

Local Hiring and First Source Hiring Policies

A National Review of Policies and Identification of Best Practices

By

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INTRODUCTION

Many cities have adopted local hiring or first source hiring policies to leverage their public works and community development resources to increase employment opportunities for their residents. The City of Pittsburgh has had one such policy (Pittsburgh Works!) on its books since 2000, one year after voters approved an amendment to the City Charter requiring that at least 35% of all employee work hours on City-funded construction projects be performed by City residents. Unfortunately, Pittsburgh Works! has never been implemented. There are many possible reasons for this, including the failure to task a City department with implementation and enforcement and to provide the necessary resources to carry out those functions, the failure to link implementation with the City's existing workforce development system, and a state law that prohibits application of the ordinance to certain state-funded projects.¹

Regional Housing Legal Services (RHLS) was asked by Councilman Lavelle to provide legal research and legislative drafting to develop one or more legally defensible, effective proposed ordinances designed to maximize employment opportunities for Pittsburgh residents, particularly those with barriers to employment, on City-funded development projects in Pittsburgh. As a first step in that process, we reviewed municipal hiring ordinances and policies throughout the United States, with particular focus on disadvantaged workers, targeted neighborhoods, project labor agreements, apprenticeship/on-the-job training components, and post-construction employment. We also consulted various other resources, including a 2005 analysis of first source hiring programs conducted by the National Economic Development and Law Center (NEDLC),² performance reports prepared by various first source programs, and program staff and others who are familiar with the implementation of local hiring or first source hiring policies in cities that were identified as potentially representing best practices.

This paper provides an overview of local hiring and first source hiring policies throughout the country, and an identification of what appear to be best practices. In this paper, *local hiring* will be used to refer to policies that require covered employers to hire a certain percentage of city residents, and *first source hiring* will refer to policies that specify a procedure that employers must use to maximize local hiring – namely, giving a city-based or neighborhood-based job referral center the first opportunity to refer qualified candidates for available positions. Examples of local hiring policies include Section 3 of

¹ Section 2003 of the Act of October 30, 2000 (P.L. 616, No. 85) states that “No political subdivision or authority in a county may enter into any contract related to a redevelopment capital assistance project as provided under section 318 of the act of February 9, 1999 (P.L.1, No.1), known as the “Capital Facilities Debt Enabling Act,” which contains a provision requiring that a specified percentage of a contracting party's work force be residents of a specific municipality.” This effectively preempts the application of Pittsburgh Works! local hiring requirements to RACP-funded projects.

² SALAFAI SUAFAI & TARECQ AMER, NAT’L ECON. DEV. & LAW CTR., CITY OF DENVER: FIRST SOURCE HIRING AGREEMENTS (2005).

the U.S. Housing and Community Development Act of 1968³ and Pittsburgh Works! The best-known example of a first source hiring policy is Portland, Oregon, which established its policy in 1978, the first municipality to do so.⁴ Many cities throughout the country have adopted hybrid policies, including Boston, San Francisco, and Washington, DC.

LOCAL HIRING/FIRST SOURCE HIRING POLICY FEATURES

Though local hiring and first source policies vary according to the needs of local jurisdictions, many of them share the following features:

Coverage. Most cities apply local hiring or first source hiring requirements to all city departments that award contracts or development subsidies, although many apply to construction only, not to post-construction jobs. Coverage thresholds range from no minimum dollar amount (St. Louis, Hartford, Portland) to \$400,000 (San Francisco). Some cities use a minimum square footage (e.g., Hartford, which applies to all city-funded projects of 40,000 square feet or more). San Francisco and Washington, D.C. have minimum thresholds for local hiring but not first source hiring.⁵ East Palo Alto covers construction and post-construction jobs on development projects receiving \$50,000 or more in city funds.⁶ Los Angeles covers contracts receiving more than \$25,000 in city funds, with an exception for contracts for public works, which are subject to separately negotiated project labor agreements.⁷

Resident Hiring Goal. Most first source hiring policies include local hiring goals. According to NEDLC, those with goals show a greater rate of employing residents than those without.⁸ Goals range from aspirational goals requiring good faith efforts to binding minimum requirements, and are generally stated either as a percentage of new hires or a percentage of total hours worked. Section 3, enforced by the U.S. Department of Housing and Urban Development (HUD), requires that at least 30% of all new hires be low-income residents of the area where the HUD-funded project is located, and in at least one case, HUD interpreted this to mean that at least 30% of all hours worked by new hires must be worked by low-income residents.⁹ San Francisco requires that at least 50% of all work hours across all trades on covered construction projects be worked by city residents, phased in over a 7-year period.¹⁰ Contractors

³ Section 3 requires employers on HUD-funded projects to provide training, employment and contracting opportunities to low income residents of the area where the HUD-funded project is located, to the greatest extent feasible. 12 U.S.C. §1701u.

