

## **XX LABOR BEST PRACTICES**

### **XX.1 Introduction**

As described in Chapter 14 (“Federal Requirements”), if a Project receives any Federal assistance pursuant to Title 23 of the United States Code, the Developer is required to comply (and require its Subcontractors to comply) with certain Federal laws, including labor laws, pertaining to the use of Federal funds. Additionally, all employers associated with a Project – including the Developer and any contractors, subcontractors, and concessionaires – are required to comply with any applicable Federal labor and employment laws, such as the Fair Labor Standards Act, the Family and Medical Leave Act, the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, the Davis-Bacon Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, as well as any relevant State and local requirements.

However, as a best practice, Departments and Developers are encouraged to consider adopting labor practices that provide worker protections beyond those that are required by law. Such practices can help ensure that a Project benefits the communities in which the Project is located by creating good middle-class jobs, and can also provide significant benefits to employers and taxpayers by encouraging efficiencies that result from the reduced worker turnover, increased productivity, higher-quality work, and more reliable performance produced by a well-trained, well-compensated workforce. By adopting or promoting adoption of such practices, Departments and Developers can reward employers who invest in their workforces, create and retain high-quality jobs, and deliver the best quality performance, and can leverage public investments to produce economic benefits even beyond the value of the Project. A Project that incorporates such practices can serve as a model for other projects and employers in the area and nationwide.

Some jurisdictions already encourage or require such practices in the public-private partnership (“P3”) context. For example, Illinois, Indiana, Maryland, and Pennsylvania each has its own specific laws requiring contractors working on P3 projects to meet certain standards, such as the payment of prevailing wages and equal employment opportunity.

Where permitted by law, Departments can promote such “high road” labor practices in one of two ways – by incorporating them as preferences or requirements during the bidding process itself or by including them in contract requirements. Some of the sections below provide sample contract language to serve as examples for Departments choosing to incorporate these types of best practices into contracts with Developers and Subcontractors. Departments can also choose to incorporate these practices as preferences or requirements in the bidding process so that they are part of the criteria Departments use to evaluate bidders on a Project.

The sample contract language provided is intended only as a guideline; it is expected that Departments will fashion their own provisions based on their specific needs and priorities. As such, the sections below use descriptive rather than prescriptive terms in articulating the labor practices at issue. However, State and local governments are

encouraged to consider implementing these practices given their benefits to workers, government entities, taxpayers, and the community at large.

**The best practices and sample language included below are not intended to satisfy or replace any requirements imposed by Federal, State, or local law. Federal, State, or local law may mandate different or additional requirements or contractual clauses for certain types of contracts or subcontracts, including P3s, or may prohibit some types of arrangements or provisions. If so, the employer must follow those requirements, which may differ substantially from the sample provisions below. In particular, if a Project receives any Federal assistance or involves a Federal contract or subcontract, Developers should ensure that they are in compliance with all relevant Federal requirements.<sup>1</sup>**

Labor practices can be adopted on a jurisdiction-wide basis (typically through State or local laws and regulations) or on a Project-by-Project basis (typically through individual contracts). The sections below outline several labor practices that Departments and Developers can incorporate into P3 agreements. Such best practices may include: (i) prevailing wages and fringe benefits; (ii) employee benefits such as paid sick and family leave and health and retirement benefits; (iii) protections for incumbent and displaced workers; (iv) practices to promote apprenticeship and workforce development; (v) programs to promote workplace health and safety; (vi) practices to promote transparency in wage payment and the proper classification of workers; (vii) practices to promote equal employment opportunity; (viii) adoption of a project labor agreement; and (ix) a systematic approach that seeks to ensure that contractors and subcontractors on a P3 Project are employers whose history demonstrates responsibility and business integrity in their compliance with labor laws and other legal obligations.

## **XX.2 Prevailing Wages and Fringe Benefits**

The Federal Davis-Bacon Act (“DBA”), 40 U.S.C. Chapter 31, Subchapter IV, provides well-established standards for the payment of prevailing wages and fringe benefits for laborers and mechanics who work in construction, alteration, and repair (including painting and decorating). Likewise, the Federal Service Contract Act (“SCA”), 41 U.S.C. Chapter 67, provides well-established standards for the payment of prevailing wages and fringe benefits to service employees. Under the DBA and SCA, covered workers must be paid no less than the wages and fringe benefits that prevail for their classification (or occupation) in their locality.

The DBA and SCA apply to Federal contracts, and DBA requirements also generally apply to projects financed using Federal dollars, including federally assisted highway construction; transportation projects financed using Federal loans, loan guarantees, and credit under the Transportation Infrastructure Finance and Innovation Act of 1998

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<sup>1</sup> The FHWA has published a guide for how to apply Federal-aid requirements to P3 transactions. A copy of this guide can be found at [http://www.fhwa.dot.gov/ipd/p3/toolkit/publications/p3\\_oversight/default.aspx](http://www.fhwa.dot.gov/ipd/p3/toolkit/publications/p3_oversight/default.aspx). Additional requirements will apply if the Project involves a Federal contract or subcontract.

(“TIFIA”) program; and any other transportation projects financed under Title 49, Chapter 53 U.S.C.<sup>2</sup>

When employers involved in a P3 Project pay fair wages and benefits, they are better able to deliver a quality and timely product by attracting a stable workforce of high-quality, high-skilled, and experienced workers who will complete a job accurately and on time, reducing the high costs associated with absenteeism and worker turnover; lowering costs for recruiting, training, and employee supervision; increasing worker productivity; and receiving higher-quality performance. These outcomes benefit workers, employers, the Developer, investors in the Project, and the public at large. To reap these benefits, Departments pursuing P3 Projects are encouraged to consider including contract terms requiring that the Developer, together with all contractors, subcontractors, concessionaires, and any other employers associated with a Project, pay their workers fair wages and benefits.

In the event a Project does not involve a Federal contract or Federal assistance and is thus not covered by the DBA and/or SCA,<sup>3</sup> Departments and Developers may be able to realize the public and private benefits of fair wages and benefits by drafting P3 agreements requiring that all employers on a Project pay workers at least the prevailing wages and fringe benefits specified by the U.S. Department of Labor in the applicable DBA or SCA wage determination.<sup>4</sup> If workers are employed on a Project to which the DBA or SCA does not apply and are employed in classifications for which DBA and SCA wage and benefit rates are unavailable,<sup>5</sup> employers on the Project could pay such workers either the rates listed for the most analogous classification on the DBA or SCA wage determination for the relevant locality, or, for workers who do not have an analogous DBA or SCA classification, no less than the wages and benefits that prevail among the majority of employees who perform similar work in the geographic area at issue.<sup>6</sup> Federal DBA and SCA wage rates are publicly available.<sup>7</sup> If a State or locality has its own prevailing wage laws that exceed the requirements of the DBA and SCA,<sup>8</sup> it

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<sup>2</sup> See 23 U.S.C. § 113; 23 U.S.C. § 602(c)(1); 49 U.S.C. § 5333(a). Other Federal funding laws that incorporate the DBA’s prevailing wage requirements are listed at 29 C.F.R. § 5.1(a).

<sup>3</sup> While the DBA applies both to Federal contracts and subcontracts and to federally assisted projects, the SCA applies only to Federal contracts and subcontracts, but not to federally assisted projects.

