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Ninth Circuit Asks California Supreme Court to Decide Question That Could Greatly Expand California's Prevailing Wage Laws

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Last week, the U.S. Court of Appeals for the Ninth Circuit in *Mendoza v. Fonseca McElroy Grinding Co., Inc., et al.*, No. 17-15221 (January 15, 2019), requested that the California Supreme Court decide the following question:

Is operating engineers' offsite "mobilization work"—including the transportation to and from a public works site of roadwork grinding equipment—performed "in the execution of [a] contract for public work," Cal. Lab. Code § 1772, such that it entitles workers to "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed" pursuant to section 1771 of the California Labor Code?

Presuming that the California Supreme Court grants the request for certification as to this question, its answer will likely have a substantial impact on California's prevailing wage laws.

Article By
Robert Roginson
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Our Insights
Labor & Employment
Litigation / Trial Practice
Utilities & Transport
Public Education & Services
9th Circuit (incl. bankruptcy)
California

Background

California's prevailing wage statute requires that all workers employed on "public works" projects be paid at least the "prevailing rate." The prevailing wage in California is typically tied to the union wage scale in the particular trade. California law defines a "public work" to mean any (1) "construction, alteration, demolition, installation, or repair work"; (2) "done under contract"; and (3) "paid for in whole or in part out of public funds" and requires that prevailing wages be paid to any worker performing work "in the execution of the contract." In the underlying decision, *Mendoza v. Fonseca McElroy Grinding Co., Inc.*, 2016 WL 6947552 (N.D. Cal. Nov. 28, 2016), the U.S. District Court for the Northern District of California found that the plaintiff workers were not entitled to the payment of prevailing wages for off-site mobilization work, including loading, maintaining, and transporting milling machines from the contractor's yard to the jobsite and back. Crucially, the contractor paid its workers for travel time, but at a lower rate than the applicable prevailing wage rate. In reaching its determination that such work did not constitute the type of work for which prevailing wages are required, the court found that the off-site mobilization work was not "an integrated aspect of the flow process of construction" or "'integral to the performance of that general contract'"; thus, the court concluded that the off-site mobilization work was not "in the execution of a public works contract." Notably, the court agreed with the contractor's argument that to require the payment of prevailing wages for off-site mobilization work would be "to justify application of the prevailing wage law to the transportation of many things needed for a public works construction job."

Ninth Circuit Leaves Question to the California Supreme Court

Following the district court's decision, the plaintiffs appealed to the Ninth Circuit, asking it to determine whether the plaintiffs were employed in the "execution of" a public works contract when they performed off-site

mobilization work. In its Order Certifying Question to the California Supreme Court, the Ninth Circuit noted that California courts had not previously addressed the applicability of California's prevailing wage laws to off-site mobilization work. The Ninth Circuit did, however, reference two California Court of Appeal cases—*Williams v. SnSands Corporation*, 156 Cal.App.4th 742 (2007) and *Sheet Metal Workers' International Association, Local 104 v. Duncan*, 229 Cal.App.4th 192 (2014)—whose decisions might provide guidance.

In *Williams*, the court of appeal addressed whether a material subcontractor's truck drivers who hauled materials from a public works site were exempt from the prevailing wage requirements. The court utilized three factors to consider in reaching a determination: (1) "whether the transport was required to carry out a term of the public works contract"; (2) "whether the work was performed on the project site or another site integrally connected to the project site"; and (3) "whether work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract." 156 Cal. App. 4th at 752. The *Williams* court applied these factors and concluded that the truck drivers were not entitled to the payment of prevailing wages. *Id.* at 754-55.

In *Sheet Metal Workers*, the court of appeal decided whether the prevailing wage laws apply to an employee of a subcontractor "who fabricates materials for a public works project at a permanent, offsite manufacturing facility that is not exclusively dedicated to the project." 229 Cal. App. 4th at 196. In that case, the court of appeal held that "[w]ork performed at a permanent, offsite, and non-exclusive manufacturing facility" did not require the payment of prevailing wages. *Id.*

Looking at both the *Williams* and *Sheet Metal Workers* decisions, the Ninth Circuit noted that application of the three *Williams* factors suggested that the plaintiffs were not entitled to the payment of prevailing wages for off-site mobilization work. The Ninth Circuit acknowledged, however, that the Department of Industrial Relations' (DIR) Public Works Manual states that "[t]ravel time related to a public works project constitutes 'hours worked' on the project, which is payable at not less than the prevailing rate based on the worker's classification." It also reviewed a DIR coverage determination, *In re Kern Asphalt Paving & Sealing Co., Inc.*, No. 04-0117-PWH (March 28, 2008), in which the director of the DIR concluded that workers who first reported to a contractor's shop and then were transported in company vehicles to a public works construction site must be paid for that travel time at the prevailing wage rate. The Ninth Circuit opined that "the reasoning and conclusion of *Kern Asphalt* are instructive, if not binding, even though the courts bear the ultimate responsibility for interpreting the statutory language of the prevailing wage law." (Slip Op. at 17.)

Ultimately, the Ninth Circuit found that because no California court had specifically addressed the issue of whether off-site mobilization work was subject to California's prevailing wage requirements, and "[g]iven the potential scope of this decision," certification to the California Supreme Court was appropriate. (Slip Op. at 18.)

Key Takeaways

It is expected that the California Supreme Court will grant the request for certification and decide the issues presented by the Ninth Circuit. As the Ninth Circuit highlighted, the issue presented has the potential to significantly expand prevailing wage coverage to apply to non-construction, non-jobsite work based simply upon its tie to a public works project. However, the Ninth Circuit over-relied on the travel time provisions set forth in the DIR's Public Works Manual as well as the non-precedential *Kern Asphalt* coverage determination. Indeed, the DIR's Public Works Manual specifically states that its "text, standing alone, is . . . not binding . . . on the courts when reviewing DIR proceedings under the prevailing wage laws." Public Works Manual § 1.1. Similarly, as to the Ninth Circuit's reliance on the *Kern Asphalt* coverage determination, courts have routinely held that no "deference" is to be extended to the director of the DIR's interpretation of prevailing wage laws. *State Building and Construction Trades Council of California v. Duncan*, 162 Cal.App.4th 289, 294 (2008). Further, the *Kern Asphalt* determination is distinguishable from *Mendoza* in that the contractor in *Kern Asphalt* did not pay for travel time *at all*; thus, the director decided that the applicable rate was the prevailing wage rate. By contrast, the contractor in *Mendoza* did pay its workers for the off-site mobilization work.

The Ninth Circuit's order and the California Supreme Court's decision on this issue have the potential to expand the application of prevailing wage laws to the transportation of many items, such as materials, tools, and personnel, needed to support public works construction jobs. Contractors whose workers engage in significant travel time may want to consider consulting with legal counsel to anticipate the issues that may arise as this case develops.