⁴ FRIEDA MOLINA, CENTER FOR COMMUNITY CHANGE, MAKING CONNECTIONS: A STUDY OF EMPLOYMENT LINKAGE PROGRAMS 20 (1998).

⁵ San Francisco requires first source hiring on all residential projects of 10 or more units and all commercial projects of more than 25,000 square feet; Washington D.C. requires first source hiring on all government-assisted contracts. SF First Source Hiring Program, §83.4(p) and (q); D.C. Official Code §2-219.03 (2013).

⁶ EAST PALO ALTO REDEVELOPMENT AGENCY, FIRST SOURCE HIRING AND LOCAL BUSINESS ENTERPRISE POLICY 5 (2010).

⁷ L.A. ADMIN. CODE division 10, chapter 1, article 18, §10.44.1; Partnership for Working Families, *Constructing Buildings and Building Careers* (2010), at 22, available online at <http://www.forworkingfamilies.org/sites/pwf/files/publications/1110-ConstructingBuildingsBuildingCareers.pdf>.

⁸ SUAFAI & AMER at 4.

⁹ *Carmelitos Tenants Association v. City of Long Beach*, (HUD Section 3 Case # 09-98-07-002-720, June 9, 1998).

¹⁰ SAN FRANCISCO LOCAL HIRING POLICY FOR CONSTRUCTION §622(G)(4).

that do not expect to be able to meet this threshold must request and receive a waiver from the city.¹¹ HUD Community Development Block Grant (CDBG) regulations require that at least 51% of all post-construction jobs in CDBG-funded job creation or retention activities be “held by or available to” low-income residents.¹² St. Louis requires that 100% of all entry-level jobs be filled by city residents, with a minimum 60% compliance threshold.¹³

Target Population. Local hiring and first source hiring policies primarily target the residents of the municipalities in which the policy was adopted, but often provide a specific hiring preference for hard to employ or economically-disadvantaged residents. San Francisco requires that at least 25% of all work hours across all trades be worked by “disadvantaged workers”, phased in over a 7-year period.¹⁴ Hartford requires that at least 6.9% of all construction hours be worked by women, that at least 25% be worked by minorities, and that at least 45% of all post-construction jobs be filled by minorities.¹⁵ Los Angeles public works projects are subject to project labor agreements that require that 30%-40% of all work hires be residents of high-poverty or high-unemployment neighborhoods and that 10%-15% of all hires be disadvantaged residents.¹⁶ Washington, D.C. gives double credit toward the resident hiring threshold for hours worked by residents who have been certified by the city as “hard-to-employ.”¹⁷

Apprentice Goals. Some local hiring and first source hiring programs set apprenticeship goals in addition to resident hiring goals. Washington, D.C. requires that city residents account for 60% of all apprentice hours on projects receiving more than \$5 million in assistance.¹⁸ San Francisco requires that 50% of all apprentice hours be worked by city residents, with at least 25% worked by disadvantaged workers (no phase-in).¹⁹ Hartford requires that 1 in every 5 workers on a project be apprentices and that 50% of apprentices be city residents.²⁰

First-Source Referrals. Cities with first source hiring policies typically centralize the referral process in a single department that is responsible for executing first source agreements, notifying applicants, making referrals, monitoring compliance and reporting outcomes.²¹ NEDLC found that where first source programs were not tied to a centralized workforce system, they have not been successful.²² Some cities, like San Francisco²³ and Los Angeles,²⁴ incorporate neighborhood-based referral centers into their first-source systems.

¹¹ *Id.* at §622(G)(4)(C).

¹² 24 CFR §570.208(A)(4).

¹³ ST. LOUIS CITY REV. CODE § 3.90.030(A) (2013).

¹⁴ S.F. LOCAL HIRING POLICY FOR CONSTRUCTION §622(G)(4).

¹⁵ HARTFORD MUN. CODE, art. X, div. 5, §2-717.

¹⁶ Partnership for Working Families, *Constructing Buildings and Building Careers* at 22.

¹⁷ D.C. Official Code §2-219.03(e)(1A).

¹⁸ *Id.*

¹⁹ S.F. LOCAL HIRING POLICY FOR CONSTRUCTION §622(G)(4).

²⁰ HARTFORD MUN. CODE, art. X, div. 5, §2-717(b).

²¹ SUAFAI & AMER at 6.

²² *Id.*

²³ S.F. LOCAL HIRING POLICY FOR CONSTRUCTION §622(G)(7)(b).

