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SCOTUS denies review of California's *Solus* decision — potentially exposing employers to millions in penalties

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Recently, the U.S. Supreme Court denied review of a California Supreme Court's decision holding that the federal Occupational Safety and Health Act ("OSHA") does not preempt a separate enforcement action for civil penalties under the state's unfair competition and fair advertising laws based on state workplace safety violations. *Solus Industrial Innovations, LLC, et al. v. The Superior Court of Orange County* ("*Solus*") has now opened the door to expanding enforcement beyond California's workplace safety regulatory scheme and the California Division of Occupational Safety and Health ("Cal/OSHA").

Solus stems from a 2009 fatal accident after which Cal/OSHA issued five citations against the employer for alleged safety violations. The Orange County District Attorney's (the "D.A.'s") office also brought a lawsuit against *Solus* under California's Unfair Competition Law ("UCL") and Fair Advertising Law ("FAL"). (Cal. Bus. & Prof. Code, §§ 17200 *et seq.*; 17500 *et seq.*). The UCL claim alleged that *Solus* failed to comply with workplace safety standards under the California Occupational Safety and Health Act ("Cal/OSHA") (Lab. Code § 6300 *et seq.*), which amounted to an unlawful, unfair and fraudulent business practice. The FAL claim alleged that *Solus* "made numerous false and misleading representations concerning its commitment to workplace safety…" The D.A. requested civil penalties in the amount of up to $2,500 per day, per employee, for the alleged violation period.

Solus argued that the UCL and FAL claims were preempted by the federal Occupational Safety and Health Act ("Fed/OSHA") of 1970. (29 U.S.C. § 651 *et seq.*). In February 2018, the California Supreme Court found that Fed/OSHA did ***not*** preempt these claims. The ruling now leaves California employers potentially liable for not only penalties under California occupational safety and health regulations, but also for civil penalties related to UCL and/or FAL claims. The UCL and/or FAL penalties, which can be in the millions, would be ***in addition*** to any civil penalties issued by Cal/OSHA for safety violations.

Workplace safety violations now potentially have significantly greater civil penalty consequences

The Court's decision, though unpublished, is troubling for multiple reasons. First, the decision appears to contradict California Labor Code Section 142.3, which states that the Occupational Safety and Health Standards Board is the only agency with authority to adopt, amend or repeal occupational safety standards. Moreover, it also does not acknowledge that the Division of Occupational Safety and Health is the only agency that has the authority to enforce these standards. (Labor Code Section 147.1). Finally, the Court does not consider that UCL/FAL claims impose liability twice on employers for the same alleged violation in direct contradiction to Cal/OSHA Appeal's Board case law. *In the Matter of the Appeal of Syar Industries Inc*., OSHAB 13-1876 DAR (Oct. 15, 2015) (holding that it is improper to impose two penalties for one hazard).

Employers also should be concerned with how these additional actions will affect potential settlements of Cal/OSHA citations. Moreover, the use of UCL/FAL claims can extend the time period for which employers can be penalized for violations of state workplace safety violations. Under Labor Code Section 6317, a citation must be issued within six months of the alleged violation. However, UCL and FAL claims have four- and three-year statutes of limitations, respectively. Thus, a D.A. could wait *years* after the issuance of a Cal/OSHA citation (and settlement) to bring a UCL/FAL lawsuit.

Impact for employers

At this point, *Solus* remains unpublished. According to California, court rules state that unpublished opinions generally may not be cited or relied on by other courts or parties in other actions. Regardless, California employers should note that *Solus* potentially permits UCL/FAL actions for civil penalties that are now multitudes greater than under typical enforcement by Cal/OSHA. *Solus* raises the stakes, and thus, employers should continue to invest significantly in complying with workplace safety and health regulations, but also confer with counsel during and after Cal/OSHA inspections or investigations. The potential for these other enforcement actions also significantly increases the value of non-admission clauses, which employers should require as part of any settlement of a Cal/OSHA appeal.

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