Recycling Contracts

Company	Contract #	Area	Percentage	Year
Ecology	0808000126	8	1.2%	2013
Ecology	0808000126	8	2.2%	2014
Ecology	0808000126	8	0.2%	2015
Ecology	0808000124	6	1.9%	2013
Ecology	0808000124	6	1.7%	2014
Ecology	0808000124	6	0.2%	2015
Ecology	1000544	9	2.8%	2013
Ecology	1000544	9	1.2%	2014
Ecology	1000544	9	1.3%	2015
Ecology	1000544	9	0.5%	2016
Ecology	1000544	9	1.73%	2018
Ecology	0808000028	12	1.4%	2012
Ecology	0808000028	12	1.9%	2013
Ecology	0808000028	12	1.7%	2014
Ecology	0808000028	12	0.2%	2015
Ecology	0808000011	10	1.4%	2012
Ecology	0808000011	10	1.9%	2013
Ecology	0808000011	10	1.7%	2014
Ecology	0808000011	10	0.2%	2015
Ecology	0808000036	11	1.4%	2012
Ecology	0808000036	11	1.9%	2013
Ecology	0808000036	11	1.7%	2014
Ecology	0808000036	11	0.2%	2015
Ecology	0808000026	13	1.4%	2012
Ecology	0808000026	13	1.9%	2013
Ecology	0808000026	13	1.7%	2014
Ecology	0808000026	13	0.2%	2015

CPI for Refuse/Recycling Contracts

Company	Contract #	Area	Percentage	Year
Unity	1074846	2	New Contract	
Unity	1005672	3	0.6%	2016
Unity	1005672	3	0.8%	2017
Unity	0808000125	7	0.6%	2016
Unity	0808000125	7	0.8%	2017
Unity	9808000141	2	2.8%	2012
Unity	9808000141	2	1.2%	2013
Unity	9808000141	2	0.6%	2014
Potomac	0808000122	1	1.4%	2013
Potomac	0808000123	4	No Request	

OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Marc P. Hansen
County Attorney

MEMORANDUM

TO: Cherri Branson, Director
Office of Procurement

FROM: Edward B. Lattner, Chief
Division of Government Operations

DATE: May 1, 2018

RE: **Bill 6-18, Contracts - Labor Peace Agreements - Displaced Service Workers - Amendments**

The National Labor Relations Act (NLRA) preempts local regulation of labor activities protected by the NLRA, but a local government is not preempted when it acts as a market participant rather than a market regulator. Bill 6-18 provides that, in each "contract to provide services directly to County residents with a value equal to or greater than $250,000," the Procurement Director must consider whether it would be in the County's best interest to require the contractor to enter into a labor peace agreement with its employees. I believe that the Bill 6-18 is not preempted by the NLRA because, on balance, it would have the County act more as a market participant, determining whether a labor peace agreement is in the County's best interest on a contract-by-contract basis, rather than as a market regulator, globally mandating a labor peace agreement as an element of all contracts to provide services directly to County residents. I have suggested some edits below that would strengthen this conclusion.

However, a provision of the Bill requiring that a County contractor "remain neutral to union organizing" should be deleted as it likely violates the First Amendment, a concept that is embodied in the NLRA's policy of encouraging free debate on issues dividing labor and management.

I. BILL 6-18 SUMMARY

Bill 6-18 has three main components. First, it would authorize the Chief Administrative Officer (CAO) to require a contractor awarded a covered contract to enter into a labor peace agreement with a labor organization. Second, the Bill would also require a multi-term contract that requires a labor peace agreement to include an annual contract price increase after the first year of at least the increase in the appropriate Consumer Price Index. Third, it would amend the

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Displaced Service Workers Protection Act (Bill 19-12), by adding County contractors who provide residential solid waste, recycling, or yard waste collection disposal services to the list of contractors that must offer employment to a former contractor's non-management employees for at least 90 days after entering into a new contract with the County.

