SEYFARTH SHAW

Management Alert

California Supreme Court Clears the Way for Employee Cal/OSHA Lawsuits

By Joshua Henderson

Seyfarth Synopsis: *Cal/OSHA regulations are enforced by a state agency in administrative litigation. A new Supreme Court decision, Solus Industrial Innovations, Inc. v. Superior Court, allows employees allegedly suffering injuries caused by Cal/OSHA violations to sue for unfair business practices.*

The Facts

A water heater explosion at Solus Industrial Innovations, Inc. left two employees dead. After an investigation, the Division of Occupational Safety and Health issued five citations against Solus for alleged violations of Cal/OSHA regulations. Solus appealed the citations to the Cal/OSHA Appeals Board.

Meanwhile, the California Bureau of Investigations (BOI) conducted a separate investigation, as it must when an employee is killed at work. The BOI forwarded its investigation results to the Orange County district attorney (DA), who then filed criminal charges against the plant manager and maintenance supervisor for felony violations of the Labor Code.

The DA also filed a civil action against Solus, claiming that Solus had violated California's Unfair Competition Law (UCL) and Fair Advertising Law (FAL). These claims alleged that Solus, by maintaining an unsafe work environment, had engaged in unfair and unlawful business practices, while also committing false advertising by making "numerous false and misleading representations concerning its commitment to workplace safety and its compliance with all applicable workplace safety standards," which allowed it to attract and retain customers and employees.

Solus demurred to the DA's lawsuit, which was overruled. On an expedited appeal, the Court of Appeal ruled in favor of Solus. The Court of Appeal reasoned that the federal Occupational Safety and Health Act (OSHA) preempted UCL and FAL claims arising from alleged Cal/OSHA violations. The DA sought review by the California Supreme Court.

The Supreme Court's Decision

A unanimous California Supreme Court reversed. The Court held that federal OSHA did not preempt the DA's civil action against Solus. Rather, California law preempted federal OSHA—a sort of reverse preemption.

Understanding the Supreme Court's holding requires a brief summary of federal OSHA's relationship with Cal/OSHA. Federal OSHA occupies the field of workplace safety and health, but permits states to create their own regulatory plans subject to federal review and approval. California has had such a federally approved state plan since 1973. Under this system, federal OSHA provides a regulatory "floor" under which state plans may not fall. But states may enact broader workplace safety protection than found under federal OSHA.

The Supreme Court rejected Solus's argument that federal law explicitly or impliedly preempted California law except for provisions of the federally approved state plan. Federal OSHA identifies specific areas (such as workers' compensation laws) that are not preempted. Yet it does not identify precisely what is preempted. According to the Supreme Court, federal OSHA, by allowing states to provide broader protections, anticipates that states may use enforcement mechanisms other than administrative litigation under the state plans to further their aims. Civil litigation under state law, according to the Court, is not foreclosed by the federal statutory scheme.

The Supreme Court noted that UCL and FAL actions may be brought by both government officials *and* by persons who have suffered an "injury in fact."

What *Solus* Means For Employers

While California law (specifically, PAGA) previously has allowed claims against employers based on alleged workplace safety violations, PAGA poses several obstacles to ultimate recovery, including exhaustion of administrative remedies and, for some alleged violations, allowing an employer thirty-three days to cure the violations.

Those obstacles do not exist for would-be plaintiffs in UCL and FAL litigation. Accordingly, *Solus* may result in a spike in workplace safety and health litigation against employers, for several reasons. First, *Solus* does not require a final order of the Cal/OSHA Appeals Board affirming the underlying administrative citations. Indeed, though the Division had filed citations against Solus, the case was put on hold. During a BOI investigation and any ensuing prosecution, litigation between the Division and an employer concerning administrative citations is held in abeyance. This point raises the possibility that an employer may defeat Division citations and criminal charges, yet still be subject to civil claims.

Second, nothing in the California Supreme Court's decision suggests that administrative citations are a prerequisite to filing a UCL or FAL claim. Employees may attempt to establish injury in fact in litigation without resorting to filing an administrative complaint with the Division. By contrast, PAGA requires notice to the Division, along with "the facts and theories to support the alleged violation." Although damages are not available under the UCL, restitution and injunctive relief are. An employee must prove some kind of economic injury in these cases, which may make it more difficult to recover restitution, but may lead to injunctions against employers.

Third, while the Division has six months to issue a citation, the statute of limitations is four years for a UCL claim and three years for a FAL claim. Therefore, the "repose" promised by a six-month administrative limitations period may be shattered by an employee civil action filed long thereafter.

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