<sup>4</sup> Under the DBA and SCA, covered contractors are free to satisfy any fringe benefits requirements by paying employees the cash value of the fringe benefits specified in a wage determination. Departments and Developers choosing to implement a fringe benefit component of a prevailing wage requirement for a P3 could include a similar option to maximize flexibility.

<sup>5</sup> *E.g.*, employees who are neither “laborers and mechanics” nor “service employees” as defined by the DBA and SCA. If a project is subject to the DBA or SCA and employs workers in classifications that are not included on an applicable wage determination, the classification must be added through a conformance procedure.

<sup>6</sup> If information is unavailable for the particular area, employers could use prevailing wages for similarly situated employees in a geographic area with a similar median income.

<sup>7</sup> Locality-specific wage determinations under the DBA and SCA can be found at Wage Determinations Online at <http://www.wdol.gov>.

<sup>8</sup> Neither the DBA nor the SCA preempts State or local prevailing wage laws.

may be more appropriate to incorporate these laws into the P3 agreement rather than (or in addition to) the DBA and SCA.<sup>9</sup>

Finally, Departments can also choose to require a higher minimum wage “floor” independent of the applicable prevailing wage for workers on P3 agreements. To that end, Executive Order 13658, Establishing a Minimum Wage for Contractors, establishes a minimum wage of \$10.10, subject to annual increases based on the Consumer Price Index, for workers on covered Federal contracts.<sup>10</sup> Departments could incorporate a similar provision into P3 agreements.<sup>11</sup>

An example provision requiring the payment of prevailing wages as well as a minimum wage “floor” is below:

- (a) *The [Developer] shall, and shall require that all its [Subcontractors], pay any laborers and mechanics, as defined in the regulations implementing the Davis-Bacon Act, 29 C.F.R. § 5.2(m), working at the site of the Project who work in construction, alteration, and repair (including painting and decorating) no less than the applicable prevailing wages and fringe benefits as set forth by the United States Department of Labor for such workers under 40 U.S.C. Chapter 31, Subchapter IV, otherwise known as the Davis-Bacon Act [or applicable State prevailing wage requirements];*
- (b) *The [Developer] shall, and shall require that all its [Subcontractors], pay any of their service employees, defined as any workers engaged in the performance of a contract the principal purpose of which is to furnish services (other than any workers employed in a bona fide executive, administrative, or professional capacity, as defined in 29 C.F.R. part 541), who are working on the Project no less than the applicable prevailing wages and fringe benefits set forth by the United States Department of Labor for such employees under 41 U.S.C. Chapter 67, otherwise known as the Service Contract Act [or the applicable State prevailing wage requirements];*
- (c) *The fringe benefits specified in (a) and (b) may be satisfied through the [Developer’s] or [Subcontractor’s] irrevocably paying contributions to an independent trustee or other third person pursuant to an existing bona fide fund, plan, or program on the workers’ behalf; by furnishing bona fide fringe benefits to the workers; by making equivalent payments in cash to the workers; or any combination of the above methods.*
- (d) *For any workers of the [Developer] and its [Subcontractors] working on the Project for whom the prevailing wage and benefit determinations described in (a) and (b) are not available or do not exist, the [Developer] shall, and shall require that all of its [Subcontractors], pay such workers either*
- 1) No less than the prevailing wages and fringe benefits listed for a*

<sup>9</sup> For example, Pennsylvania and Illinois laws governing transportation P3s require that agreements incorporate the requirements of the States’ own prevailing wage laws. See 630 Ill. Comp. Stat. § 5/55 (citing 30 Ill. Comp. Stat. § 500/30-22); 74 Pa. Cons. Stat. § 9119(a)(2). Similar requirements exist in other States such as Maryland and Hawaii. See Md. Code, State Fin. & Procurement § 11-203(h)(2)(vi); Haw. Rev. Stat. § 104-2(a).

<sup>10</sup> See E.O. 13658 §§ 2(a), 7.

<sup>11</sup> All Developers and Subcontractors must, of course, also comply with all applicable Federal, State, and local minimum wages laws and regulations.

*classification under the Davis-Bacon Act or Service Contract Act [or applicable State prevailing wage law] that is substantially similar to the worker's classification, or*

2) *No less than the wages and fringe benefits that prevail among the majority of employees who perform similar work in [the geographic area].*

(e) *Notwithstanding the above provisions, the [Developer] shall, and shall require that all its [Subcontractors], pay each worker who performs work on the [Project] at least a minimum wage of [amount] per hour.*

### **XX.3 Employee Benefits**

#### **XX.3.1 Paid Sick and Family Leave**

In addition to prevailing wage and fringe benefit provisions, another best practice is for Departments to ensure that employers associated with a P3 Project provide their workers with paid sick and family leave. The Federal Family and Medical Leave Act of 1993 (“FMLA”) guarantees eligible employees of covered employers up to 12 weeks of unpaid, job-protected leave per year, with continuation of group health insurance coverage, to address a serious health condition of the worker or a close family member, care for a newborn, and attend to other needs. It also provides up to 26 weeks of leave to care for a covered servicemember recovering from a serious injury or illness incurred in the line of duty on active duty. However, because of minimum requirements regarding employer size and length of employee service, the FMLA covers only about 60 percent of American workers and less than one-fifth of all new mothers.<sup>12</sup> Moreover, because FMLA leave is unpaid, many workers cannot afford to take the full amount of leave they need.

Even fewer American workers have access to paid sick and family leave. According to one survey, only 53 percent of workers reported having access to paid sick days to cover their own illness, only 48 percent reported being able to take paid leave to care for a family member, and only 39 percent reported access to paid family leave for the birth of a child.<sup>13</sup> Only 12 percent of American companies offer paid leave for new parents.<sup>14</sup>

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<sup>12</sup> Council of Economic Advisers, Executive Office of the President, *The Economics of Paid and Unpaid Leave* (2014) (“*Economics*”), at 3, [http://www.whitehouse.gov/sites/default/files/docs/leave\\_report\\_final.pdf](http://www.whitehouse.gov/sites/default/files/docs/leave_report_final.pdf) (citing Jacob Alex Klerman, Kelly Daley, and Alyssa Pozniak (prepared for U.S. Dep’t of Labor by Abt Assocs.), *Family and Medical Leave in 2012: Technical Report* (2013), <http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf>). For example, employees who work for employers with fewer than 50 employees within 75 miles of the employee’s worksite are not eligible to take FMLA leave, and employees must have worked for an employer for at least a year and generally must have at least 1,250 hours of service in the prior year to be eligible. See 29 U.S.C. §§ 2611(2)(A), 2611(2)(B)(ii).

<sup>13</sup> Council of Econ. Advisers, *Economics*, at 9-10.

<sup>14</sup> See Soc’y for Human Res. Mgmt., *2014 Employee Benefits: An Overview of Employee Benefits Offerings in the U.S.*, at 28, [https://www.shrm.org/Research/SurveyFindings/Documents/14-0301%20Benefitis\\_Report\\_TEXT\\_FNL.pdf](https://www.shrm.org/Research/SurveyFindings/Documents/14-0301%20Benefitis_Report_TEXT_FNL.pdf).

Paid family and medical leave improves worker productivity, enables employees who are sick or injured to stay home and recover rather than working at less than full strength and potentially passing illnesses on to other workers, and saves employers costs, all of which benefit Projects. Additionally, paid sick and family leave policies can help employers recruit and retain talented workers, which increases the quality of the work performed on a Project and decreases the recruiting and training costs and productivity losses that result from excessive turnover.<sup>15</sup> For example, one survey showed that businesses with family-friendly policies including either paid or unpaid sick leave were more likely than other businesses to have above-average labor productivity.<sup>16</sup> As a result, Departments that require paid sick and family leave of P3 Developers and other employers will attract productive, cost-effective bidders.