A. The Labor Peace Agreement Provisions Of Bill 6-18.

The labor peace agreement provisions of Bill 6-18 are well summarized in the Council staff packet. First, the Bill would authorize the Chief Administrative Officer (CAO) to require a contractor awarded a covered contract to enter into a labor peace agreement with a labor organization. A covered contract is defined as a County contract to "provide services directly to County residents with a value equal to or greater than $250,000." A "labor peace agreement" means:

> a written contract between an employer and a labor organization that represents or is seeking to organize that employer's employees that includes a provision:
>
> (a) prohibiting the labor organization and all employees covered by the agreement from engaging in any concerted economic action with the employer for the duration of the County contract;
> (b) prohibiting the employer from engaging in a lock-out of the employees performing services under a County contract for the duration of the County contract; and
> (c) requiring that all labor disputes be resolved through final and binding arbitration.

If the CAO requires a labor peace agreement in the contract documents, the contractor awarded the contract must comply within 60 days after the later of receipt of the notice of award or the receipt of a notice from a labor organization that represents its employees or seeks to represent its employees requesting a labor peace agreement. The contractor can satisfy this requirement by:

1. executing a preliminary labor peace agreement covering labor disputes over the representation of employees by a labor organization, such as a neutrality agreement, that is designed to be supplanted by a comprehensive collective bargaining agreement;
2. executing a comprehensive collective bargaining agreement; or
3. documenting that no labor organization has requested a labor peace agreement.

Finally, a neutrality agreement is "an agreement between an employer and a labor union where the employer promises to remain neutral to union organizing, grants union representatives access to the employer's property in exchange for the union's promise to forgo its right to picket,

boycott, or otherwise pressure the employer's business."

B. Contracts Potentially Covered.

The Office of Procurement has identified more than 600 service contracts with a value equal to $250,000 or greater. Procurement has not yet identified how many of these contracts "provide services directly to County residents" and would therefore be subject to the labor peace provisions of the Bill.

C. Labor Peace History With Trash Hauling And Recycling Contractors.

The Council staff packet indicates that the County currently has 13 different trash hauling or recycling contracts covering 13 different areas of the County. These 13 different contracts are held by 4 different contractors. Over the last 5 years, the County has experienced 4 labor disruptions of service on its trash hauling and recycling contracts. These service disruptions all occurred in 2013 and 2014. There have been no other no other labor strikes affecting trash hauling or recycling contracts since January 2014.

II. PREEMPTION

A. *Garmon* and *Machinists* Preemption

Although the NLRA has no express preemption provision, federal courts have long recognized two types of preemption as necessary to implement federal labor policy. The first, known as *Garmon* preemption, *see San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), "is intended to preclude state interference with the Nation Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA." *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 65 (2008) (internal quotation omitted).[1] "To this end, *Garmon* preemption forbids States to "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Id.* (internal quotation omitted). *Garmon* preemption "forbids state and local regulation of activities that are protected by § 7 of the NLRA [codified at 29 U.S.C. § 157, giving workers right to organize and collectively bargain] or constitute an unfair labor practice under § 8 [codified at 29 U.S.C. § 158, identifying unfair labor practices by employers]." *Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224-25 (1993) ("*Boston Harbor*"). *Garmon* preemption "prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Wisc.*

[1] In *Garmon*, the Supreme Court held that a state court was precluded from awarding damages to employers for economic injuries resulting from peaceful picketing by labor unions that had not been selected by a majority of employees as their bargaining agent.

Dep't of Indus., Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 286 (1986).[2]

The second type of preemption, known as *Machinists* preemption, *see Machinists v. Wisc. Emp't Relations Comm'n*, 427 U.S. 132 (1976), "forbids both the National Labor Relations Board and States to regulate conduct that Congress intended to be unregulated because left to be controlled by the free play of economic forces." *Brown*, 554 U.S. at 65 (internal quotation and citation omitted).[3] "*Machinists* preemption is based on the premise that Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes." *Id.* (internal quotation omitted).[4]

B. The Market Regulator/Participant Distinction

Local governments are not preempted under the NLRA when they are acting as a market participant, rather than a market regulator.

> When we say that the NLRA preempts state law, we mean that the NLRA prevents a State from regulating within a protected zone, whether it be a zone protected and reserved for market freedom, *see Machinists*, or for NLRB jurisdiction, *see Garmon*. A State does not regulate, however, simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to preemption by the NLRA, because preemption doctrines apply only to state regulation.

Boston Harbor, 507 U.S. 218, 226–27 (1993).