First source policies typically require a period of exclusivity during which the covered employer may only consider applicants referred by the first source program. For example, employers in Berkeley must give the first source program three days to refer qualified candidates for construction and may post elsewhere only if no qualified applicant is referred.²⁵ In San Francisco, construction contractors must interview all applicants referred by the first source center within three days of notification.²⁶ Exclusivity periods range from three days for construction (Berkeley, Oakland and San Francisco) to 6 weeks for new hires on post-construction jobs (East Palo Alto).²⁷ Washington, D.C. and Boston both require five days, and Portland, Oregon requires ten days (replacement workers) to fifteen days (new hires).²⁸

Reporting. Accurate reporting of local hire outcomes is essential to effective compliance monitoring and overall program evaluation. The reporting that is required of covered employers varies by jurisdiction and by whether the ordinance applies to construction or post-construction jobs. For construction, contractors and covered subcontractors are typically required to provide a projection of their anticipated workforce needs and to submit payroll reports throughout the term of the project.²⁹ Some cities require electronic reporting,³⁰ which facilitates the computation of the percentage of work hours performed by local residents. For post-construction jobs, Portland requires quarterly hiring and retention summaries that include the names, social security numbers, dates of hire/termination, wages, and positions hired for all hires.³¹ Washington, D.C. requires monthly hiring compliance reports that include the total number of employees; the number of new hires; the number of jobs listed with the first source program; total monthly labor costs; the number of city residents hired; the names, social security numbers and residence of all new hires; and the date of hire.³²

Monitoring. Monitoring compliance with local hiring and first source hiring requirements is typically the responsibility of the city department that is responsible for implementation.³³ These departments are in the best position to track compliance since they typically manage job postings and referrals and they receive verification reports from contractors.

Enforcement. Enforcement of local hiring and first source hiring requirements varies across jurisdictions. In Berkeley, Portland and Oakland, enforcement rests with the first source program itself.³⁴ In East Palo Alto, the first source program office investigates potential non-compliance and makes enforcement recommendations to the agency that awarded the city funding.³⁵ In Washington,

²⁴ Partnership for Working Families, *Constructing Buildings and Building Careers* at Id.

²⁵ SUAFAI & AMER at 15.

²⁶ S.F. LOCAL HIRING POLICY FOR CONSTRUCTION at Id.

²⁷ SUAFAI & AMER at 11; EAST PALO ALTO FIRST SOURCE HIRING AND LOCAL BUSINESS ENTERPRISE POLICY at 9.

²⁸ SUAFAI & AMER at Id.

²⁹ SUAFAI & AMER at 7.

³⁰ Id.

³¹ Portland Development Commission First Source Agreement Section V(B).

³² D.C. Official Code § 2-219.03(e)(1)(C).

³³ SUAFAI & AMER at Id.

³⁴ Id. at 8-9.

³⁵ EAST PALO ALTO FIRST SOURCE HIRING AND LOCAL BUSINESS ENTERPRISE POLICY at 16.

D.C., the first source program office makes enforcement recommendations to the mayor.³⁶ In San Francisco, either the first source program or the contracting agency can impose monetary penalties or seek more serious penalties such as debarment.³⁷

Sanctions. Sanctions for failing to comply with local hiring or first source hiring requirements also vary across jurisdictions. Sanctions range from monetary fines (a fixed amount per violation or forfeiture of a percent of the city contract or subsidy) to debarment from receiving future city funds. East Palo Alto provides a range of possible sanctions, including suspension or revocation of construction and occupancy permits and the imposition of fines according to a schedule of liquidated damages.³⁸ If liquidated damages are assessed, the city may declare the employer ineligible for future contracts or city-funded development assistance until the fines are paid.³⁹ Washington, D.C. provides for discretionary penalties for failure to meet the minimum hiring requirements, and mandatory penalties in the event of a willful violation, failure to submit required reporting, or deliberate submission of falsified data.⁴⁰ Employers who fail to meet minimum hiring requirements more than once within a ten year period are debarred from receiving a contract or city development assistance for up to five years.⁴¹

LOCAL HIRING AND FIRST SOURCE HIRING BEST PRACTICES

Four cities have been cited by reviewers and advocates as having had particular success with the implementation of various aspects of their local hiring or first source hiring programs: San Francisco, Washington, D.C., East Palo Alto, and Los Angeles.

San Francisco, CA

San Francisco enacted its Local Hiring Policy for Construction in 1998 and amended it in 2010, initiating a seven-year phased implementation strategy during which minimum hiring thresholds for city residents increase from 20% to 50% of project work hours, with at least half of those hours to be worked by disadvantaged workers.⁴² It also requires that at least 50% of total apprentice hours be performed by local residents, with at least 25% by disadvantaged workers (no phase in).⁴³ "Disadvantaged worker" is defined as a resident who (i) resides in a census tract with an unemployment rate of more than 150% of the city unemployment rate, (ii) has a household income of less than 80% of AMI, or (iii) is homeless, is a custodial single parent, receives public assistance (which includes unemployment compensation), lacks a GED or high school diploma, participates in a vocational English as a Second Language program, or has a criminal record or other involvement with the criminal justice system.⁴⁴

³⁶ ; D.C. Official Code § 2-219.34.