An example provision requiring the payment of paid sick and family leave is below:<sup>17</sup>

*(a) The [Developer] shall, and shall require that all its [Subcontractors], permit each worker on the Project to accrue at least [number] days of leave per [time period], with full entitlement to the worker's pay, to be used for one or more of the following reasons:*

- 1) Because of the worker's physical or mental illness, injury, or medical condition;*
- 2) To obtain professional medical diagnosis or care or preventive medical care for the worker;*
- 3) Because of the birth of a child of the worker and in order to care for such son or daughter; or because of the placement of a son or daughter with the worker for adoption or foster care;*
- 4) To care for a child, spouse, domestic partner, parent, or [other close family member] who has any of the needs or criteria described in (1), (2), or (3);*
- 5) Because of a [qualifying exigency] arising out of the fact that a [close family member described in (4)] is on active military duty;*
- 6) An absence resulting from domestic violence, sexual assault, or stalking, if the time is to seek medical attention for the employee or the employee's [close family member described in (4)]; to recover from physical or psychological injury or disability caused by domestic violence, sexual assault, or stalking; to obtain or assist a [close family member described in (4)] in obtaining services from a victim services organization; to*

<sup>15</sup> Council of Econ. Advisers, *Economics*, at 16-18.

<sup>16</sup> *Id.* at 18 (citing Shirley Dex and Colin Smith, *The Nature and Pattern of Family-Friendly Employment Policies in Britain* (2002), <http://www.jrf.org.uk/sites/files/jrf/jr116-family-friendly-employment.pdf>).

<sup>17</sup> The example provision is adapted in part from the FMLA and the Healthy Families Act, proposed legislation that has been introduced in Congress. See Healthy Families Act, H.R. 932, 114th Cong. (2015). The Healthy Families Act would allow employees to accrue up to seven days of paid sick or family leave per year, but Departments may consider setting higher standards. For example, California's family leave law provides up to six weeks of paid leave at up to 55 percent of workers' weekly earnings up to a maximum weekly dollar amount. See Cal. Unemp. Ins. Code §§ 3301, 2655. In addition to sick leave and leave to care for a sick family member or new child, the sample provision here includes language modeled after the FMLA's "qualifying exigency" and "military caregiver leave," as well as a provision modeled after the Healthy Families Act's leave for absences resulting from domestic violence, sexual assault, or stalking.

*obtain or assist a [close family member described in (4)] in obtaining psychological or other counseling; to seek relocation; or to take legal action, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from domestic violence, sexual assault, or stalking; or*

7) *[Any other grounds the Department deems sufficient to warrant family or medical leave].*

*(b) The [Developer] shall, and shall require that all its [Subcontractors], permit each worker on the Project to accrue at least [number] days of leave per [time period], with full entitlement to the worker's pay and benefits, to care for a military servicemember with a serious illness or injury if the worker is the servicemember's [close family member described in (4)] or next of kin.<sup>18</sup>*

### **XX.3.2 Health and Retirement Benefits**

Like paid sick leave, health and retirement coverage benefits employees, employers, and the Department and its taxpayers. These benefits help attract and retain quality employees and reduce turnover, because the best and most capable workers are most likely to work for, and remain with, employers who provide these important benefits. Health benefits also enable employees to obtain quality, affordable care and treatment when they are sick or injured, and this care and treatment enables workers to return to their full productivity levels at work as soon as is practicable, saving a Project time and money. And employers who contribute to health and retirement plans are often able to realize tax savings because such contributions, as well as expenses associated with plans, can be tax-deductible. Finally, these benefits can promote a strong safety culture, because when companies make long-term investments in employees, they promote improved operational execution and productivity and a well-trained, knowledgeable, and stable workforce that is capable of meeting critical safety demands.

For these reasons, Departments may consider encouraging Developers and Subcontractors to provide health and retirement benefits through measures such as financial incentives and giving Developers and Subcontractors who provide such benefits preference or priority during the bidding process.<sup>19</sup> Departments should ensure that any

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<sup>18</sup> While the sample language does not include a suggested number of days of leave for the specified conditions, it includes a separate provision for military caregiver leave. This is modeled after the FMLA, which provides 26 weeks for military caregiver leave compared to 12 weeks of leave for the other conditions covered by the Act. *See* 29 U.S.C. § 2612(1), (3).

<sup>19</sup> As to health insurance specifically, the Affordable Care Act (“ACA”) added new Internal Revenue Code provisions (“Employer Shared Responsibility provisions”) that apply to certain large employers (generally, firms with at least 50 full-time and full-time equivalent employees in the prior year). Under these Employer Shared Responsibility provisions, if the applicable large employers do not offer affordable health coverage that provides a minimum level of coverage to their full-time employees (and their dependents), the employer may be subject to an Employer Shared Responsibility payment if at least one of its full-time employees receives a premium tax credit for purchasing individual coverage on one of the new Affordable Insurance Exchanges, also called a Health Insurance Marketplace. Many Developers and Subcontractors, due to their size, will be subject to the Employer Shared Responsibility provisions, but Departments may consider incentivizing Developers and Subcontractors who are not subject to these provisions to provide their employees with health benefits.

such incentives or preferences are consistent with Federal, State, and local law, including the Employee Retirement Income Security Act of 1974 (“ERISA”).

#### **XX.4 Incumbent Worker Nondisplacement and Protections**

When a Department enters into a P3 to replace or take over a project that was previously operated or maintained by a public entity (or by another private entity), the agreement may seek to retain workers previously working at that entity. If the P3 Project wholly displaces the existing workforce, the result can be harmful not only for the workers who lose their jobs but also for the Project, which will lose workers with a significant amount of expertise and knowledge. Additionally, if a P3 Project results in a decline in workers’ wages, benefits, and other conditions of employment, it can impair worker recruitment and retention, and may also compromise the success of future P3 initiatives. Conversely, keeping existing workers provides continuity in the delivery of services and ensures that a Project has an experienced, trained workforce that is familiar with a worksite, its operations, and its unique requirements. As such, many Departments will find it in their interests to include in P3 contracts, or in legislation, protections for incumbent workers affected by a P3.<sup>20</sup>

Federal law provides two general models for incumbent worker nondisplacement and other protections that Departments may consider adopting into P3s. One model provides incumbent employees with the right of first refusal of employment with the new employer. For example, Executive Order 13495, which applies to service employees on Federal contracts covered by the Service Contract Act, requires that when a service contract expires and a follow-on contract is awarded for the same or similar services as the same location, the new (successor) contractor generally must provide all of the service employees who had worked for the previous (predecessor) contractor during the last month of the predecessor contract the right of first refusal of employment with the successor contractor.<sup>21</sup> There are a few exceptions to this general rule. Most notably, the successor contractor may give priority to its own employees who worked for at least three months immediately preceding the new contract and would otherwise face layoff or discharge, it need not offer employment to workers who are being retained by the predecessor contractor, and the successor has discretion to employ fewer employees than the predecessor.<sup>22</sup> The predecessor contractor must provide notice to its employees of their rights under E.O. 13495.<sup>23</sup> Another example of this type of protection can be found in a regulation that applies when Federal government work is converted to private contract work.<sup>24</sup> This provision requires that a contractor give government workers who have been, or will be, adversely affected or separated from government service as a result

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<sup>20</sup> This may be particularly important where the previous workforce included veterans who held veterans preference under laws established by the public entity.