For example, in *Golden State I*, 475 U.S. 608 (1986), the Court held that Los Angeles could not condition renewal of a taxicab franchise upon settlement of a labor dispute but, in *Boston Harbor,* the Court wrote that "a very different case would have been presented [in *Golden State I*] had the city of Los Angeles purchased taxi services from Golden state in order to transport city employees." *Boston Harbor*, 475 U.S. at 227. Thus, in *Boston Harbor*, the Court held that the NLRA did not preclude a state agency supervising a construction project from

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[2] In *Gould*, *Garmon* preemption served to invalidate a state law that disqualified from doing business with the state persons who have violated the NLRA three times within a five year period.

[3] In *Machinists*, the Court held that a state could not designate as an unfair labor practice a concerted refusal by a union and its members to work overtime because Congress did not mean such self-help activity to be regulable by the states. In *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*), the Court applies *Machinists* preemption to hold that Los Angeles was preempted from conditioning renewal of a taxicab operating license upon the settlement of a labor dispute.

[4] In *Brown*, the Court invalidated under *Machinists* preemption a state law that prevented grant recipients and private employers receiving more than $10,000/year from the state from using that money for or against union organizing.

requiring that contractor abide by a labor agreement to assure labor stability over the life of the project. In finding that the state agency had acted as a market participant, the Court stressed that the challenged action "was specifically tailored to one particular job," and aimed "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Boston Harbor*, 475 U.S. at 232.[5]

1. Acting by regulation v. contract.

It is tempting to say that the government acts as a market regulator when it acts by law or regulation and it acts as a participant when it acts under a specific contract. But, as the Third Circuit has noted, that is not always the case.

> We begin by rejecting the notion that the line between regulation and proprietary action can be drawn simply by determining whether the state seeks to affect labor relationships through mandatory or prohibitive regulation on the one hand, or through the coercive effect of government's spending power on the other. The mere fact that government affects labor relations by imposing conditions under its power to procure or to spend does not automatically mean that the state is acting in a proprietary capacity that is immune from preemption review.
>
> * * *
>
> Accordingly, the line between state regulation that is subject to preemption and market participation that escapes preemption must be drawn more finely than by simply distinguishing between regulation through mandatory laws and regulation achieved through the spending or procurement power.

Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hosp. Res., LLC, 390 F.3d 26, 213-14 (3rd Cir. 2004). The court in *Sage* wrote that "other appellate courts that have examined the regulator/market-participant distinction also focus on the fit between the challenged state requirement and the state's proprietary interest in a particular project or transaction." *Id.* at 214.

> In *Chamber of Commerce of the United States v. Reich*, the D.C. Circuit addressed an Executive Order barring the federal government from contracting with employers who hire permanent replacements during a lawful strike. 74 F.3d 1322 (D.C. Cir. 1996). The Executive Order swept broadly, effectively forcing companies doing business with the federal government to avoid "permanent replacements even if the strikers are not the employees who provide the goods or services to the government." *Id.* at 1338. Indeed, even subsidiaries that did not do

[5] In *Gould*, the law broadly disqualified firms with multiple past labor law violations from doing business with the state. The government was found to be acting as a market regulator because the predicate violations were historical and were not limited to transactions with the state itself. Thus, the statute was not related to the state's proprietary interest in ongoing projects but was simply punitive.

> business with the government would be forced to comply with the order if an affiliated business organization sought a federal contract. As in *Gould*, this was a procurement condition that reached far more widely than what would be necessary to protect against disruption of those contracts in which the government had a direct proprietary interest. Not surprisingly, therefore, the D.C. Circuit held that the Executive Order was a regulatory effort "to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers." *Id.* at 1337. Preemption analysis therefore applied.
>
> In *Building & Construction Trades Department v. Allbaugh*, however, the D.C. Circuit declined to find preemption applicable to a much more specific Executive Order that required federal agencies and private entities to maintain neutrality regarding project labor agreements in federally funded construction contracts. 295 F.3d 28 (D.C. Cir. 2002). Even though the Executive Order applied to all federally funded contracts, it applied only to those contracts. The Order did not speak to the behavior of contractors on other, nongovernment projects. The D.C. Circuit reasoned that "[b]ecause the Executive Order does not address the use of [project labor agreements] on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as 'regulatory.'" *Id.* at 36. Preemption analysis, therefore, did not apply.

Sage, 390 F.3d at 214-15 (3d Cir. 2004) (footnote omitted).

