

California Supreme Court Rejects Expansion of the Prevailing Wages Requirement

September 7, 2021
Number 24

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On August 16, 2021, the California Supreme Court rejected arguments in two cases that sought to expand the definition of “public works” under the prevailing wage statutory scheme, which was designed to enforce minimum wages on construction or maintenance projects paid with public funds. Both opinions are authored by Justice Carol Corrigan and reference each other, with Justices Goodwin Liu and Mariano-Florentino Cuéllar dissenting in both.

In one case, the majority held that delivery of equipment necessary for a public works project, i.e. mobilization work, is not subject to prevailing wages since it is not work performed in “execution” of the public works contract. In the second case, the majority found that work performed on Metrolink rail carts is not subject to prevailing wages because this work does not involve “fixed works on land” nor is it integral to the overall public works project.

Mendoza v. Fonseca McElroy Grinding Co. Inc. (Supreme Court Case No. S253574)

The Mendoza case arose out of underlying litigation originally brought in federal court. The plaintiffs in that case appealed from a federal District Court summary judgment to the Ninth Circuit Court of Appeals, arguing that hauling equipment to and from publicly funded construction sites (i.e. mobilization work) required the payment of prevailing wages as work performed “in execution” of the public works contract pursuant to Labor Code section 1772.

The Ninth Circuit requested the California Supreme Court weigh in on whether off-site mobilization work performed for a public works project entitles workers to prevailing wages under section 1772. The California Supreme Court held that section 1772 “does not expand coverage to labor not otherwise defined as public work [under Labor Code section 1720(a)]. Unless mobilization qualifies as public work, an employer has no obligation to pay the prevailing wage to those who perform it. Section 1722 cannot independently serve as the basis for concluding that prevailing wage must be paid for mobilization.”

Busker v. Wabtec Corp. (Supreme Court Case No. S251135)

The defendant in the Busker case, Wabtec Corporation, retained plaintiff John Busker as a subcontractor to install electrical equipment for a communications system

designed to prevent collisions and other dangerous train movement on Metrolink rail cars. Busker sued in state court, and Wabtec removed the matter to federal court. Busker argued the installation was covered by prevailing wages because the work was integrally related to the construction of a larger public works project. On appeal before the Ninth Circuit, the Ninth Circuit certified the question to the California Supreme Court of whether installing electrical equipment on rail carts fell within the definition of public works under Labor Code section 1720(a). The California Supreme Court held that the installation work did not come within the statutory definition of “public works,” finding that although “the components installed on trains partner with the filed work, in the sense that they ultimately function together as part of an overall communication system,” this interface did not make the installation of the communications system integral to the construction work.

The California Supreme Court declined the invitation to interpret the statutory terms “construction” and “installation” broadly, or to apply the definition of “public works” to all manner of work, including work on trains. Rather, it confirmed that “public works” are “fixed works” and “structures,” i.e., things fixed to the ground that cannot move from one place to another. The court explained that “[i]f ‘construction’ included any activity necessary to the operation of a public work, that term would bring within its expansive sweep any activity necessary to make the public work functional, whether or not the activity is related to the construction process.”

The California Supreme Court also noted that an unbroken line of opinions by the California appellate courts and Attorney General, as well as the Department of Industrial Relations’ (DIR) practice, dating back nearly a century, confirm that prevailing wages are not required for work performed on rolling stock like Metrolink trains. The court also noted that the California Legislature has consistently excluded work done on “rolling stock” from prevailing wage requirements since the inception of the statutory scheme.

Takeaways

The majority’s opinion in Mendoza disapproves of three prior California Court of Appeal opinions addressing section 1772 to the extent the opinions suggest that section 1772 section expands prevailing wage requirements beyond the definition of public works in section 1720(a). The opinion also declined to give deference to past DIR decisions interpreting section 1772 to apply to mobilization, finding that because DIR applied the same approach to section 1772 as the appellate opinions, they did not offer any “valid reason to extend coverage to mobilization under that statute.”

These opinions, in particular Mendoza, confirm that the determination of whether prevailing wages apply to particular project must be made on a case-by-case basis. If the work falls under the definition of public works under section 1720(a), and will be funded fully or partially with public funds, then prevailing wages will likely be required.

If you have any questions about these cases, or prevailing wage and other public works requirements in general, please contact the author of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcasts](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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