<sup>21</sup> See E.O. 13495, Nondisplacement of Qualified Workers Under Service Contracts (Jan. 30, 2009); see also U.S. Dep’t of Labor, Wage & Hour Div., Final Rule on Nondisplacement of Qualified Workers Under Service Contracts, 76 Fed. Reg. 53720 (Aug. 29, 2011); 29 C.F.R. § 9.12(a).

<sup>22</sup> See 29 C.F.R. § 9.12(c)(1), (d). If the successor contractor employs fewer employees than its predecessor, it must still provide a right of first refusal to the predecessor’s employees for 90 days after the contract begins to fill any vacancies that arise. For a complete list of exceptions to the nondisplacement rule, see 29 C.F.R. § 9.12(c) and (d).

<sup>23</sup> See *id.* § 9.11(b).

<sup>24</sup> See 48 C.F.R. § 52.207-3.



of the new contract a right of first refusal for jobs under the contract for which they are qualified.

A more comprehensive model in Federal law for ensuring that a new project does not result in the worsening of employment conditions is Section 13(c) of the Federal Transit Act.<sup>25</sup> Section 13(c) protects employee rights, including collective bargaining rights, if they pre-existed Federal assistance. Under Section 13(c), as a condition of receiving financial assistance from the Federal Transit Administration to acquire, improve, or operate a mass transit system, the State or local entity receiving such assistance is required to put arrangements in place to protect the interests of employees who may be affected by such assistance. Arrangements under 13(c) must include provisions that may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise, (2) the continuation of collective bargaining rights, (3) the protection of individual employees against a worsening of their positions related to employment, (4) assurances of employment to employees of acquired public transportation systems, (5) assurances of priority of reemployment of employees whose employment is ended or who are laid off, and (6) paid training or retraining programs.<sup>26</sup> These arrangements must be certified by the Department of Labor. Departments can require similar arrangements in the P3 context to protect the rights of employees affected by a P3. While the 13(c) model may be particularly appropriate in the context of transit P3 Projects, it can be adapted to non-transit projects as well. The Department of Labor's website includes several model 13(c) agreements.<sup>27</sup>

Other models exist in which the P3 may maintain a closer relationship with the public entity that previously operated or maintained the Project. For example, under some circumstances, Developers and Subcontractors may continue utilizing the existing public entity and its employees to work on the Project, such as by using the public entity as a contractor to the Developer or a Subcontractor or by entering into an employee leasing arrangement with the public entity. Depending on the circumstances, these types of arrangements may enable the public employees to continue their government service and, if they are still considered common-law employees of the governmental entity, to retain their governmental pay, pension, and health benefits. Departments entering into these types of arrangements should ensure that they are in compliance with all relevant legal requirements, including regulations of the Department of Labor and the Internal Revenue Service that pertain to governmental benefit plans.

State laws also provide useful examples for Departments seeking to require or encourage protective arrangements as a condition of entering into a P3. For example, Illinois legislation authorizing a P3 for Chicago Midway International Airport required the private entity to offer the public employees who would become employees of the private

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<sup>25</sup> See 49 U.S.C. § 5333(b).

<sup>26</sup> *Id.* § 5333(b)(2).

<sup>27</sup> See U.S. Dep't of Labor, Office of Labor-Management Standards, Mass Transit Employee Protections, <http://www.dol.gov/olms/regs/compliance/compltransit.htm>. This web page includes a discussion of Section 13(c) as well as links to four Section 13(c) agreements endorsed by the Department, including the Unified Protective Arrangement, the Special Warranty Arrangement, the Nonunion Protective Arrangements, and the Model ("National") Agreement.

entity the economic equivalent of the standard of their public sector wages and benefits, and also required the government to offer substantially similar alternative jobs to those public employees.<sup>28</sup>

While the specific terms of a protective agreement in the context of a P3 will likely vary by Department and by Project, the inclusion of protections for incumbent workers, particularly those that protect such workers from displacement and maintain their wages and benefits, can yield benefits for workers, management, and Departments.

## **XX.5 Workforce Development and Apprenticeship**

Departments are also encouraged to consider promoting workforce development activities, including partnering with the public workforce system to assist in outreach, recruitment, screening, assessment, and job training for workers of Developers and their Subcontractors. Under these models, Developers and Subcontractors can be offered incentives or be required to work with the local Workforce Development Board to provide any or all of the following: notification of upcoming positions (including necessary experience and skills requirements), identification of on-the-job training opportunities, assistance in the development of customized training opportunities for positions associated with the project, and review of pre-screened applicants.

One specific area of workforce development includes Registered Apprenticeships. Apprenticeships – a combination of on-the-job learning and related instruction in which workers learn how to perform a highly skilled occupation – can yield valuable benefits for workers seeking to earn wages and learn skills, for employers striving to improve their own workforce, and for local and State governments wishing to create and sustain economic growth. As such, many Departments may encourage employers associated with a Project to participate in high-quality Registered Apprenticeship programs that can lead to sustainable careers in transportation and related industries like construction.

The U.S. Department of Labor administers the National Registered Apprenticeship system, which partners with employers, employer associations, labor management organizations, State and local governments, community organizations, and others to promote high-quality apprenticeship programs. In a successful Registered Apprenticeship program, the apprentice receives a combination of on-the-job training and structured learning. The apprentice begins working from day one and earns gradual wage increases as he or she gains the necessary skills. At the conclusion of the program, the apprentice receives a portable, nationally-recognized credential that certifies that he or she has reached a certain level of proficiency. In the United States today, there are over 19,000 active Registered Apprenticeship programs that offer training to over 410,000 Registered Apprentices.<sup>29</sup> Numerous industries that participate in Registered Apprenticeship programs are directly relevant to a transportation P3 Project, including construction, manufacturing, telecommunications, and information technology.

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<sup>28</sup> 50 Ill. Comp. Stat. §§ 615/35, 615/40. The Midway P3 Project ultimately did not go forward.

<sup>29</sup> U.S. Dep't of Labor, Employment & Training Admin., Data and Statistics: Registered Apprenticeship National Results, Fiscal Year 2014, [http://www.doleta.gov/oa/data\\_statistics.cfm](http://www.doleta.gov/oa/data_statistics.cfm).

Developers and their Subcontractors who employ Registered Apprentices have the benefit of creating a pipeline of skilled workers who become, through their training, familiar with the specific needs and specifications of their industry and employer and, as a result, produce high-quality results. The on-the-job learning that apprentices receive from more experienced workers leads to increased productivity and knowledge transfer. Registered Apprenticeship programs also enhance employee retention; in 2011, 87 percent of apprentices who completed a Registered Apprenticeship program were still employed nine months after completing their apprenticeship.<sup>30</sup> And because apprenticeship programs emphasize safety training, they can reduce employer costs associated with workers who become injured or sick while on the job.