2. The *Sage* two-step test.

The court in *Sage* fashioned a two-step test for determining whether a government's condition of funding constitutes market participation that falls within the *Boston Harbor* exception to preemption.

> First, does the challenged funding condition serve to advance or preserve the state's proprietary interest in a project or transaction, as an investor, owner, or financier? Second, is the scope of the funding condition "specifically tailored" to the proprietary interest? *Boston Harbor*, 507 U.S. at 232, 113 S. Ct. 1190. If a condition of procurement satisfies these two steps, then it reflects the government's action as a market participant and escapes preemption review. But if the funding condition does not serve, or sweeps more broadly than, a government agency's proprietary economic interest, it must submit to review under labor law preemption standards. We think this test faithfully embodies the teachings of *Gould* and *Boston Harbor*, and is consistent with the approaches taken by our sister circuits.

Sage, 390 F.3d at 216 (3rd Cir. 2004).[6] In the case before it, the *Sage* court upheld a city ordinance that conditioned the grant of tax increment financing for a hotel development project upon recipient's agreement to enter into a labor peace agreement with employees hired to staff hospitality operations. The ordinance was not unduly broad in promoting and protecting the city's proprietary interest in the project. The city was acting as market participant and therefore exempt from preemption review.

Lower and appellate court decisions illustrate the application of the regulatory/proprietary distinction. In *Associated Builders & Contractor of Rhode Island, Inc. v. City of Providence*, 108 F.Supp.2d 73 (D.R.I. 2000), the court struck down under *Machinists* preemption a city ordinance requiring developers to execute and enforce project labor agreements in exchange for favorable tax treatment on private construction projects. The court found that the city was acting as market regulator. "The City's action in this case is not limited to one particular project, but is rather a policy to be implemented on several projects. This distinction has been important to courts refusing to apply the market participant exception, because a policy, regardless of the motive behind it, is more 'regulatory' than 'proprietary' in nature than a single contracting or, in this case, a taxing decision." *Id.* at 85. *See also Associated Builders and Contractors Inc. N.J. Chapter v. City of Jersey City*, 836 F.3d 412 (3rd Cir. 2016) (city acted as regulator when offering tax exemptions to private developers who entered into peace labor agreements with labor unions because the city had no proprietary interest in these projects).

If a local ordinance is not specifically tailored to preserve the locality's proprietary interest in an underlying project, the locality will likely be found to be acting in a regulatory rather than proprietary manner, **even where local action is limited in scope to governmental contracts**. In *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005), the court struck down a county ordinance governing businesses the county hired to provide transportation and other services to elderly and disabled residents. The Seventh Circuit held that the county was acting as a market regulator and its ordinance was preempted by the NLRA. *Id.* at 282. The ordinance required those businesses to sign labor peace agreements, but it also imposed several additional conditions favorable to union organizing and did little to avoid service interruptions. *Id.* at 278, 281. The court rejected the county's argument that the ordinance was proprietary, in large part because the ordinance's impact would not be restricted to contracts with the county. *Id.* at 279–82. For example, the ordinance prohibited contractors from scheduling meetings designed to discourage any of their employees from joining a union, regardless of whether those employees worked on county contracts. *Id.* at 280. The Seventh Circuit also reasoned that the county could have achieved its goal of avoiding service interruptions by other means, *id.* at 282, and that several of the requirements it imposed focused on union organizing in particular. *Id.* at 278, 280–81.

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[6] The Ninth and Sixth Circuit apply the two-step test disjunctively, as two alternate methods, either of which is sufficient to demonstrate non-regulatory market participation. The Third Circuit's opinion in *Sage* suggests that the government must satisfy both steps of the test to be proprietary. *See Allied Construction Industries v. City of Cincinnati*, 879 F.3d 215, 221 6th Cir. 2018).

In contrast, the Ninth Circuit ruled that Los Angeles, in its capacity as proprietor of Los Angeles International Airport, could require service providers at the airport to enter into labor peace agreements with their employees. *Airline Service Providers Assoc. v. Los Angeles World Airports*, 873 F.3d 1074 (9th Cir. 2017). The court found that the city requirement met the two-prong test set out in *Sage*. First, the challenged governmental action was undertaken in pursuit of the efficient procurement of needed goods and services, as one might expect of a private business in the same situation. Second, the narrow scope of the challenged action defeated any inference that its primary goad as to encourage a general policy rather than to address a specific proprietary problem.

