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TO: Long Beach City Officials

FROM: Andrew Kahn, Attorney for UNITE HERE

RE: Labor Peace Requirements Set by Localities for Hotels

1. <u>What are labor peace requirements about?</u>

Localities are increasing adopting "labor peace" requirements when they lease property to hotels or subsidize them. These are requirements that the hotel enter into an agreement with any union which wishes to organize the hotel's employees in which the union commits to not engaging in any strike, boycott or other economic interference with the agency's revenues from the hotel. The locality does not dictate any other provision of the labor peace agreement (LPA), but rather leaves that up to negotiations between the employer and union. Such requirements have been adopted by ordinances in Los Angeles, Pittsburgh and Washington D.C. Individual hotel projects have had such requirements imposed in San Francisco and numerous other cities. Numerous airports have imposed labor peace requirements for their foodservice leases.

2. <u>Does a labor peace requirement force the employer to be unionized?</u>

Absolutely not. If employees of the hotel are not yet unionized, the LPA typically takes the form of an agreement solely about the process by which employees can choose whether or not to unionize: UNITE HERE wants to avoid bitter, drawn-out organizational campaigns that scare workers and antagonize managers. UNITE HERE does not require an employer to negotiate about wages, hours or working conditions unless and until employees have chosen the union as their bargaining representative.

<u>3. What are the risks to the City if no labor peace agreement is in place?</u>

Without such an agreement, a union has a legally-protected right to urge consumers to boycott the non-union hotel. When this hurts hotel revenues, the hotel in turn pays less in lease payments to the City. Without such an agreement, unions typically end up encouraging consumer boycotts of non-union operations during the organizing process as a way of encouraging the employer to quit wasting everyone's time and money and come to the bargaining table. Even where a hotel's employees prefer being non-union, the competition from non-union facilities

unfairly impacts unionized employers, and therefore UNITE HERE regularly discourages groups from patronizing non-union hotels. Localities cannot ban strikes, picketing or boycotts, but unions can voluntarily waive those rights on their own behalf and for those employees who have chosen union representation.

Due to the NLRB's lack of resources and built-in inefficiencies, without an LPA in place, any management lawyer worth his salt can prevent his client from being ordered to bargain with a union for at least three years after a majority of employees sign cards authorizing the union to bargain for them. See, e.g., Santa Fe Hotel, 319 NLRB No. 116 (1995), enf'd, 107 F.3d 923 (CADC Oct. 16, 1996)(court finally orders bargaining in October 1996 after election occurring October 1993 after over two-thirds of employees signed union cards in early 1993). The Board process offers near-endless opportunities for litigation, forcing union representatives to spend weeks sitting around NLRB offices rather than working in the field, and often incurring legal fees necessary to answer the numerous technical objections an employer can raise (for example, an employer can force litigation before the election over the fact-intensive question of whether every lead worker is a statutory "supervisor" or not – even if those individuals play no role in the organizing campaign, never end up voting, and are too few in number to change the outcome of the election).

During the prolonged time period involved in NLRB representation case proceedings, employers typically fire union supporters or these supporters get fed up and quit. See Prof. Paul Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA," 96 Harvard Law Review 1769, 1793-1795 (1983). During that time period employers typically face employees to attend meetings to hear attacks on the Union, while the employer excludes the Union from the property so that employees cannot hear both sides. Federal labor law does not bar this one-sided campaigning by employers, nor does it prohibit employers from lying to their employees in campaigning against unions. In re Virginia Concrete Corp., Inc., 338 NLRB 1182 (2003); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992). Due to onslaughts like this, in less than half the cases where the union wins an NLRB election does it end up with a contract. Weiler, supra.

These problems are why unions are compelled to (and almost always do) resort to economic pressure in the absence on an LPA if they wish to fulfill employee desires for a union contract. We mention these things not because we ask your sympathy for organized labor, but merely to demonstrate to you why it is likely over the course of a long-term lease that there will be labor interference with the City's proprietary interests in a revenue stream from the hotel, if no labor peace agreement is in place.

4. How much risk of lawsuit would the City face from adopting a labor peace requirement?

We are extremely confident that a locality with a proprietary interest in hotel operations has the legal right to set a labor peace requirement for new hotel leases, as several court decisions have upheld similar requirements: Hotel Employees & Restaurant Employees Union, Local 2 v. Marriott Corp., 1993 WL 341286 (N.D.Cal. 1993), Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC, 390 F.3d 206 (CA 3 2004), and No. Ill. Chap. ABC v. Lavin, __ F.3d __, 2005 WL 3336530, 178 LRRM 2650 (CA 7 2005).[1] These decisions are not subject to serious question because they flow directly from the U.S. Supreme Court's holding in the Boston Harbor case that a locality is free to protect its proprietary interests by requiring private employers with whom it does business to enter into agreements with organized labor to avoid the risk of labor picketing and other forms of interference with those proprietary interests. Bldg & Constr. Trades Council v. Assoc'd Builders & Contractors of Mass., 507 U.S. 218, 113 S.Ct. 1190 (1993).