State and local governments also see economic benefits from Registered Apprenticeship programs. By expanding the number of highly skilled workers in a State or locality, a Registered Apprenticeship program can help jurisdictions recruit and retain businesses that require such skilled workers. Additionally, because apprentices pay income taxes on their wages, they can generate tax revenue. For example, it is estimated that every \$1 the Federal government invests in Registered Apprenticeship programs yields more than \$50 in revenue.<sup>31</sup> Finally, apprenticeship provides a path toward employment and higher earnings for a diverse workforce that includes minorities, women, veterans, youth, low-income individuals, and dislocated workers. For example, in 2009, Oregon passed legislation requiring the State's transportation department to use one-half of 1 percent of eligible Federal highway funds, up to \$2.1 million every two years, to increase diversity in the highway construction workforce and to prepare workers who seek to enter the highway construction workforce.<sup>32</sup> Such spending is authorized by 23 U.S.C. § 140(b), and States and localities may wish to use this available funding as a means of promoting apprenticeship and diversity in the highway workforce.

Departments seeking to secure the benefits of Registered Apprenticeship in a P3 may encourage employers on a P3 to participate in a Registered Apprenticeship program by, for example, providing Developers and Subcontractors with incentives to participate in such programs or granting preferences to bidders who participate in such programs.<sup>33</sup> Departments should ensure that any policies pertaining to apprenticeship for P3s are fully consistent with Federal, State, and local law, including ERISA.<sup>34</sup> More information on

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<sup>30</sup> U.S. Dep't of Labor, Employment & Training Admin., What Is Registered Apprenticeship?, <http://www.doleta.gov/oa/apprenticeship.cfm>.

<sup>31</sup> U.S. Dep't of Labor, Employment & Training Admin., *Registered Apprenticeship: A Solution to the Skills Shortage* (Part 2), <http://www.doleta.gov/oa/pdf/fsback.pdf>.

<sup>32</sup> See Or. Rev. Stat. § 184.866.

<sup>33</sup> Registered Apprenticeship programs are regulated by the U.S. Department of Labor's Office of Apprenticeship and apprenticeship agencies in about 25 States. See U.S. Dep't of Labor, Employment & Training Admin., *A Quick-Start Toolkit Building Registered Apprenticeship Programs*, [http://www.doleta.gov/employers/apprenticeship\\_toolkit.pdf](http://www.doleta.gov/employers/apprenticeship_toolkit.pdf). The Office of Apprenticeship's regulations are set forth at 29 C.F.R. Parts 29 and 30.

<sup>34</sup> In addition, if a Project is subject to the DBA, SCA, or E.O. 13658 and employs apprentices or trainees on the Project, it must do so in compliance with U.S. Department of Labor regulations. See 29 C.F.R. §§ 4.6(p), 5.5(a)(4), 10.2.

these strategies can be found in the Department of Labor's Federal Resources Playbook for Registered Apprenticeship.<sup>35</sup>

## XX.6 Workplace Health and Safety

### XX.6.1 Injury Illness and Prevention Programs

Employers who prevent workplace injuries and illnesses are not only protecting their workers' safety, health, and well-being; they are improving their own efficiency, quality, and bottom line. In a P3 Project, such savings can translate into lower cost, better value, more efficient and reliable performance, and higher-quality services for the Department and taxpayers.

Each year, approximately 4,500 workers are killed on the job and nearly three million suffer serious work-related injuries or illnesses.<sup>36</sup> These illnesses and injuries not only have a devastating immediate effect, but can have long-term consequences as well; even with workers' compensation benefits, the incomes of workers who are injured are, on average, almost \$31,000 lower over 10 years than if they had not been injured.<sup>37</sup> Workplace injuries have a particularly significant impact on low-wage workers, whose family members must often reduce their own hours of work and wages to care for a disabled partner or family member.<sup>38</sup>

In addition to the impact on workers, workplace illnesses and injuries cause employers to incur substantial costs and business disruptions. According to one study, the direct cost of the most disabling workplace injuries in 2012 was nearly \$60 billion.<sup>39</sup> Another study estimated the annual workers' compensation benefits paid for all compensable injuries and illnesses in 2012 at over \$61 billion.<sup>40</sup> Other direct costs may include potential fines from regulatory agencies for violations of workplace health and safety requirements. In addition to these direct costs, other indirect costs can include wages paid to injured workers for absences not covered by workers' compensation; time lost through work stoppages; administrative time spent by supervisors following injuries; employee training and replacement costs; lost productivity related to accommodation of injured employees and new employee learning curves; and replacement costs of damaged material, machinery, and property.

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<sup>35</sup> See U.S. Dep't of Labor, Employment & Training Admin., *The Federal Resources Playbook for Registered Apprenticeship*, <http://www.doleta.gov/oa/federalresources/playbook.pdf>.

<sup>36</sup> See U.S. Dep't of Labor, Occupational Safety & Health Admin., *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job* (2015), at 3, <http://www.dol.gov/osha/report/20150304-inequality.pdf>.

<sup>37</sup> *Id.* at 4.

<sup>38</sup> See *id.* at 4-5.

<sup>39</sup> Liberty Mutual Research Institute for Safety, *2014 Liberty Mutual Workplace Safety Index* (2014), [http://www.libertymutualgroup.com/omapps/ContentServer?c=cms\\_document&pagename=LMGResearchInstitute%2Fcms\\_document%2FShowDoc&cid=1138365240689](http://www.libertymutualgroup.com/omapps/ContentServer?c=cms_document&pagename=LMGResearchInstitute%2Fcms_document%2FShowDoc&cid=1138365240689). The "most disabling" injuries are defined by this study as those causing the injured employee to miss six or more days of work.

<sup>40</sup> National Academy of Social Insurance, *Workers' Compensation: Benefits, Coverage, and Costs, 2012* (2014), at 1, [http://www.nasi.org/sites/default/files/research/NASI\\_Work\\_Comp\\_Year\\_2014.pdf](http://www.nasi.org/sites/default/files/research/NASI_Work_Comp_Year_2014.pdf).

One way that employers can help ensure workplace safety and health is through an injury and illness prevention program.<sup>41</sup> Such a program is a proactive process to help employers find and fix workplace hazards before workers become hurt or sick. Not only do employers who implement these programs experience dramatic decreases in workplace injuries, but they also often report a transformed workplace culture that can lead to higher productivity and quality, reduced turnover, reduced costs, and greater employee satisfaction. When workers and employers work together to develop a culture of safety, workers are encouraged to offer their ideas and contributions, which can result in greater employee loyalty and higher productivity. And through the process of comprehensively identifying, preventing, and controlling workplace hazards, workers and employers may also identify and correct other flaws and inefficiencies at the workplace, which can translate into increased output and quality.

Thirty-four States already require or encourage employers to implement injury and illness prevention programs. Fifteen States have mandatory injury and illness prevention program regulations for some or all employers, while others provide voluntary guidance, consultation, training, and other assistance; provide financial incentives for employers to implement such programs; or require mandatory safety committees of some or all employers.<sup>42</sup> In the construction industry, Occupational Safety and Health Administration (“OSHA”) regulations already require employers to initiate and maintain programs that provide for frequent and regular inspections by competent individuals of job sites, materials, and equipment.<sup>43</sup> All employers, however, regardless of industry, may adopt injury and illness prevention programs, and as noted above, such programs are effective in improving efficiency and performance and decreasing costs.

