



## CALIFORNIA SUPREME COURT SHOULD REJECT USE OF UNFAIR COMPETITION LAW TO REGULATE WORKPLACE SAFETY

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In a deeply troubling development for California employers, a number of prosecutors in the state have been attempting to punish alleged violations of the California Occupational Safety and Health Act of 1973 (Cal/OSHA) through civil actions based on California's "unfair competition" law.<sup>1</sup> Some employers that have been threatened with such actions have accepted injunctions and seven-figure settlements rather than face the immense potential penalties available under the UCL. This development could not be further from the legislative intent of Cal/OSHA. The legislature intended, as a matter of public policy, that Cal/OSHA impose relatively small penalties in exchange for employers' acceptance of substantial compliance obligations. UCL penalties can be so enormous that a UCL claim based on Cal/OSHA becomes a massive tail wagging the dog, contravening sound public policy in the process.

In 2014, the California Court of Appeal, Fourth District, held that a district attorney's UCL action against Solus Industrial Innovations, LLC for alleged violation of Cal/OSHA standards was preempted by the federal Occupational Safety and Health Act of 1970 (Fed/OSHA). The district attorney appealed the ruling, and the California Supreme Court granted review of that decision on June 18, 2014, resulting in the de-publication of the Court of Appeal's opinion. The case has not yet been set for oral argument.<sup>2</sup> Employers with facilities in California will want to watch this case very closely.

In *Solus*, the Court of Appeal held that Fed/OSHA preempted state authority over occupational safety and health issues, unless the state submitted and obtained federal approval for a state-specific plan for the development and enforcement of its own occupational health and safety standards. California submitted Cal/OSHA for approval. The Court of Appeal noted that Cal/OSHA expressly provides that its implementing standards (which can be promulgated only by the California Occupational Safety and Health Standards Board (Standards Board)) are enforced by the California Division of Occupational Safety and Health (DOSH), and that the California Occupational Safety and Health Appeals Board (Appeals Board) is responsible for adjudicating appeals of such enforcement actions. Cal/OSHA does *not* provide for enforcement of its standards through civil actions brought by district attorneys.

The Court of Appeal noted that the ability of states to avoid federal preemption and enforce their own workplace standards is entirely dependent on approval of the state plan by the U.S. Secretary of Labor. Any change to a previously approved state plan likewise must be approved by the Secretary and incorporated into the plan. As the appellate court stated, "[i]t is only when the state stays within the terms of its approved plan [] that its actions will not be preempted by federal law." UCL actions have not been incorporated into Cal/OSHA nor have they been approved by the Secretary.

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<sup>1</sup> BUSINESS & PROFESSIONS CODE § 17200 *et seq.* (UCL).

<sup>2</sup> *Solus Industrial Innovations v. Superior Court*, Case No. S222314, Dkt. No. 4.

The Court of Appeal's decision is well-reasoned and supported by prior case law. Indeed, in the leading decision on Fed/OSHA preemption, *Gade v. National Solid Wastes Management Assoc.*,<sup>3</sup> the U.S. Supreme Court made clear that states are only able to avoid federal preemption through an approved state plan. States are not permitted to supplement state-plan standards or enforcement without federal approval.

Several other considerations also weigh in favor of upholding the Court of Appeal's decision in *Solus*. One is the effect that UCL decisions can have on the interpretation of Cal/OSHA standards. California's UCL essentially takes the requirements for other laws and makes them independently actionable when committed pursuant to business activity.<sup>4</sup> California courts have, thus, recognized that one way to defend a UCL claim is to argue that there was no violation of the underlying statute on which the UCL claim was based.<sup>5</sup>

The practical effect of this defense is that, when a UCL action is based on a Cal/OSHA standard violation, courts may be forced to interpret these standards to decide whether they were violated without an underlying administrative decision to review. As the state-designated enforcement agency, it is up to DOSH to interpret those standards in the first instance, and it is up to the Appeals Board to adjudicate those interpretations. UCL actions based on an alleged violation of a Cal/OSHA standard interfere with these functions and intrude upon the exclusive jurisdiction of the administrative agencies. Such UCL actions also subject employers and employees to potentially divergent interpretations of Cal/OSHA standards.

As noted above, Cal/OSHA vests exclusive jurisdiction in three agencies: the Standards Board, DOSH, and the Appeals Board, which collectively are responsible for the development, enforcement, adjudication, and interpretation of the state's occupational safety and health standards. The role of local prosecutors was contemplated and addressed under Cal/OSHA, but the role of local prosecutors under Cal/OSHA is limited to referrals from the Bureau of Investigations for potential criminal prosecution of cases under specifically defined circumstances.<sup>6</sup> Cal/OSHA does *not* provide for referral to local prosecutors for the purposes of bringing civil actions.

It is also important to note that Cal/OSHA explicitly delegated the task of developing appropriate penalties to the Director of Industrial Relations.<sup>7</sup> Pursuant to this directive, extensive regulations were devised for the calculation of appropriate penalties that take into account various factors, such as the nature of the violation (regulatory, general, serious, willful, repeat, or failure to abate), the size of the employer, history of violations, and any abatement actions.<sup>8</sup> If prosecutors are allowed to bring UCL actions to collect additional penalties for Cal/OSHA standards violations, they would effectively defeat this carefully calibrated statutory and regulatory plan.

Cal/OSHA further provides that the Standards Board is "the only agency in the state authorized to adopt occupational safety and health standards."<sup>9</sup> A UCL action, particularly one that seeks injunctive relief, is in essence a new occupational safety and health standard developed just for one employer without the benefit of the rulemaking process—something that is not permitted by Cal/OSHA.

The appellate court in *Solus* was correct in holding that the District Attorney's UCL claims were preempted, and the California Supreme Court should uphold that decision. A UCL action potentially subjects an employer to injunctive actions and millions of dollars in fines for workplace-safety violations, far above and beyond any fines or abatement requirements that DOSH may impose for the identical violation. These additional fines and injunction requirements have not been incorporated into Cal/OSHA as approved by the Secretary of Labor.

<sup>3</sup> 505 U.S. 88, 99 (1992).

<sup>4</sup> *Farmers Ins. Exchange v. Superior Court*, 2 Cal.4th 377, 383 (1992).

<sup>5</sup> See *Krantz v. BT Visual Images, LLC*, 89 Cal.App.4th 164, 178 (2001).

<sup>6</sup> CAL. LABOR CODE § 6315(g).

<sup>7</sup> *Id.*, § 6319(c).

<sup>8</sup> See 8 CAL. CODE OF REG. §§ 333–336.

<sup>9</sup> CAL. LABOR CODE § 142.3(a)(1).