This issue brief is a publication of the Maurice & Jane Sugar Law Center for Economic & Social Justice regarding initiatives to provide first source hiring provisions in local ordinances and city contracts.

**FIRST SOURCE HIRING INITIATIVES**

First source hiring ordinances, contract clauses, and related agreements seek to provide meaningful employment opportunities to residents living within communities most directly impacted by local development projects.

Local development projects are typically undertaken based on broad representations that the project will create a multitude of good-paying jobs within the local community. However, municipalities often find that the very residents intended to benefit are instead left out of the employment opportunities that arise from the project.

First source hiring initiatives seek to ensure that local residents receive a fair share of the economic benefits of public development projects.

**DEVELOPMENT PROJECTS: FOR WHOM BENEFIT?**

American cities collectively spend over $2.8 trillion each year contract for goods and services, and invest in building public infrastructure.\(^1\)

Public development projects are undertaken to generate increased economic activity within the private sector. They are based on a premise that increased private sector economic activity within a community will generate jobs for residents and revitalize local communities.

Local government spurs such development through expenditures on construction contracts and by providing development subsidies to private business. Such subsidies take many forms and can include cash payments, tax breaks, site development, low-cost loans, etc. These contracts and subsidies are often based upon beliefs that the development project will create good paying jobs to residents within the local community. And, while number of jobs created is difficult to determine with meaningful accuracy, development projects certainly create some employment opportunities during the construction and operations phases of many projects.

However, exactly who will be hired for the jobs created remains uncertain. Far too often, local residents are left out of employment opportunities created by the project. When local residents are left out, local government often finds that the development project fails to provide meaningful economic revitalization.

First source hiring initiatives are one tool that is commonly used by local government to ensure that promised benefits are provided to local residents.

**FIRST SOURCE HIRING INITIATIVES: WHAT ARE THEY?**

While there is no single recognized definition of a “first source hiring” program, the term is commonly used to describe requirements that promote employment of persons from the local community who are within groups traditionally marginalized from employment opportunities.

There is a significant overlap in the terms “first source hiring”, “local hire”, and “targeted hire” and these terms are often used interchangeably. However, as
used in this brief, “local hire” principally refers to programs that seek to require direct hiring of persons who reside in the impacted community and “targeted hire” is used to refer to requirements that developers hire persons from specific segments of the population historically underrepresented in the workforce.

First source hiring commonly contains elements of both local and targeted hire programs and combines the goals of each into a single initiative.

Nearly half the States have enacted some form of first source purchasing or hiring statutes and a vast number of cities operate similar preference programs as well.

WHAT PROBLEMS ARE ADDRESSED BY FIRST SOURCE HIRING?

1. Enhancing the Tax Base of Local Communities.

First source hiring enhances the number of gainfully employed residents in a local community and the profitability of the local businesses they patronize. The tax contribution of residents through income gains and increased purchasing power enhances the municipality’s resources to provide services throughout the community.

2. Reducing Burden on Aid-Based Social Programs.

First source hiring allows otherwise unemployed or underemployed residents to obtain meaningful work and thereby reduce dependency on publicly funded aid. The burden on private charities is similarly lightened.


First source hiring initiatives ensure that local residents gain training and on-the-job experience that will enhance their employability both now and in years to come.


Residents who benefit from first source hiring often live in economically depressed areas that are especially vulnerable to crime. First source hiring reduces criminal activity by channeling individuals into economically productive activities and increasing their stake in the community. Municipalities reap the fiscal benefits of the community’s reduced policing and incarceration needs.

5. Addressing Diversity without Affirmative Action.

Disinvested urban areas generally have a larger than average proportion of residents of color who have traditionally been excluded from the construction industry and other higher wage sectors of the economy. First source hiring ordinances promote hiring these local residents and in turn, increase diversity in hiring without resorting to controversial affirmative hiring practices that expressly turn on race, gender or ethnicity.


Redevelopment efforts need to be sustained long past the initial building phase of a project. Hiring locally enables residents to spend their income in the target neighborhood, thereby directly contributing to the continued growth of the local economy and thereby creating a multiplier effect for additional new jobs.


Residents living and working in the same neighborhood drive less, require fewer parking resources, and reduce air pollution. Reduced commute distances and increased walking to work by local residents also renders public health benefits and improved quality of life.

LEGAL ISSUES

When a governmental entity is involved first source hiring programs should be crafted to ensure that particular requirements do not run afoul of constitutional limitations, statutory prohibitions, or other regulations.

Legal challenges to first source hiring generally take place on grounds of the “Privileges and Immunities” and “Commerce” Clauses of the United States Constitution.

1. Privileges and Immunities Clause.

The United States Constitution’s privileges and immunities clause is found at Amendment XIV, Section 1, Clause 2.

The clause reads: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

Courts have found that the privileges and immunities clause generally prohibits state and local governments from discriminating against citizens of another state. The clause does not prohibit
discrimination between citizens from different communities within a single state.