Injury and illness prevention programs typically involve a number of elements, all of which are flexible and can be implemented by large and small businesses alike: management leadership, worker participation, hazard identification, hazard prevention and control, education and training, and program evaluation and improvement. These elements can include, for example, encouraging workers to report concerns, such as hazards, injuries, illnesses, and near misses; identifying workplace hazards through inspections, worker input, and investigations; informing workers of any hazards that may exist; implementing a plan to prioritize and control hazards; educating workers how to recognize hazards, how to assist in eliminating, controlling, and reducing them, and how

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<sup>41</sup> Different entities use various terms to describe systematic approaches to reducing injuries and illnesses in the workplace. Consensus and international standards use the term “Occupational Health and Safety Management Systems,” OSHA currently uses “Injury and Illness Prevention Programs,” and others use “Safety and Health Programs.” All of these refer to efforts to systematically address workplace safety and health hazards on an ongoing basis to reduce the extent and severity of work-related injuries and illnesses.

<sup>42</sup> The fifteen States with regulations requiring injury and illness prevention programs of some or all employers are Arkansas, California, Hawaii, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New York, North Carolina, Oregon, Utah, and Washington. See U.S. Dep’t of Labor, Occupational Safety & Health Admin., *Injury and Illness Prevention Programs – White Paper* (2012), <http://www.osha.gov/dsg/InjuryIllnessPreventionProgramsWhitePaper.html>. The remaining States with regulations or incentives that promote such programs include Alabama, Colorado, Connecticut, Delaware, Idaho, Indiana, Kansas, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Vermont, West Virginia, and Wyoming. See *id.*

<sup>43</sup> 29 C.F.R. § 1926.20(b)(1-2).

to properly report injuries and illness; and periodically reviewing the overall program to determine whether it is effective or needs improvement.

In recognition of the benefits of injury and illness prevention programs, Departments assessing candidates for a P3 project can prioritize bidders who implement injury and illness prevention programs, or they can include contract terms requiring bidders to implement such programs. Guidance on implementing these types of programs can be found on OSHA’s website.<sup>44</sup>

## XX.6.2 Proper Incentives for Reporting Workplace Injuries and Safety Violations

Employers can also promote workplace safety by ensuring that they do not establish programs and systems that – whether intentionally or unintentionally – discourage employees from reporting workplace injuries. For example, some employers may provide bonuses or other incentives for employees, teams, or worksites that have not experienced any injuries in a certain period of time. While these programs often are well-intentioned, they may discourage reporting because reporting an injury can eliminate or reduce employees’ opportunity to earn the relevant reward. Additionally, to the extent that these programs effectively discriminate against workers who report injuries, they may be unlawful under Section 11(c) of the Occupational Safety and Health (“OSH”) Act and other laws, and if they result in injuries not being reported, they may cause the employer to violate OSHA regulations that require employers to keep records of workplace injuries.<sup>45</sup>

To prevent such results and to promote true workplace safety, employers can use different types of incentives, such as those that encourage or reward workers for reporting injuries, illnesses, near-misses, and hazards, for participating in safety and health training, or for taking part in safety and health committees, and thus encourage workers to be actively involved in their employers’ safety and health management system. Departments can use the terms of their contracts or solicitation requirements to encourage such practices, rather than those that may discourage workers from reporting injuries.

An example of a provision incorporating the health and safety protections described above is below:

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| <p>(a) <i>The [Developer] and each [Subcontractor] on a Project must initiate and maintain a written injury and illness prevention program.</i></p> <p>(b) <i>Such a program must provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the [Developer] or [Subcontractor].</i></p> <p>(c) <i>Such a program must also involve:</i></p> |
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<sup>44</sup> See U.S. Dep’t of Labor, Occupational Safety & Health Admin., Injury and Illness Prevention Programs, <http://www.osha.gov/dsg/topics/safetyhealth/index.html>.

<sup>45</sup> For additional guidance on safety incentives and disincentives, see OSHA’s memorandum on Employer Safety Incentive and Disincentive Policies and Practices (Mar. 12, 2012), <https://www.osha.gov/as/opa/whistleblowermemo.html>, and Revised VPP Policy Memorandum #5: Further Improvement to the Voluntary Protection Programs (VPP) (Aug. 14, 2014), [http://www.osha.gov/dcsp/vpp/policy\\_memo5.html](http://www.osha.gov/dcsp/vpp/policy_memo5.html).

- a. Participation by both management and workers;*
- b. Initiatives to regularly and proactively identify, prevent, and control hazards and risks to worker safety and health;*
- c. Regular education and training of management and workers; and*
- d. Regular evaluations of the program and improvement as necessary.*
- (d) Such a program may not use incentives that could discourage workers from reporting hazards, illnesses, or injuries, such as associating a benefit or reward for workers, managers, or teams with few or zero reported injuries over a given period of time.*
- (e) The [Developer] and each [Subcontractor] may not discriminate or retaliate against workers who report hazards, illnesses, or injuries.*

## **XX.7 Wage and Classification Transparency**

Transparency between employers and workers about their pay and classification status can help workers understand their rights under wage payment and antidiscrimination laws and receive benefits for which they are eligible. Many workers are unaware of potential compensation violations because they lack information about the number of hours they have worked (including the number of overtime hours), whether any additions or deductions have been made from their pay, and whether they are being correctly classified by their employer as employees or independent contractors. Additionally, some employers prohibit employees from inquiring about, disclosing, or discussing their pay with their fellow workers, which both decreases the likelihood that the most qualified and productive workers will be hired at the market price and prevents the employees from learning about any wage discrimination that may exist. Early identification of wage-related issues through wage and classification transparency can benefit a P3 Project, as it may help prevent disagreements about wages and employee classification from becoming prolonged disputes that have an adverse impact on the timely completion of a Project. By enabling workers to raise any concerns about their pay as soon as they arise, transparency encourages employers on a Project to resolve those concerns quickly and effectively.

Departments can encourage such transparency by requiring Developers and other employers associated with a Project to provide wage statements to their employees each pay period that contain information about the individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay, and by requiring a one-time notice of whether the employer is treating the worker as an independent contractor rather than an employee. Departments can encourage additional transparency by prohibiting employers on a P3 from taking adverse employment actions against workers and job applicants who inquire about, discuss, or disclose their own compensation or the compensation of other workers or job applicants.

An example of a provision incorporating these protections is below:<sup>46</sup>

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<sup>46</sup> These provisions are adapted in part from section 5 of Executive Order 13673, Fair Pay and Safe Workplaces (July 31, 2014), and Executive Order 13665, Non-Retaliation for Disclosure of Compensation Information (Apr. 8, 2014). Executive Order 13673 requires covered Federal contractors and subcontractors to provide each of their

- (a) *The [Developer] and all [Subcontractors] must provide each individual performing work on the Project, on each payday, with a document containing the following information for that individual:*
- 1) *The worker's gross pay for the pay period;*
  - 2) *Any additions made to or deductions made from pay;*
  - 3) *The basis for how the worker is paid (e.g. by the hour, shift, day, week, salary, piece, commission, or other);*
  - 4) *The total number of hours worked by the worker during the pay period;*
  - 5) *The total number of overtime hours worked by the worker during the pay period, if the worker is eligible for overtime pay under Federal, State, or local law or receives overtime pay pursuant to a contract or collective bargaining agreement; and*
  - 6) *Whether the worker is eligible for overtime pay under Federal, State, or local law or receives overtime pay pursuant to a contract or collective bargaining agreement.*
- (b) *The [Developer] and all [Subcontractors] must provide each individual performing work on the Project, before the individual performs any work on the Project, with a document stating whether the employer has designated the worker as an employee or an independent contractor.*
- (c) *The [Developer] and [Subcontractors] shall provide the documents described in section (a) and (b) to each worker in English and in any language(s) other than English in which a significant portion of the [Developer's] or [Subcontractor's] workforce is fluent.*
- (d) *The [Developer] and [Subcontractors] shall not discharge, or in any other manner discriminate against, any worker or job applicant because such worker or job applicant has inquired about, discussed, or disclosed his or her own compensation or the compensation of another worker or job applicant.*
- (e) *The prohibition in (d) shall not apply to instances in which a worker who has access to the compensation information of other workers or job applicants as a part of the worker's essential job functions (e.g. a worker in human resources) discloses without authorization the compensation of such other workers or job applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the [Developer] or [Subcontractor], or is consistent with the [Developer's] or [Subcontractor's] legal duty to furnish information.*