³⁷ S.F. LOCAL HIRING POLICY FOR CONSTRUCTION, §622(G)(7)(f).

³⁸ EAST PALO ALTO FIRST SOURCE HIRING AND LOCAL BUSINESS ENTERPRISE POLICY at 16-17.

³⁹ Id.

⁴⁰ D.C. Official Code § 2-219.03(e)(4).

⁴¹ Id.

⁴² San Francisco Administrative Code Chapter 622 (LOCAL HIRING POLICY FOR CONSTRUCTION), §622(G)(4).

⁴³ Id.

⁴⁴ Id. at §622(G)(2).

The Local Hiring Policy applies to public works contracts in excess of \$400,000.⁴⁵ San Francisco also has a First Source Program that applies to all residential projects of 10 or more units and all commercial projects of more than 25,000 square feet.⁴⁶ The Local Hiring Policy and First Source Hiring Program are administered by the Office of Economic and Workforce Development (OEWD), and are staffed by five full-time Compliance Monitors, a Workforce Compliance Manager, and seven Employment Liaisons (One Stop Career Centers). Compliance Monitors help employers understand their responsibilities, monitor compliance with first source and local hiring requirements, and refer graduates from the CityBuild Academy (also operated by OEWD), which provides pre-apprenticeship training for disadvantaged workers.⁴⁷ Employers also receive referrals from the neighborhood-based One-Stop centers.⁴⁸

OEWD monitors roughly \$11 billion of construction projects per year.⁴⁹ Contractors are required to submit monthly certified payroll reports via an electronic labor compliance database created by Elation Systems.⁵⁰ This allows OEWD to track and report hours worked by local residents and apprentices within each trade, and to compare actual hours worked with the contractor's initial workforce projections. The system is also used by contracting agencies to monitor compliance with Davis-Bacon wage requirements.⁵¹ OEWD pays an annual subscription fee of \$50,000, which includes unlimited use by contractors and free training to teach contractors how to use the system.⁵² Final contract payment is contingent upon an OEWD certification of compliance.⁵³ Contractors who are out of compliance may enter into a corrective action plan, which can include hiring disadvantaged workers on non-covered projects or sponsoring apprentices to make up the deficiency.⁵⁴

Since renewed implementation began in 2011, the city tracked over 110 projects subject to local hiring requirements. In the first year, when the resident hiring goal was 20%, projects met and exceeded the goal with 34% of total hours worked.⁵⁵ In one project, the San Francisco Municipal Transportation Agency achieved a total of 47% of work hours performed by local residents.⁵⁶ Local resident hours also comprised 60% of total apprentice hours.⁵⁷ The second year met similar success with 32% of total work hours performed by local residents, compared with the city's goal of 25%, and 56% of total apprentice

⁴⁵ S.F. LOCAL HIRING POLICY FOR CONSTRUCTION, §622(G)(3).

⁴⁶ San Francisco Administrative Code, Chapter 83 (FIRST SOURCE HIRING PROGRAM), §83.4(p) and (q).

⁴⁷ Interview with Ken Nim, OEWD Workforce Compliance Manager, and Patrick Mulligan, Director of CityBuild (Oct. 17, 2013).

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id., see <http://www.elationsys.com> for product and subscription information.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

⁵⁵ OFFICE OF ECONOMIC AND WORKFORCE DEVELOPMENT, SAN FRANCISCO LOCAL HIRING POLICY FOR CONSTRUCTION: 2012-2013 ANNUAL REPORT, 3 (2013).

⁵⁶ Id.

⁵⁷ Id.

hours performed by local residents.⁵⁸ These percentages were distributed across almost all trades, with most trades exceeding both the resident hiring and apprentice requirements.⁵⁹

OEWD is still in the process of establishing a tracking system for disadvantaged workers, so it is not known whether the disadvantaged worker hiring thresholds are being met.⁶⁰ But OEWD has been working to create greater access for disadvantaged workers through its CityBuild Academy. In the two years since the Local Hiring Policy was amended, CityBuild graduated 161 disadvantaged workers, 143 of whom entered into state-certified apprenticeship programs.⁶¹ OEWD believes that many of these apprentices were hired on projects that were covered by the Local Hiring Policy.⁶²

OEWD has commissioned an analysis of the likely impact of the Local Hiring Policy on the cost of city-funded construction projects, which is expected to be released in November, 2013. According to the Director of CityBuild, early drafts of the report have indicated that the Local Hiring Policy has had negligible impact on the cost of covered projects.⁶³