Waivers of the right to take economic action against an employer are contained in practically every collective bargaining agreement, and thus it is well-settled that a union can waive its own rights and those of its members to take economic action. NLRB v. Magnavox, 415 U.S. 322, 325, 94 S.Ct. 1099 (1974); Standard Concrete Products Inc. v. General Truck Drivers, Office, Food and Warehouse Union, Local 952, 353 F.3d 668, 676 (CA 9 2003).

5. What does the union ask for in exchange for waiving its rights to boycott, etc.?

It is well-established that an employer and a union not yet representing a majority can enter into a legally-binding agreement about the union organizing process. Retail Clerks v. Lion Dry Goods, 369 U.S. 17, 82 S.Ct. 541, 7 L.Ed.2d 503 (1962)(enforcing contract allowing union access to break rooms). What UNITE HERE has generally obtained from employers in exchange for its waiver of the

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[1]There are no cases to the contrary. On occasion localities have gone beyond simply demanding a union commitment to labor peace to also dictate other provisions of the agreement. Such a distortion of the labor peace concept has been held preempted by the National Labor Relations Act (for in that situation the locality is acting as a regulator rather than a proprietor protecting its own interests). Similarly, if the scope of a state or local requirement extends past the agency's own spending or revenues, courts find this shows the requirement to represent regulatory rather than proprietary action.

rights to boycott and strike are employer commitments to (1) not campaign against employees choosing union representation, (2) allow the Union access to non-work areas and to lists of employees' names and addresses (if the employee has not objected to disclosure), (3) recognize the Union as the bargaining representative based upon a confidential card-check by a neutral, and (4) have an arbitrator resolve any disputes arising during the term of the agreement. Such agreements are commonly referred to as "card check/neutrality agreements".

Contrary to claims by some management lawyers, the National Labor Relations Board has not questioned the legality of this sort of agreement, but instead questioned only whether recognition achieved by card-check should preclude a subsequent election petition to decertify the union. See Aladdin Gaming, 345 NLRB No. 41 (2005)("a 'card check' to determine majority status is a well used and legitimate method of establishing whether a union has been selected by a majority of the employees as their collective-bargaining representative. MGM Grand Hotel Inc., 329 NLRB 464, 465 (1999)."); Dana Corp. 341 NRLB No. 150 (2004)(accepting review of recognition bar issue). The Board cannot find a card-check inherently unlawful because the Act encourages employer recognition of unions based on a majority of employees signing petitions or cards authorizing union representation (every union which wishes to proceed to an NLRB election must first show the NLRB that it tried to obtain voluntary recognition based on signatures but was turned down, and must show employee support through signatures). Card-check/neutrality agreements have uniformly and repeatedly been upheld by the courts. See e.g., HERE Local 217 v. J.P.Morgan Hotel, 996 F.2d 561, 567 (CA 2 1993); HERE Local 2 v. Marriott Corp., 961 F.2d 1464 (CA 9 1992).[2] The card-check is typically done on a confidential basis by a neutral so that it involves no greater invasion of privacy than using a voting booth: it is essentially an election using absentee ballots. Over 40,000 Las Vegas hotel employees and thousands of San Francisco and L.A. hotel employees have been organized via card check/neutrality agreements involving dozens of different operators. The grocery industry was unionized via card-check agreements, as have many other industries. Local government agency employees have been given the right to organize via card-check. Gov. Code sec. 3507.1. Hotel employees deserve the same right.

The NLRB itself always orders employers to turn over the names and addresses of all employees after an election petition has been filed, so this provision of the agreement does not obtain information the Union would not eventually obtain through NLRB proceedings (although this would be after Board litigation about the scope of the unit: the unions' primary objection to NLRB representation

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[2]The sole issue presented to the NLRB at present is whether a recognition achieved by a card-check will delay an NLRB election during negotiations if during negotiations some employees change their minds and sign petitions to oust the union.

proceedings is not to using a NLRB ballotbox but rather to all the years of litigation usually connected to an NLRB election).