Courts have found however that the clause is not implicated where nonresidents are not deprived of a right or privilege of citizenship that is “fundamental to the promotion of interstate harmony.” Courts have further found that even where such a right or privilege is at issue, state and local government may discriminate against out-of-state workers where a substantial reason for the difference in treatment” exists and the “degree of discrimination bears a close relation” to the reasons advanced.\(^7\)

Detractors of local hiring initiatives have argued that first source hiring initiatives violate the privileges and immunities clause by discriminating against nonresident workers.

Courts have found that employment on public works projects is a fundamental right under the privileges and immunities clause. Courts however have not established clear guidelines for what may constitute a substantial reason for discriminating against out-of-state workers in hiring. As a result, there is a great deal of ongoing experimentation and development within municipalities that have adopted first source hiring programs.

The legality of mandatory local hiring requirements is most directly addressed in the case of United Bldg. and Const. Trades Council v. Camden, 465 U.S. 208 (1984). In that case the court considered the City of Camden’s ordinance mandating that at least 40% of the workforce on city construction projects be composed of city residents.

While finding that local hiring requirements were subject to privileges and immunities clause analysis, the Court did not strike Camden’s ordinance as facially invalid. Rather, the Court found that the barring out-of-state citizens from work on public works projects implicated the fundamental employment rights of out-of-state citizens. The Court then held that clause does not proscribe an absolute bar to discrimination against citizens of another state. Rather, such differing treatment is permitted where there is a substantial reason for it and the degree of discrimination is closely related to the goals sought to be addressed by the government’s actions.

In summarizing its holding, the Court wrote that the Privileges and Immunities Clause:

\[\text{[D]oes not preclude discrimination against citizens of other States where there is a }\]

"substantial reason" for the difference in treatment. "[T]he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them.

The Court wrote further that as part of the justification of differing treatment between residents and out of state residents, it must be shown that nonresidents constitute a particular source of the harms that the local law seeks to address. The Court explicitly recognized further that:

Every inquiry under the Privileges and Immunities Clause "must . . . be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

The Court then found that there was an insufficient record from which to decide whether Camden’s ordinance could pass the test established by Court and remanded the case to the lower courts.

Since United Bldg. and Const. Trades Council v. Camden, courts have looked with suspicion upon statutes and ordinances that mandate hiring certain percentages local residents.\(^8\)

To avoid application of and to overcome challenges based upon the privileges and immunities clause, states and municipalities have employed a number of approaches. Most notably, states and cities have:

- a. Adopted ordinances after extensive fact-finding in support of reasons advanced for adopting mandatory local hire requirements.
- b. Adopted a “best efforts” requirement for developers and contractors to meet local hiring goals. These approaches generally promote either voluntary compliance or permit developers or contractors to show certain conditions that excuse meeting the stated goals.
- c. Require developers to fund or conduct job
training programs for local residents.

d. Require developers and contractors to promptly notify local jobs outlets and community groups of employment openings.

e. Require developers and contractors to first recruit new hires from local job training or job referral sources within the impacted community. Typically, these provisions allow developers and contractors to recruit from other sources if no viable applicants are found within a short time-period.

f. Provide for monitoring and meetings with local governmental officials and community groups to review, discuss, and improve outreach and hiring of local residents throughout the course of the project.

g. Adopting ordinances that provide preferences for hiring local residents vis-à-vis residents of other communities within the same state.

The City of San Francisco is the most prominent example of the approach taken in subparagraph a. above. There have been no known challenges to San Francisco’s ordinance. Numerous localities have adopted some or all of the approaches found in subparagraphs b. through f. including but not limited to: Los Angeles, CA, Oakland, CA, Denver, CO, Newark, N. J., Pittsburgh, PA, Portland, OR, Providence, RI, and Washington, DC. Few challenges have been made to ordinances employing a best efforts approach and no known challenges to ordinances based on the requirements found in subparagraphs c. through f. The City of Cleveland has adopted the approach found in subparagraph g. Cleveland’s ordinance was challenged and upheld.

2. Commerce Clause.

State and local governments are often prohibited from discriminating against out-of-state residents under the commerce clause.

However, the commerce clause generally does not prohibit such discrimination when state or local governments are acting as “market participants.” When a state or local government can show that it has expended its funds as a participant rather than as a regulator of the market, courts will uphold the policy. Typically, local government and can readily show that it was acting as a market participant when imposing local hiring requirements on a public development project.


8 Id.

Notably in *United Bldg. & Constr. Trades Council v. Camden*, the Court cited the language of the amended ordinance as:

The developer/contractor, in hiring for jobs, shall make every effort to employ persons residing within the City of Camden but, in no event, shall less than forty percent (40%) of the entire labor force be residents of the City of Camden.

The ordinance thus appears to combine a best efforts approach with a mandatory floor.