C. Analysis

Bill 6-18 is not neatly categorized as regulatory or proprietary. It would, of course, be a local law, which, absent further analysis might suggest that the County is acting in a regulatory fashion. But Bill 6-18 does not broadly require that all County employers enter into labor peace agreements with their employees. Nor does it broadly require that all County contractors enter in labor peace agreements with their employees. The reach of Bill 6-18 is limited to those County contracts (to provide services directly to County residents with a value equal to $250,000 or greater) where the CAO determines that it would be in the County's best interest after considering a variety of statutory factors. Bill 6-18 merely compels the CAO's consideration of a labor peace agreement, not its imposition.

However, the scope of the law must be specifically tailored to advance the County's proprietary or economic interest in making sure that services contracted for are delivered. Again, the law will be deemed regulatory (and therefore preempted) to the extent to strays beyond the County's narrow proprietary/economic interests and is seen as advancing a broader labor policy.

I believe that any regulatory aspects of the bill can be minimized (and the proprietary aspects strengthened) with amendments to § 11B-90 (lines 55-65) that limit the imposition of a labor peace agreement to the contractor's employees who are actually performing services under a covered contract.

> Labor peace agreement means a written contract between an employer and a labor organization that represents or is seeking to organize that employer's employees that includes a provision:
> (a) prohibiting the labor organization and all employees [covered by the agreement] performing services under a covered contract from engaging in any concerted economic action with the employer for the duration of the County contract;
> (b) prohibiting the employer from engaging in a lock-out of the employees performing services under a [County] covered contract for the duration of the County contract; and
> (c) requiring that all labor disputes between the employer and the employees

performing services under a covered contract be resolved through final and binding arbitration.

The Council might think about adding the following to the list of factors in § 11B-91(a) that the CAO should consider in deciding whether to impose a labor peace agreement requirement: "any history of labor strife in the County in the provision of the services to be contracted for."

Finally, §11B-91(c)(2) (lines 100-09) should be amended as follows:

(2) The contractor may satisfy this requirement by executing a:
(A) preliminary Labor Peace Agreement covering labor disputes over the representation of employees performing services under a covered contract by a labor organization, such as a neutrality agreement, that is designed to be supplanted by a comprehensive collective bargaining agreement;

III. FIRST AMENDMENT

A requirement that an employer remain neutral to union organizing, to the point where it cannot even spend its own funds to express its viewpoint, likely runs afoul of the First Amendment's guarantee of freedom of speech. As noted above, Bill 6-18 provides that a contractor can satisfy the labor peace agreement requirement by executing a "preliminary Labor Peace Agreement covering labor disputes over the representation of employees by a labor organization, such as a neutrality agreement, that is designed to be supplanted by a comprehensive collective bargaining agreement." A neutrality agreement is defined as "an agreement between an employer and a labor union where the employer promises to remain neutral to union organizing, grants union representatives access to the employer's property in exchange for the union's promise to forgo its right to picket, boycott, or otherwise pressure the employer's business."

A. The Unconstitutional Conditions Doctrine

Under what has come to be known as the "unconstitutional conditions" doctrine, the government cannot deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech, even if he has not entitlement to that benefit. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006). The Supreme Court has drawn a distinction "between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*,570 U.S. 205, 214 (2013). The Court has acknowledged that "the line is hardly clear." *Id.* at 216.

Phrased alternatively, the Court has written that "our 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. 173, 197 (1991). For example, in *Rust*, the government prohibited federal Title X health care funds from being used in programs where abortion is a method of family planning. Implementing regulations required grantees to ensure that their Title X projects were physically and financially separate from their other projects that engaged in the prohibited activities. The Court rejected a First Amendment challenge to the program, writing that "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." *Id.* at 196. While a Title X funded **project** could not advocate abortion, a Title X **grantee** could continue to engage in abortion advocacy. *Id.* at 196-97. *See also Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983) (upholding requirement that a nonprofit organization seeking tax-exempt status under 26 U.S.C. § 501(c)(3) not engage in substantial efforts to influence legislation because that organization could separately incorporate as a § 501(c)(4) organization and undertake all its lobbying activities in that capacity).