Washington, DC

In 1983, Washington, D.C. established a First Source Policy by Mayor's Order 83-265, which passed into law the following year.⁶⁴ The current ordinance, which was amended in 2011, requires that contractors with contract amounts over \$300,000 enter first source agreements and use the city's one-stop system for recruitment, referral, and placement.⁶⁵ It also requires that 51% of all new jobs on the project be filled by local residents.⁶⁶ Construction contractors receiving \$500,000 or more in public funding in any 12-month period must have a registered apprenticeship program, and at least 35% of all apprentice hours must be worked be performed by local residents.⁶⁷ For construction projects receiving \$5 million or more in public funding, the local hiring requirements are heightened: 20% of journey worker hours; 60% of apprentice hours; 51% of skilled laborer hours; and 70% of common laborer hours.⁶⁸ Recent reporting on a hotel and convention center project that was subject to similar requirements showed that 40% of all hours were worked by local residents.⁶⁹

The city's Department of Employment Services (DOES) is the designated administrator of the first source policy. Operating costs for the First Source Program are roughly \$500,000 per year, which

⁵⁸ Id. at 4.

⁵⁹ Id. at 5.

⁶⁰ Id. at 19.

⁶¹ Id.

⁶² Id.

⁶³ Interview with Ken Nim and Patrick Mulligan (Oct. 17, 2013).

⁶⁴ D.C. Official Code §§ 2-219.01–2.219.05 (2013).

⁶⁵ Id., §2-219.03.

⁶⁶ Id., §2-219.03.

⁶⁷ Id., §32-1431.

⁶⁸ Id., §2-219.03(e)(1A).

⁶⁹ Telephone interview with Drew Hubbard, Associate Director, DOES First Source Program (Oct. 10, 2013).

covers three Compliance Monitors, three support staff and an Associate Director.⁷⁰ The Compliance Monitors are responsible for monitoring hundreds of first source hiring agreements every year, covering over \$150 million in construction contracts.⁷¹ The Compliance Monitors conduct on-site visits, review monthly payroll records, and provide technical assistance to help employers comply with the first source policy.⁷² Covered construction contractors are required to submit electronic payroll reports in D.C.'s Electronic Compliance Database.⁷³ Enforcement decisions are made by either the contracting agency or the Deputy Mayor, upon recommendation by DOES.⁷⁴

With each request for final payment under a covered contract, the contractor must submit documentation of its compliance with local hiring requirements or request a waiver.⁷⁵ A waiver can be granted only if DOES certifies that the contractor made a good faith effort to comply, which involves the following criteria: (i) whether DOES has certified that there is an insufficient number of residents possessing the skills required for the available positions, (ii) whether the employer posted all job announcements with DOES for at least 10 days, (iii) whether the employer advertised positions for at least 7 days in a local newspaper, (iv) whether the employer substantially complied with reporting requirements, and (v) if required, whether the employer has substantially complied with its resident employment plan.⁷⁶ It is the contractor's burden to demonstrate good faith efforts to comply with the local hiring requirements.

If an employer fails to satisfy the resident hiring requirements and fails to obtain a waiver of compliance, the mayor may impose monetary fines equal to 1/8 of 1% of the total labor cost under the contract.⁷⁷ In the event of a willful violation, failure to submit required reporting, or deliberate submission of falsified data, the mayor is required to impose monetary fines equal to 5% of total labor cost.⁷⁸ If an employer fails to meet minimum hiring requirements or be granted a waiver more than once within a ten year period, the mayor must debar that employer from receiving a contract or city development assistance for up to five years.⁷⁹

In its nation-wide review of first source programs in 2005, NEDLC concluded that Washington, D.C.'s program has produced "very impressive" outcomes.⁸⁰ After a 2010 audit found deficiencies in compliance monitoring and enforcement,⁸¹ and an independent analysis by workforce development

⁷⁰ Telephone interview with Drew Hubbard, Associate Director of the First Source Program (Oct. 23, 2013).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*, D.C. Official Code §2-219.03(e); § 2-219.34.

⁷⁵ D.C. Official Code §2-219.03(e)(2).

⁷⁶ *Id.*, §2-219.03(e)(3).

⁷⁷ *Id.*, § 2-219.03(e)(4).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ SUAFAI & AMER, *supra* note **Error! Bookmark not defined.**, at 17.

