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NINTH CIRCUIT UPHOLDS READY - MIXED CONCRETE PREVAILING WAGE LAW

On September 20, 2018, the United States Ninth Circuit Court of Appeal upheld the enforceability of Section 1720.9 of the Labor Code (AB 219). *Allied Concrete & Supply Co. v. Baker*, 2018 U.S. App. LEXIS 26881(9th Cir. Sept. 20, 2018). Under Section 1720.9, persons or entities that haul and deliver ready-mixed concrete to 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 the project.

A group of ready-mix concrete suppliers had challenged Section 1720.9 in the United States District Court for the Central District of California. On October 18, 2016, the District Court issued a preliminary injunction against the enforcement of section 1720.9. 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 material vendors, to prevailing wage requirements. The District Court issued a “permanent injunction” against the enforcement of Labor Code section 1720.9. The California Department of Industrial Relations (“DIR”) filed an appeal.

On April 19, 2017, the United States 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.

On September 20, 2018, the Ninth Circuit issued its ruling in connection with the DIR’s appeal. The Ninth Circuit reversed the District Court and ruled that Section 1720.9 did not violate the United States Constitution and was not preempted by Federal Aviation Administration Authorization Act of 1994.

The suppliers, who lost on appeal, may request reconsideration by the Ninth Circuit panel that issued the decision or a rehearing by the full Ninth Circuit. They also may try to appeal to the Supreme Court, which is unlikely to hear the case as it takes very few civil cases each year.

Given the Ninth Circuit’s ruling, we recommend that clients continue to comply with Section 1720.9 and include the following provision in their contracts with ready-mix concrete suppliers:

Section 1720.9 of the Labor Code (AB 219) requires that any person or entity that engages in “the hauling and delivery of ready-mixed concrete” must: (1) comply with prevailing wage laws, including payment of prevailing wages and the submission of certified payroll reports; and (2) register with the Department of Industrial Relations, even if the person or entity is not a licensed contractor. Subcontractor agrees strictly to comply with these requirements. Subcontractor agrees to comply with Division 2, Part 7, Chapter 1 of the California Labor Code, Section 1720 et seq.

Please contact our office if you have questions or would like further information.