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Displaced Phila. Workers Protected Under Little-Known Law

Michael Blann

The best-kept secret for Philadelphia employees in the hotel, building-management and health care fields is a local law that went into effect in June 2000 known as the Philadelphia Displaced Contract Workers Ordinance (DCWO). (See Chapter 9-2300 of the Philadelphia Code.) The ordinance makes it unlawful for a successor contractor to fail to continue the employment of the previous service contractor's employees for a period of 90 days. The ordinance only applies to security, janitorial, building maintenance, food and beverage, hotel service or health care services performed within the city of Philadelphia.

Here is how the law works. The owner of a business, referred to as an "awarding authority," which decides to replace one contractor with another contractor where substantially the same services are being performed, must give advance notice to the service contractor that the contract will be terminated. The terminated or ending contractor must then provide to the successor contractor the name, date of hire and employment occupation classification of each employee employed by the predecessor contractor at the time of receiving the notice, within three days. The law also applies when a business acquires another company and elects to switch contractors.

Under the terms of the ordinance, the new contractor must hire the previous contractor's employees for a "90-day transition employment period." During such 90-day period, the successor contractor cannot discharge an employee retained pursuant to the law without cause, which is limited solely to the performance or conduct of the particular employee. If the successor contractor elects to use fewer employees at the covered site, it is required to retain employees by seniority within each job classification. The successor contractor must also maintain a preferential

hiring list composed of the employees not retained.

The following types of employees are covered by the DCWO without any limitations:

• Employees hired by a contractor as food-service workers in a hotel, restaurant, cafeteria, apartment building or hospital nursing care facility.

• Employees hired by a contractor to perform janitorial, security or building maintenance services in an office building or institution.

• Employees hired by a contractor to perform health care or related support services in a hospital, nursing care facility, or similar establishment, including registered nurses.

The law, while relatively straightforward, does contain some exceptions. For example, the DCWO does not apply to:

• Contractors that employ fewer than 10 individuals.

• Employees who work fewer than 15 hours a week.

• Managerial, supervisory or confidential employees, including those defined as such under the Fair Labor Standards Act.

• Employees employed for fewer than eight months with the prior contractor.

In the non-union setting, the DCWO still allows the successor contractor to set the terms and conditions of employment of the transitioned employees, so long as the new contractor retains the employees for 90 days. There is no requirement to pay the employee the same prevailing wage or offer the same benefits or perquisites as the previous contractor. The successor contractor is required to hand-deliver a written offer of employment to each employee in the employee's native language or another language in which the employee is fluent. The offer letter shall state the time within which the employee must accept the offer but in no case may that time be less than 10 days from the date of the offer and in no case may the 10th day occur any later than five days prior to the expiration of the predecessor contract. In other words, the employee must be given sufficient notice of the offer well before the expiration of the terminated contract.

The ordinance provides a sample notice, written in both English and Spanish. The letter should state that the employee has the right, with certain exceptions, to be hired by the company for the first 90 days; during this 90-day period, the employee cannot be fired without just cause, and if the employee believes that he or she has been fired or laid off in violation of the ordinance, the employee has the right to sue and be awarded back pay, attorney fees and court costs.

As for the law's teeth, the DCWO vests responsibility for its enforcement with the Philadelphia Labor Standards Unit. Section 19-2602 of the Philadelphia Code was amended by the DCWO to enable the unit to investigate all complaints against any contractor, subcontractor or awarding authority. The unit has the power to subpoena witnesses, books and records. A hearing is not required, but employers may request one. The unit will refer meritorious complaints to the Department of Licenses and Inspections "for revocation of the offending person's business privilege license."

Most importantly, the DCWO expressly allows a discharged employee to bring a private cause of action against the previous contractor, the successor contractor or even the awarding authority, jointly or severally, for back pay, including the value of benefits, and reinstatement. If the employee succeeds in court, the employer is liable for attorney fees and costs. If found in violation of the ordinance, an employer will be subject to a fine of $50 to $100 dollars per day, per employee.

Displaced-worker protection laws like the DCWO have become much more prevalent throughout the United States. The first was passed in Washington, D.C., in 1994 and since then, laws have been enacted in Providence, R.I.; New

York City; San Francisco; Los Angeles; Philadelphia; St. Louis; Newark, N.J.; Westchester County, N.Y.; Montgomery County, Md.; and Cook County, Ill. (subsequently repealed) (see http://goo.gl/pLlO9K). To date, there are no reported opinions or challenges to the Philadelphia DCWO. When reviewing the law itself, the absence of any intent element is quite apparent, unlike other discrimination laws. From a purely statutory construction standpoint, the DCWO appears to be a strict liability law.

Some commentators have suggested that a challenge to the law is likely on the grounds that it is preempted by the National Labor Relations Act (NLRA). One such challenge occurred in *Washington Service Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995), however, that court ruled that the NLRA does not preempt this type of employment preservation law.

Assuming the DCWO is enforceable, and there is no reason to believe it is not, one of the major implications is that a successor contractor may have to inherit the preceding contractor's unionized employees. If that is the case, under the NLRA, the successor would then be obligated to recognize and bargain with the union representing the predecessor's employees. There is a great deal of uncertainty with a law like the DCWO. I fully expect it to play out through litigation over the next few years.

Jeffrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.*