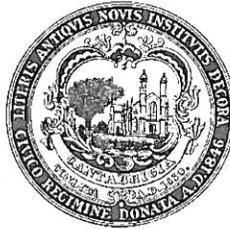


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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
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November 9, 2015

Richard C. Rossi
City Manager
795 Massachusetts Avenue
Cambridge, MA 02139

***RE: Awaiting Report # 14-81 RE: report on how to ensure that
the apprentice program provision remains part of the Cambridge
Employment Plan***

Dear Mr. Rossi:

In the above referenced July 28, 2014 Policy Order Resolution No O-14, the City Council requested that you confer with the City Solicitor to determine whether, in light of recent case law, there are legally feasible options for retaining the existing apprentice program requirement contained in Chapter 2.66 of the Cambridge Municipal Code, which sets forth the Cambridge Employment Plan. This letter responds to said request.

I. Background

In February, 2013, the U.S. District Court for the District of Massachusetts ruled that a City of Quincy ordinance requiring that any contractor submitting a bid for a City project participate in an approved Apprentice Training Program was pre-empted by the Employee Retirement Investment Security Act of 1974 ("ERISA"), and therefore could not be enforced. On July 16, 2014, the First Circuit Court of Appeals upheld the District Court's decision. Merit Construction Alliance v. City of Quincy, --- F.3d ----, 2014 WL 3457605 (1st Cir. Mass., 2014).

The City of Cambridge has an ordinance, Article II, Chapter 2.66, that contains an apprentice program requirement that is substantially similar to the City of Quincy ordinance that was the subject of the Merit Construction case. This ordinance has not been repealed or rescinded, but following the Merit Construction decision, the City ceased enforcement of the portion of the ordinance that contains the apprentice program requirement.

II. Legal Analysis

A. Statutes and Ordinances Requiring Participation in Apprentice Programs are Pre-empted by ERISA

Apprenticeship programs have routinely been found to be an employee benefit program falling within the scope of ERISA. See Cal. Div. of Labor Standards Enforcement v. Dillingham Constr. Inc., 519 U.S. 316, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997), Merit Construction Alliance v. City of Quincy, --- F.3d ----, 2014 WL 3457605 (1st Cir. (MA) 2014), Minn. Ch. Of Assoc. Builders and Contractors, Inv v. Minn. Dept of Public Safety, 267 F.3d 807, 814 (8th Cir. (MN) 2001), Utility Contractors Assoc of N.E., Inc v. City of Fall River, 2011 WL 4710875 (D. Mass. Oct 04, 2011). To date, each time the federal courts for our jurisdiction have been faced with a requirement that an employer hire apprentices under state regulation, the court has found that the requirement was pre-empted by ERISA. See Merit supra, Minn. Ch. Of Assoc. Builders and Contractors, Inc., supra, and Utility Contractors Assoc. of N.E., supra.

The Merit Construction case was not the first time that the court was faced with the question of whether or not bidders for city contracts could be required to participate in apprenticeship programs that conform to the provisions of M.G.L. c. 23 §§11H and 11I. The court had previously faced this question in relation to a Fall River ordinance and found that ERISA pre-empted that ordinance. Utility Contractors Assoc of N.E., Inc, 2011 WL 4710875.

In Merit Construction, the court found that the stipulations/requirements in place for the apprentice programs, i.e. requiring apprentice programs to comply with the Commonwealth's requirements, "mandate[d] an employee benefit structure and specific[d] how that structure must be administered." This was determined to be "simply too intrusive to withstand ERISA preemption." Merit Construction, --F.3d. at --, 2014 WL 3457605. Additionally, the court was concerned with the fact that the ordinance required standards that were different from the standards of other cities/towns. The ordinance mandated that the contractors must have at least one apprentice graduate from the apprentice program within the previous twelve months. This graduation requirement was different from the one contained within Fall River's disputed ordinance, and, thus would "requir[e] the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction" which was something that ERISA was specifically intended to prevent. Id., *citing* Ingersoll-Rand Co v. McClendon, 498 U.S. 133, 142 (1990).

B. An Ordinance Which Incentivizes Participation in an Apprentice Program May Not be Pre-empted by ERISA.

In contrast to direct requirements for participation in apprentice programs, the U.S. Supreme Court has allowed for the creation of "indirect economic influence" which does "not bind plan administrators to any particular choice". For example, a California statutory provision that allowed for a payment of a lower than prevailing wage to apprentices only if they were apprenticed through approved programs was found to be outside the reach of ERISA. See Dillingham Constr. Inc., at 329. In California, bidders for state contracts

were required to pay the prevailing wage for all employees, but were allowed to pay a lower rate to apprentices who were part of a state approved apprenticeship program. There was no requirement that bidders use state approved apprenticeship programs, but if they did not, any apprentice working on a state job would have to be paid at a journeyman's rate. Id. at 332. The court found that this created an indirect economic influence which would encourage bidders to use apprentices from state approved programs, but since no requirements were imposed and that the bidder did not have to use a program used by the state or any program at all, the statute was not preempted by ERISA.

State laws which create ratios of apprentices/non-licensed workmen to supervising journeyman have been found not to be preempted by ERISA, as they create indirect economic impacts, increasing the cost of training but not preventing training. See Willmar Elec. Service Inc. v. Cooke, 212 F.3d 533 (10th Cir.), *cert. denied*, 531 U.S. 979, 121 S.Ct. 428, 148 L.Ed.2d 436 (2000); Wright Electric, Inc. v. Minnesota State Bd. of Electricity, 322 F.3d 1025, 1030 (8th Cir. 2003).

III. Conclusion

An ordinance which creates an *indirect economic incentive* for using a state approved apprentice program might survive ERISA preemption. However, an ordinance which *requires* bidders to have state approved apprentice programs would likely not survive a legal challenge.

Very truly yours,



Nancy E. Glowa
City Solicitor