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UPDATE ON AB 219 – APPLICATION OF PREVAILING WAGE LAWS TO READY-MIXED CONCRETE DELIVERIES

Overview of AB 219 / Labor Code Section 1720.9

AB 219 added “the hauling and delivery of ready-mixed concrete” to the definition of “public works,” for the purposes of prevailing wage requirements. Under AB 219, entities that haul and deliver ready-mixed concrete on a public work of improvement must:

- Pay prevailing wages to employees who haul or deliver ready-mixed concrete to the job site;
- Submit certified payroll records to the party that purchased the concrete and to the direct contractor within five (5) days after the employee has been paid;
- Register as a Public Works Contractor (“PWC”) with the Department of Industrial Relations (“DIR”); and
- Enter into a written subcontract agreement with anyone who purchases ready-mixed concrete for a public work of improvement

The U.S. District Court Decision and the DIR’s Response

Several sellers of ready-mixed concrete challenged the constitutionality of Labor Code section 1720.9, the codification of AB 219, in the U.S. District Court for the Central District of California. The sellers sought an injunction to prohibit the enforcement of section 1720.9. On October 18, 2016, the District Court issued a preliminary injunction against the enforcement of section 1720.9.

In response to the District Court’s preliminary injunction, the DIR issued a press release (published at <https://www.dir.ca.gov/DIRNews/2016/2016-100.pdf>) stating that the

DIR had requested a stay of the injunction, that DIR planned to appeal the court's decision to grant the preliminary injunction, and that "[i]f the injunction is stayed, and DIR is successful on appeal, the department intends to enforce all prevailing wage requirements from AB 219's effective date of July 1, 2016, to the full extent allowed by law." The Ninth Circuit Court of Appeals subsequently stayed the District Court's preliminary injunction, pending appeal.

On March 14, 2017, the District Court entered a judgment that decided that Labor Code section 1720.9 is unconstitutional because the statute violates the Equal Protection Clause of the United States Constitution. The District Court reasoned that the statute arbitrarily subjects ready-mixed concrete companies, but not other similarly situated construction-materials vendors, to the prevailing wage requirements. The District Court issued a "permanent injunction" against the enforcement of Labor Code section 1720.9.

After the District Court's decision, the DIR issued a second press release (published at <http://www.dir.ca.gov/DIRNews/2017/2017-24.pdf>), stating that the DIR requested a stay of the permanent injunction, that it plans to appeal the decision, and that "[i]f the injunction is stayed, and DIR is successful on appeal, the department intends to enforce all prevailing wage requirements from AB 219's effective date of July 1, 2016, to the full extent allowed by law."

On April 19, 2017, the Ninth Circuit Court of Appeals issued an order granting the DIR's motion to stay the District Court's permanent injunction order, thereby allowing the DIR to enforce Labor Code section 1720.9 pending the appeal.

Further Developments and Recommendations

We expect a decision from the Ninth Circuit regarding the constitutionality of section 1720.9 in the late 2017 or early 2018. Until then, Section 1720.9 is the law, and there can be significant consequences for noncompliance. We therefore strongly recommend that in all purchases of ready-mixed concrete on a public project, you make sure that the seller is in compliance with Section 1720.9 and that you have a written agreement with the seller that requires such compliance.

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