Departments can also promote compliance with wage payment and classification requirements by requiring employers on a P3 to certify on a regular basis that they have complied with all relevant wage payment laws, have correctly classified their workers, and are complying with tax laws, workers compensation laws, and other relevant requirements – with penalties for failure to comply. This approach encourages employers

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workers with a wage statement each pay period, and also requires that such contractors and subcontractors provide notices to any workers they are treating as independent contractors rather than employees. The President signed Executive Order 13665 to prohibit pay secrecy policies for Federal contractors and subcontractors.



who share the benefits of working on a P3 to proactively review their classification of employees.<sup>47</sup>

## XX.8 Equal Employment Opportunity

Equal employment opportunity principles help employers identify the person best qualified for a job, creating a more productive workforce. Many Developers and Subcontractors are bound by Federal laws governing equal employment opportunity. State and local laws and ordinances may prohibit discrimination on additional grounds and may extend nondiscrimination requirements to employers who are not covered by Federal law. As a best practice, Departments may also include nondiscrimination and equal opportunity requirements in their contracts with P3 Developers for employers that are not otherwise covered.

Most employers with at least a specified number of employees<sup>48</sup> are required to comply with certain Federal equal opportunity laws, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Equal Pay Act, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, and others. Additionally, if an employer working on a P3 project is receiving any Federal assistance, Title VI of the Civil Rights Act of 1964 prohibits the employer from discriminating on the bases of race, color, and national origin and provides that the Federal government may terminate its financial assistance to employers who fail to comply with these provisions.<sup>49</sup>

Additional equal employment opportunity provisions apply to many covered Federal contractors, subcontractors, and federally assisted construction contracts. Executive Order 11246, as amended, bars discrimination by covered Federal contractors and subcontractors, as well as federally assisted construction contractors (*i.e.*, companies working on a construction contract that receives funds under a Federal program by means of a grant, loan, insurance, or guarantee), on the bases of race, color, religion, sex, sexual orientation, gender identity, and national origin. The Executive Order also requires covered employers to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment. Section 503 of the Rehabilitation Act prohibits discrimination by covered Federal contractors and subcontractors against qualified individuals with disabilities and requires them to take affirmative action to employ, and advance in employment, such individuals.<sup>50</sup> Similarly, the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA") prohibits discrimination by covered Federal contractors and subcontractors against qualified protected veterans and requires that they take affirmative action to employ, and advance in employment, such veterans.<sup>51</sup>

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<sup>47</sup> Municipal ordinances in Boston, Somerville, and Worcester, Massachusetts follow this model. See City of Boston Mun. Code, ch. VIII, § 8-9.2(c)(4); Somerville, Mass. Code of Ordinances ch. 2, § 2-355(b)(5); Worcester Rev. Ordinances ch. 2, § 35(c)(4).

<sup>48</sup> Each statute specifies its own requirements for coverage.

<sup>49</sup> 42 U.S.C. §§ 2000d, 2000d-1.

<sup>50</sup> 29 U.S.C. § 793; 41 C.F.R. part 60-741. Section 503 does not apply to federally assisted construction contractors.

<sup>51</sup> 38 U.S.C. § 4212(a)(2), 41 C.F.R. part 60-300. VEVRAA does not apply to federally assisted construction contractors.

Departments are encouraged to consider requiring or incentivizing nondiscrimination and incorporating equal opportunity provisions into their contracts with Developers and employers on P3s even if such steps are not required by law. For example, contractual provisions or bid specifications might require that all Federal, State, and local nondiscrimination laws and ordinances apply regardless of the number of workers employed by an employer. They might also include a requirement to employ affirmative efforts to promote equal opportunity, such as self-audits to avoid disparities in hiring, promotion, and compensation and to ensure effective recruitment, training, and educational programs. The affirmative action provisions of Executive Order 11246, Section 503 of the Rehabilitation Act, and VEVRAA and their implementing regulations may serve as helpful guidance for Departments and employers wishing to promote such practices. Finally, Departments may consider requiring employers on P3s to maintain written equal employment opportunity policies that set forth the employers' policies and procedures for complying with equal opportunity laws and promoting equal opportunity in their workforces.

## **XX.9 Project Labor Agreements**

It is in the strong interest of a Department for employers on a Project to maintain positive and productive relationships with their workforce and to resolve issues related to labor management before a Project begins. One way to do so is through a Project Labor Agreement ("PLA"). A PLA is a pre-hire collective bargaining agreement ("CBA") that governs terms and conditions of employment on one or more construction projects and lasts only as long as the project. In transportation projects, PLAs are typically negotiated between the State or local contracting agency and appropriate labor organizations, such as an area or State building and construction trades councils and relevant local unions.

PLAs can be valuable tools that can help ensure that taxpayers and private investors receive quality projects that are delivered on time and under budget and create good jobs that benefit families and communities. They can be particularly useful in the construction context, as construction projects typically involve numerous employers at a single location working in tandem. PLAs can provide uniformity and certainty to the Developer and the Department by prohibiting work stoppages and providing for expeditious dispute resolution procedures (usually through binding arbitration), and by having one agreement govern the terms and conditions of employment of all contractors and subcontractors. They can save both taxpayers and private investors money by providing a steady flow of highly trained labor and guaranteeing labor peace that helps ensure timely completion of a Project. And by standardizing all labor conditions on a Project, PLAs can create a level playing field where the best, most efficient bidder is awarded a contract, rather than a bidder that provides the lowest wages and benefits.

PLAs can also protect workers by ensuring that they can collectively bargain for important terms and conditions of their employment such as workplace safety, grievance procedures, wages and benefits, training and apprenticeship, and other issues. PLAs can make workplaces safer, because they often include language establishing labor-management health and safety committees, and can also be used to create structures for recruiting and training junior construction workers and to further other goals such as

opportunities for small or minority-owned businesses and the use of environmentally sustainable technologies.