⁸¹ Office of District Columbia Auditor, Auditor's Review of Compliance with Living Wage Act and First Source Act Requirements (May 18, 2010).

advocates found programmatic deficiencies,⁸² the ordinance was amended in 2011. In 2012, 763 first source agreements were executed and 786 local residents were hired, out of 1593 new hires on projects subject to first source hiring (49% of all new hires).⁸³ According to Drew Hubbard, who was appointed to manage the First Source Program in January, 2013, the biggest deficiency in maximizing local hiring is DOES' inability to refer qualified candidates.⁸⁴ To remedy this, DOES is creating a "workforce intermediary" to identify future hiring needs and to work with existing training providers to ensure that residents have the necessary skills.⁸⁵

East Palo Alto, CA

Codified in 2000, the first source policy for East Palo Alto covers any contract valued at over \$50,000 that receives a subsidy in the form of direct or indirect assistance from the city. The city's Redevelopment Agency administers the program and is responsible for monitoring compliance. The policy requires that 30% of total hours worked on a construction project be worked by local residents. Contractors must demonstrate good faith efforts to comply, including notifying the Redevelopment Agency of job openings and making reasonable changes to crew structures to accommodate resident hiring. Business tenants in city-funded development projects must also comply with local hiring and first source hiring requirements for permanent employment, including notifying the first source referral system when on-site jobs become available, and filling 30% of available jobs in each pay grade with local residents.⁸⁶

East Palo Alto has been successful in fulfilling its resident hiring goals on post-construction jobs. By the first quarter of 2007, 43% of retail and service jobs in subsidized developments were awarded to local residents. The construction policy, however, has had its challenges, with only 23% of construction jobs going to local residents in the same period.⁸⁷ Challenges include lack of union support and minimal access to apprenticeships in the area.⁸⁸

Some of the city's success can be attributed to the policy's enforcement and sanction provisions, which are often threatened and sometimes invoked.⁸⁹ Upon finding a violation of the first source policy, the Redevelopment Agency may withhold funds, suspend or revoke construction or occupancy permits, and impose fines according to a schedule of liquidated damages (such as \$1000 for hiring an employee without following the first-source notification process and \$500 per day for failure to meet the minimum

⁸² CHAPPELL, ET AL., REFORMING FIRST SOURCE: STRENGTHENING THE LINK BETWEEN ECONOMIC DEVELOPMENT AND JOBS (December, 2010), available at http://www.dcappleseed.org/library/CFNCR7981_First%20Source%201216.pdf

⁸³ Compilation of quarterly reports provided by Drew Hubbard, Associate Director of DOES First Source Program, 10/11/13.

⁸⁴ Telephone interview with Drew Hubbard, Associate Director of the First Source Program (Oct. 23, 2013).

⁸⁵ *Id.*

⁸⁶ EAST PALO ALTO FIRST SOURCE HIRING AND LOCAL BUSINESS ENTERPRISE POLICY at 2-3, 5.

⁸⁷ KATHLEEN MULLIGAN-HANSEL, MAKING DEVELOPMENT WORK FOR LOCAL RESIDENTS 10 (2008), available at <http://www.forworkingfamilies.org/sites/pwf/files/publications/0708-MakingDevelopmentWorkForLocalResidents.pdf>.

⁸⁸ *Id.* at 12.

⁸⁹ *Id.* at 31, 38.

local hiring goals or demonstrate good faith efforts).⁹⁰ If liquidated damages are assessed, the city may declare the employer ineligible for future city contracts or city-funded development assistance until the fines are paid.⁹¹ The contracting agency may also arbitrate or take judicial action against an employer. Monetary penalties collected are used to fund job training for local residents.

Los Angeles, CA

The Los Angeles first source hiring ordinance covers all contracts awarded by the city or receiving at least \$25,000 in city funds, but excludes construction contracts for public works of improvement.⁹² Instead, public works projects are subject to departmental project labor agreements (PLAs) with the L.A. Community Redevelopment Agency, the Port of L.A. and the L.A. Department of Public Works.⁹³ PLAs generally include provisions for work standards, wages, and dispute resolution procedures, but these departmental PLAs include targeted hiring goals as well. For example, the L.A. Department of Public Works PLA requires that 30% of all work hours be performed by residents of high-poverty or high-unemployment zip codes; that 20% of all work hours be performed by apprentices, of which 50% are residents of the targeted zip codes; and that 10% of all work hours be performed by disadvantaged workers.⁹⁴ A disadvantaged worker is a resident who has household income below 50% of AMI or who is homeless, is a welfare recipient, has a history of involvement with the criminal justice system, is unemployed, is a custodial single parent, or is suffering from chronic unemployment or underemployment.⁹⁵ These departmental PLAs arose from a movement of grassroots campaigns that sought to increase community participation in development decisions.⁹⁶

Each PLA is monitored and enforced by the respective city agency. Employers are presumed to have a set number of core employees, after which they must hire from a local hiring hall.⁹⁷ According to the L.A. Bureau of Contract Administration, the Public Works PLA has exceeded its targeted hiring and apprenticeship goals, with 33% of all hours worked on covered contracts being worked by local residents from targeted zip codes and 22% of all hours worked being worked by apprentices.⁹⁸ It is not clear whether the PLA's disadvantaged worker goals are being met.⁹⁹ The Los Angeles Unified School District and the Los Angeles Community College District have similar policies.¹⁰⁰

⁹⁰ CITY OF EAST PALO ALTO, *supra* note 86, at 16-17.