In *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), by contrast, the Court struck down a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private funds. Even a station receiving only one percent of its overall budget from the Federal Government, the Court explained, was "barred absolutely from all editorializing." *Id.* at 400. Unlike the situation in *Regan*, the law provided no way for a station to limit its use of federal funds to non-editorializing activities, while using private funds "to make known its views on matters of public importance." *Id.* The prohibition thus went beyond ensuring that federal funds not be used to subsidize "public broadcasting station editorials," and instead leveraged the federal funding to regulate the stations' speech outside the scope of the program. *Id.* at 399 (internal quotation marks omitted). *See generally Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 215–16 (2013).

To the extent Bill 6-18 would require a contractor to remain neutral to union organizing, even when using its own resources, it violates the First Amendment.

B. Preemption

Even if Bill 6-18 was amended to prohibit the use of **County funds** to advocate for or against union organizing in the hopes of passing muster under the First Amendment, it might still be preempted under the NLRA.

The legislative history of the NLRA reflects Congresses' strong support for free speech on labor relations issues. Shortly after enactment of the NLRA in 1935, the NLRB determined that an employer's attempts to persuade employees not to join a union—or to join one favored by the employer rather than a rival—amounted to a prohibited practice under § 8 of the NLRA. The

NLRB concluded that § 8 demanded complete employer neutrality during organizing campaigns because any partisan employer speech about unions would interfere with employees' § 7 rights to organize. Although Supreme Court decisions sought to curtail the NLRB's "aggressive interpretation" of the NLRA, the NLRB continued to regulate employer speech in a rather restrictive fashion. *Brown*, 554 U.S. at 66-67.

Concerned that the NLRB's interpretation pushed the labor relations balance too far in favor of unions, Congress amended the NLRA in 1947 with the Labor Management Relations Act (Taft-Hartley Act). The amendment modified § 7 to recognize that employees "have the right to refrain from any or all" § 7 organizing activities, and it added § 8(b) to prohibit unfair labor practices by unions. In addition, it added a provision in § 8(c) to protect speech by both unions and employers from regulation by the NLRB:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

The Supreme Court has written that, while "from one vantage, § 8(c) merely implements the First Amendment," *Brown*, 554 U.S. at 67 (internal citation and quotation omitted), the Taft-Hartley Act actually represents something more.

> But its enactment also manifested a congressional intent to encourage free debate on issues dividing labor and management. It is indicative of how important Congress deemed such free debate that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes, stressing that freewheeling use of the written and spoken word has been expressly fostered by Congress and approved by the NLRB.

Brown, 554 U.S. at 67-68 (internal quotations and citations omitted). In *Brown*, the Court wrote that the § 7 right of employees to refuse to join unions "implies an underlying right to receive information opposing unionization. And the addition of § 8(c) "expressly precludes regulation of speech about unionization so long as the communication does not contain a threat of reprisal or force or promise of benefit." *Id.* at 68.

In *Brown*, the Supreme Court invalidated a California law that prohibited the use of state money by employers to promote or deter union activities. The Court turned aside the state's argument that the limitation on the use of state funds was not preempted by the NLRA because it was permissible under the First Amendment.

> The question, however, is not whether [the state law] violates the First Amendment,

> but whether it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the NLRA. Constitutional standards, while sometimes analogous, are not tailored to address the object of labor preemption analysis: giving effect to Congress' intent in enacting the Wagner and Taft–Hartley Acts. Although a State may choose to fund a program dedicated to advance certain permissible goals, it is not permissible for a State to use its spending power to advance an interest that—even if legitimate in the absence of the NLRA—frustrates the comprehensive federal scheme established by that Act.

Brown, 554 U.S. 60, 73–74 (2008) (internal citations and quotations omitted). Therefore, the constitutionality of this provision, even if limited to the use of County funds, is questionable.

IV. OTHER

Other suggested changes:

Line 53: "principle" should be "principal."

Line 68-69: use the defined term "labor organization" rather than introducing a different term ("labor union").

Section 11B-91(c)(1)(B) (lines 91-99):

> (1) If the covered contract documents require a labor peace agreement, the contractor awarded the contract must execute a labor peace agreement with a labor organization within sixty (60) days after the later of:
>
> (A) receiving the notice of award from the County; or
>
> (B) receiving a request for a labor peace agreement from a labor organization that already represents [its employees] or seeks to represent the employees performing [the work] <u>services</u> under the [County] <u>covered</u> contract.

ebl

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