To take advantage of these benefits, many public agencies will seek to enter into PLAs, which have been used on numerous large-scale public and private construction projects nationwide, from the Hoover Dam in the 1930's to schools, hospitals, roads, bridges, and baseball stadiums. PLAs have been used at a majority of the Department of Energy's ("DOE") key sites. DOE representatives have stated that PLAs have helped complete projects on time and within budget by providing a mechanism for coordinating wages, hours, work rules, and other terms of employment across the project; creating structure and stability for dispute resolution; prohibiting work stoppages, slowdowns, and strikes; and ensuring access to a well-trained, assured supply of skilled labor. The Tennessee Valley Authority ("TVA") has used PLAs on its construction projects for over two decades, during which there have been no formal strikes or organized work stoppages and a significantly reduced injury rate. The United States Navy recently entered into a PLA to facilitate the construction of a wharf on a naval base in Washington State. PLAs were also successfully used by the Los Angeles Unified School District to invest in the local workforce, promote apprenticeship, and provide opportunities for small and disadvantaged businesses,<sup>52</sup> and the Los Angeles County Metropolitan Transportation Authority approved a PLA for its construction projects, with specific goals for hiring workers in economically disadvantaged areas, disadvantaged workers, and apprentices.<sup>53</sup> The State of Illinois requires contractors on P3s for new transportation facilities to enter into a PLA.<sup>54</sup>

A useful model for the types of provisions contained in a typical PLA is contained in Executive Order 13502, which encourages Federal agencies to consider PLAs for Federal construction projects.<sup>55</sup> The Executive Order does not require the use of a PLA on any project, but it requires that any PLA entered into by a Federal agency contain the following components: (1) it must bind all contractors and subcontractors on the project pursuant to appropriate specifications in solicitation provisions and contract documents; (2) it must allow all contractors and subcontractors to compete for contracts and subcontracts regardless of whether they are otherwise parties to CBAs; (3) it must contain guarantees against work disruptions, including strikes as well as lockouts; (4) it must stipulate "effective, prompt, and mutually binding" dispute resolution procedures; (5) it must provide other mechanisms for cooperation between labor and management on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and (6) it must fully conform to applicable law.<sup>56</sup>

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<sup>52</sup> See generally Uyen Le, *Project Labor Agreements: Pathways to Business Ownership and Workforce Development in Los Angeles* (2011), <http://constructionacademy.org/wp-content/uploads/downloads/2012/03/LAUSD-PSA-Small-Business-Participation-CCA-11-18-11.pdf>.

<sup>53</sup> See Los Angeles County Metropolitan Transit Auth., Project Labor Agreement & Construction Careers Policy, <http://www.metro.net/about/pla/>.

<sup>54</sup> 630 Ill. Comp. Stat. § 5/55(b).

<sup>55</sup> E.O. 13502, Use of Project Labor Agreements for Federal Construction Projects (Feb 6, 2009).

<sup>56</sup> *Id.* § 4.

The above features are by no means exclusive; they serve merely as general guidelines to Departments that enter into PLAs with Developers. An example provision requiring a PLA (adapting the requirements of the terms of E.O. 13502) is below:<sup>57</sup>

- (a) The [Developer] shall negotiate and enter into a Project Labor Agreement that:*
- 1) Binds the [Developer] and all [Subcontractors] on the [Project];*
  - 2) Allows [Subcontractors] to compete for contracts to work on the [Project] regardless of whether they are otherwise parties to collective bargaining agreements;*
  - 3) Contains guarantees against strikes, lockouts, and similar job disruptions;*
  - 4) Sets forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the Project Labor Agreement;*
  - 5) Provides other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and*
  - 6) Fully complies with Federal, State, and local law.*

## **XX.10 Responsible Contractor Policy**

The above sections describe a number of labor practices and protections that Departments may consider requiring of employers on P3 Projects. Any of these provisions can be implemented through State or local legislation or as part of a Department’s contract with the Developer. Another alternative is a “responsible contractor policy” in the form of a statute, ordinance, or regulation that requires all employers who bid on, or qualify for, contracts to work on a P3 Project to demonstrate their compliance with certain requirements or gives priority to employers that demonstrate compliance, such as by incorporating the labor practices of the Developer and Subcontractors into the technical scoring of a bid or proposal.

Several States and cities have adopted responsible contractor policies as part of State and local procurement statutes and ordinances. To be considered a “responsible bidder” on construction contracts in Illinois, a company must comply with State prevailing wage laws, Federal equal opportunity laws, and all State laws concerning the bidder’s entitlement to conduct business.<sup>58</sup> Boston, Massachusetts, requires city contractors to comply with requirements that include payment of prevailing wages and proper classification of employees.<sup>59</sup>

Many responsible contractor policies require prospective bidders to disclose any history of violations of labor laws or other legal requirements. Disclosure enables the State or local government agency evaluating the bidder to have a complete picture of the prospective contractor’s compliance with its legal obligations, which may be indicative of

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<sup>57</sup> Departments should ensure that any PLA or provision requiring PLAs is in compliance with Federal, State, and local law.

<sup>58</sup> See 30 Ill. Comp. Stat. § 500/30-22.

<sup>59</sup> City of Boston Mun. Code, Ch. VIII, § 8-9.2.

its ability to comply with its contractual obligations with the Department. The City of Los Angeles, for example, requires that prospective contractors complete a questionnaire that addresses, in addition to the contractor's technical qualifications and capacity to perform the work, whether the contractor has a "satisfactory record of compliance with relevant laws and regulations" and a "satisfactory record of business integrity."<sup>60</sup> Similarly, Executive Order 13673, Fair Pay and Safe Workplaces, when implemented, will require prospective Federal contractors and subcontractors whose contract value exceeds \$500,000 to report any administrative merits determinations, arbitral awards or decisions, or civil judgments rendered against them for violations of certain labor laws over the previous three years and to update this information semiannually following an award of a contract or subcontract.<sup>61</sup>

These types of comprehensive systems are easily translatable to the context of a P3 Project. Illinois has incorporated the "responsible bidder" requirements contained in the Illinois Procurement Code into its requirements for contractors and subcontractors working on transportation P3 Projects.<sup>62</sup> Maryland has similarly incorporated certain responsibility requirements applicable to State contractors, including nondiscrimination, prevailing wage rates, and a living wage requirement into public-private partnerships.<sup>63</sup> Such initiatives can help ensure that the potential cost savings that a Department may realize from a P3 Project do not come at the expense of workers and their families through the underpayment of wages and benefits, inadequate worker health and safety, or other legal violations. Additionally, they can help ensure that a P3 project progresses without the unpredictable delays and pitfalls that may result from enforcement investigations, labor disputes, private litigation, and other proceedings that may follow a contractor's or subcontractor's failure to comply with its legal obligations.

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<sup>60</sup> See Los Angeles, Cal., Admin Code § 10.40.2(a). The questionnaires for construction contracts and service contracts, respectively, are located at [http://bca.lacity.org/site/pdf/cro/CROQ%20Construction%20Questionnaire%20\(rev%2012-05-11\).pdf](http://bca.lacity.org/site/pdf/cro/CROQ%20Construction%20Questionnaire%20(rev%2012-05-11).pdf) and <http://bca.lacity.org/site/pdf/cro/CROQ%20Service%20Questionnaire%20Rev%201-20-12.pdf>. The questionnaires ask for information about whether the prospective contractor has been "investigated, cited, assessed any penalties, or been found to have violated" certain Federal, State, and local laws, including wage and hour laws, civil rights laws, environmental laws, worker safety laws, licensing requirements, and others.

<sup>61</sup> E.O. 13673 § 2 (July 31, 2014). The Executive Order became effective immediately, and will apply to all solicitations for contracts as set forth by any final rule issued by the Federal Acquisition Regulation Council, which is forthcoming.

<sup>62</sup> See 630 Ill. Comp. Stat. § 5/55(a).

<sup>63</sup> See Md. Code, State Fin. & Procurement § 11-203(h)(2). Departments should ensure that any responsible contractor policies for P3s are fully consistent with Federal, State, and local law, including ERISA and the National Labor Relations Act ("NLRA").