⁹¹ *Id.*

⁹² L.A. ADMIN. CODE division 10, chapter 1, article 18, §10.44.1.

⁹³ See L.A. Bureau of Contract Administration Annual L.I.G.H.T. Report (2012), available online at <http://bca.lacity.org/site/pdf/hiring/2012-09%20ANNUAL%20LIGHT%20REPORT.pdf>.

⁹⁴ City of Los Angeles Department of Public Works Project Labor Agreement, available online at <http://bca.lacity.org/site/pdf/hiring/DPW%20Departmental%20Project%20Labor%20Agreement.pdf>.

⁹⁵ *Id.*

⁹⁶ Scott L. Cummings, *Mobilization Lawyering: Cmty. Econ. Dev. In the Figueroa Corridor*, 17 J. Affordable Hous. & Cmty. Dev. L. 59, 59 (2008).

⁹⁷ See, e.g., City of Los Angeles Department of Public Works Project Labor Agreement, §7.1.

⁹⁸ L.A. Bureau of Contract Administration Annual L.I.G.H.T. Report.

⁹⁹ *Id.*

¹⁰⁰ Partnership for Working Families, *Constructing Buildings and Building Careers* at 12.

Effective PLAs involve the participation of many stakeholders groups such as the government, developers, labor unions, pre-apprentice programs, and community non-profit organizations. The process is intended to be a collaborative one in which parties understand common economic concerns and subscribe to a shared purpose.¹⁰¹

LEGAL ISSUES

Local hiring requirements must be designed to withstand constitutional challenges and state preemption. There are two provisions of the U.S. Constitution that are potentially implicated by local hiring requirements: the Commerce Clause and the Privileges and Immunities Clause.¹⁰² These clauses will be discussed below. As previously mentioned, Pennsylvania law forbids the use of minimum local hiring percentages on projects that are funded by state Redevelopment Assistance Capital Program (RACP) funds.¹⁰³ First source requirements do not implicate any of these issues.

Commerce Clause

The Commerce Clause gives Congress the power to regulate interstate commerce.¹⁰⁴ The Supreme Court has held that this power necessarily prohibits state or local regulation or taxation that restrains, interferes with, or materially burdens, interstate commerce.¹⁰⁵ But the Supreme Court has also held that the Commerce Clause does not apply to actions taken by a municipality in the course of its direct participation in the market.¹⁰⁶ Municipal activities that would violate the Commerce Clause if taken in the context of market regulation may therefore be permissible if taken in the context of market participation.

In *White v. Massachusetts Council of Construction Employers*, the Supreme Court rejected a Commerce Clause challenge to a resident hiring preference on construction projects funded entirely by the City of Boston (using both city and federal funds), holding that Boston was acting as a market participant.¹⁰⁷ In *United Building & Construction v. Mayor & Council of Camden*, the Supreme Court clarified that a city need not entirely finance a project with its own funds in order to be considered a market participant: “In sum, Camden may, without fear of violating the Commerce Clause, pressure private employers engaged in public works projects funded in whole or in part by the city to hire city residents.”¹⁰⁸

¹⁰¹ *Id.* at 8; Cummings, *supra* note 96, at 61-62.

¹⁰² It is also possible that a local hiring ordinance could be held to violate the 14th Amendment Equal Protection Clause if it could be shown that residency was used as a surrogate for a constitutionally suspect classification, such as race, and that the preference was adopted with an intent to discriminate on that basis. The authors are not aware of any cases in which a local residential hiring preference was struck down on these grounds.

¹⁰³ See footnote 1.

¹⁰⁴ U.S. Constitution, Article I, Section 8, Clause 3.

¹⁰⁵ *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). This prohibition is often referred to as the “dormant” commerce clause.

¹⁰⁶ See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

¹⁰⁷ *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204, at 214-15 (1983).

¹⁰⁸ *United Building & Construction v. Mayor & Council of Camden*, 465 U.S. 208, at 221 (1984).

There are two limitations on the market participation doctrine. The first is where the state or municipality attempts to use its market power to influence parties that are outside of the relevant market.¹⁰⁹ The second is where the state action is so overtly political and without market justification that it is “tantamount to regulation”.¹¹⁰ Neither of these limitations apply to ordinances that set hiring preferences on development projects that are funded in whole or in part by the municipality. Such ordinances only require local hiring in the relevant market (i.e., on jobs that are created as a result of a city-funded development project),¹¹¹ and they do not attempt to influence the behavior of employers outside of that market.

