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LEGAL ALERT

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Non-union Contractors May Not Be Excluded From Job Sites

On July 31, 2007, the National Labor Relations Board (NLRB) issued a decision that will have a significant impact on the construction industry, and on how union contracts may be negotiated. In general, prior to this NLRB decision, most contractual arrangements between owners, developers, construction managers and construction trade unions, whereby non-union construction contractors and subcontractors were excluded from construction sites were considered lawful. While a number of very practical consequences remain unsettled, with limited exceptions, the new decision prohibits owners, developers, construction managers, and general contractors from agreeing with unions to require that contractors and subcontractors be signatory to (or abide by) union contracts, in order to perform construction services at a construction job site.

In order to make any such arrangements legal, the owner, developer, construction manager or general contractor will have the burden of proving, not only that it is "an employer in the construction industry," but also, that it employs craft workers at the job site or, possibly, that the objective of the agreement was to avoid tension between union and non-union workers on the same job site. Those legal burdens may be very difficult to carry.

The facts in the new decision were straightforward. A developer, owner and operator (developer) of cogeneration plants planned to build a number of new plants in the State of New York. The construction trade unions informed the developer that the unions would oppose the developer's application for the necessary environmental permits for the construction of those plants, unless the developer agreed to build them with union labor only. The

developer agreed with the unions, in writing, and instructed its construction manager to enter into project agreements with the unions that accomplished the unions' objective. The project agreements were negotiated and provided that all contractors and subcontractors had to be signatory to the project agreements. Neither the developer nor the construction manager intended to employ construction craft workers at the construction sites.

After the project agreements had been negotiated, but before actual construction had started, the developer and the construction manager had a dispute which led the developer to change construction managers. The developer selected a new construction manager which declined to enter into contracts with the unions, and the unions filed a breach of contract lawsuit against the developer. The developer responded by filing unfair labor practice charges against the unions with the NLRB, alleging that the arrangement with the unions that prohibited non-union companies from working at the job sites were unlawful and unenforceable. By filing the lawsuit against the developer, the unions were seeking to enforce unlawful arrangements, thereby committing unfair labor practices. The unions defended on the basis that the developer was an "employer in the construction industry" and, therefore, the arrangement was permitted under a special proviso that allows "an employer in the construction industry" to enter into that type of arrangement with unions.

In essence, the NLRB held that, in order to be lawful, such arrangements had to be negotiated "in the context of a collective bargaining relationship." There could be no such relationship since the developer did not employ and did not plan to employ craft employees at the sites.

At the very least, this new decision of the NLRB opens the door for non-union contractors to challenge the legality of their exclusion from job sites, because of their non-union status.

Gerard Morales
602.382.6362
jmorales@swlaw.com

Gerard Morales is a Partner in Snell & Wilmer's Phoenix office. His practice involves Labor/Employment/Construction Law - Representation in employment related matters, including wrongful termination, employment discrimination, arbitration and other alternative dispute resolution proceedings. He has extensive experience in NLRB unfair labor practice trials, and union elections matters, collective bargaining, labor law issues affecting the construction industry, wage and hour compliance, corporate policy development, and administrative proceedings before state and federal regulatory agencies, including the Equal Employment Opportunity Commission, U.S. Department of Labor, and National Labor Relations Board.