Of course, the City need not decide now whether the provisions of currently- proposed card-check/neutrality agreements are lawful or good ideas, because no LPA need be worked out until a current lease is up for negotiation with the City. If the Union is then demanding something unlawful in exchange for giving up its right to strike, the employer can then complain to the City and the proposed ordinance would allow the City to relieve the employer from the labor peace requirement. Moreover, an employer who has signed an LPA that later appears unlawful can raise this with the arbitrator typically provided for under an LPA (or with the court if there is no arbitration clause).

6. Why address this issue now if there is no labor dispute at a hotel owned by the City?

If the City does not address this issue at the outset of a lease (or negotiations over its amendment), then later during the lease term it will be too late for the City to do anything about its loss of revenues from labor disruption.

Thus it is simply irrelevant that today some non-union hotel workers may be happy with their situation: that condition can easily change over the course of a long-term lease. The industry has high employee turnover and relatively low wages and benefits, prompting many workers to want to organize. UNITE HERE is growing and has organized many hotels in the last few years.

Non-union workers have gone on strike on several occasions prior to any union appearing on the scene (for example, just in the last five years my clients received calls from workers at two facilities after the workers were already on strike, at the Sunstone-owned hotel near the Oakland airport and Farm Fresh in Arizona). UNITE-HERE would instead agree to have disputes over the terms and conditions of employment resolved by arbitration rather than by strikes or boycotts. The employer would have equal say in selecting an arbitrator, thus guaranteeing that its needs are considered.

7. Does the proposed ordinance violate employers' constitutional rights?

Absolutely not. The proposed ordinance is carefully drafted so as not to apply during existing city leases but rather would apply only to new leases or lease amendments, and hence there is absolutely no merit to the claims of some employers that the ordinance impairs contractual obligations or represents an unconstitutional taking. An employer lawsuit on this ground would be frivolous and give the City strong grounds for collecting its attorneys fees for defending it.

8. If employers sue, how will that impact the City?

Should any employer sue the City for having enacted the ordinance, our clients through our office will vigorously assist in the ordinance's defense (you can contact the Berkeley City Attorney to confirm that we are good to our word, as we helped that City successfully defend its living wage ordinance in court by intervening as a co-defendant and then filing several briefs and declarations supporting the City, for which the Court ordered RUI to pay our attorneys fees). In that case no discovery into individual councilpersons occurred. The courts held that councilpersons' subjective motivation was irrelevant to the constitutionality of the ordinance. RUI v. City of Berkeley, 371 F.3d 1137, 1154-56 (CA 9 2004). That is well-established law. Lavin, supra; Sage, supra, at n.7; City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 377, 111 S. Ct. 1344, 1352 (1991)("The situation would not be better, but arguably even worse, if the courts were to apply a subjective test: not whether the action was in the public interest, but whether the officials involved thought it to be so. This would require the sort of deconstruction of the governmental process and probing of the official "intent" that we have consistently sought to avoid. ***[6] We have proceeded otherwise only in the "very limited and well-defined class of cases where the very nature of the constitutional inquiry requires [this] inquiry." [citing race discrimination and bill of attainder cases]); U.S. v. Morgan, 313 U.S. 409, 422, 61 S.Ct. 999 (1941)("it was not the function of the court to probe the mental processes of the Secretary."); People v. Bigler, 5 Cal. 23, 26 (1855)("I know of no authority this Court possesses to inquire into the motives of the Legislature in the passage of any law; on the contrary, it has been uniformly held, that they could not be inquired into."); Nickerson v. San Bernardino, 179 Cal. 518, 522-524, 177 P. 465 (1918)(same rule applies to local legislators); County of Los Angeles v. Superior Court of Los Angeles County, 13 Cal.3d 721, 726, 532 P.2d 495 (1975) (this rule precludes discovery on local legislators' motives); City of Santa Cruz v. Superior Ct., 40 Cal. App. 4th 1146 (1995) (same rule extended to bar discovery of non-legislators if purpose is to inquire into motives of local legislative body).

It is doubtful an employer could show any monetary damages from having been directed to enter into negotiations with a union about the non-financial matters involved in labor peace agreements. It costs an employer no money to stay neutral, allow access to breakrooms, and respect the outcome of an arbitrator's tallying of employee signatures. The Court would probably not speculate that the employer's workforce will select union representation and that such representation will then lead to higher employer costs – especially as employers here have publicly claimed to offer compensation superior to that provided by union hotels.

9. How can we get more information?

If you have any legal questions or concerns, feel free to call me at 800-622-0641. At the website for the organization American Rights At Work (www.araw.org) you will find further explanation of why unions have to resort to economic pressure during organizing drive, and more information about cardchecks and the NLRB. Other labor law experts whom you could consult include Georgetown Law Professor Michael Gottesman and former NLRB General Counsel Fred Feinstein, now a professor at University of Maryland. Thank you for your consideration.