Privileges and Immunities Clause

The Privileges and Immunities Clause states that the citizens of each state are entitled to all “privileges and immunities” enjoyed by the citizens of the several states.¹¹² The Clause essentially bars individual states from favoring their own citizens over the citizens of other states. The Supreme Court has held that municipal resident hiring preferences could violate the Privileges and Immunities Clause.¹¹³ In order to survive a Privileges and Immunities Clause challenge, the municipality must establish a substantial purpose for its discrimination against non-residents (i.e., that the employment of non-residents is a “peculiar source of the evil” that the law was enacted to address, for reasons other than their state residency), and that the discrimination is narrowly tailored to advance that purpose without unreasonably harming non-residents.¹¹⁴ In *Camden*, the Supreme Court left open the possibility that the City of Camden could satisfy these criteria, and noted that deference to state and local governments in analyzing local evils and prescribing appropriate cures “is particularly appropriate when a government body is merely setting conditions on the expenditure of funds it controls”.¹¹⁵ Rather than risk legal challenge, many cities exempt out-of-state residents from the calculation of new hires or total hours worked, so that employers are not penalized for hiring out-of-state residents.

State Preemption

As previously mentioned, Section 2003 of Pennsylvania’s Act of October 30, 2000, states that “No political subdivision or authority in a county may enter into any contract related to a redevelopment capital assistance project ... which contains a provision requiring that a specified percentage of a contracting party's workforce be residents of a specific municipality.” This effectively preempts the

¹⁰⁹ See, e.g., *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (“Alaska hire” statute held to be unconstitutional since it bound not only contractors and subcontractors dealing directly with the state, but also suppliers who dealt with those contractors and subcontractors); and *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984) (Alaska’s requirement that timber taken from state lands be processed in-state was an improper use of the state’s position in the timber selling market to “impose[] conditions downstream” in the timber processing market).

¹¹⁰ See, e.g., *Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282 (1986) (“by flatly prohibiting state purchases from repeat labor law violators Wisconsin ‘simply is not functioning as a private purchaser of services’”).

¹¹¹ In *Camden*, the Supreme Court noted that the local hire ordinance did not seem to suffer from the same “ripple effect” as the Alaska hire statute in *Hicklin*. *Camden* at 223.

¹¹² U.S. Constitution, Article IV, Section 2.

¹¹³ *Camden* at 223.

¹¹⁴ *Id.* at 222.

¹¹⁵ *Id.* at 223.

application of minimum local hiring thresholds to RACP-funded projects. This does not prohibit the use of minimum local hiring thresholds on projects that do not use RACP funds. Nor would it prohibit first source hiring requirements or minimum hiring thresholds based on something other than residence (for instance, disadvantaged worker status) on RACP-funded projects.

RECOMMENDATIONS

- Cities that combine first source hiring requirements with local hiring requirements are more effective at maximizing resident employment than those that require either one or the other. The City of Pittsburgh should implement a first source hiring system while retaining the local hiring requirements contained in the City Charter.
- Implementation, monitoring and compliance investigations should be centralized under a single City department, with linkages to job training providers, referral resources and community-based recruitment centers. The most appropriate agency to serve this function in the City of Pittsburgh appears to be the City Employment and Training Division (CETD). Enforcement of local hiring thresholds should be the responsibility of the contracting or awarding agency, with input from CETD, while enforcement of first source agreements should be the responsibility of CETD.
- PLAs can potentially provide a more flexible and effective mechanism for maximizing local hiring on projects that are subject to collective bargaining agreements. Los Angeles, which uses PLAs on several of its public works projects, seems to be producing better construction hiring outcomes than East Palo Alto, which applies local hiring requirements across the board. Setting broad goals and negotiating requirements to achieve those goals on a case-by-case basis may be more conducive to securing the cooperation of developers, contractors and trade unions on large development projects than imposing an across the board requirement.
- Enforcement of post-construction hiring requirements should focus primarily on the developer's responsibility, as the recipient of City funding, to ensure that business tenants participate in the first source system. Business tenants need to understand their responsibilities from the outset. Those that fail to live up to those responsibilities should be subject to sanctions – one reason why East Palo Alto has been so successful at placing residents in post-construction jobs is the actual or threatened use of sanctions to enforce compliance – but in order to encourage voluntary compliance the administrative burden placed on business tenants should be commensurate with the benefits (employment recruitment, screening and referral) that they receive.
- Timely and accurate reporting are essential to effective compliance monitoring and overall program evaluation. Mechanisms to ensure timely and accurate reporting include conditioning progress payments on the submission of complete payroll reports (e.g., Davis-Bacon) and the use of mandatory sanctions for failure to submit reports or for submitting falsified data (e.g., Washington, D.C.).
- Sanctions should be predictable and actually used. Both East Palo Alto and Washington, D.C. have threatened or used sanctions to enforce compliance.