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Ninth Circuit Upholds California Statute Requiring Public Works Employers to Obtain Employee Collective Consent before Contributing to Anti-Union IAFs to Meet Prevailing Wage Requirement.

California Labor Code section 1770 requires contractors on public works projects to pay their employees a “prevailing wage.” To satisfy the prevailing wage requirement, employers can either pay all cash wages or pay a combination of cash wages and benefits, such as contributions to healthcare, pension funds, and other fringe benefits, such as employer payments to third-party industry advancement funds. (“IAFs”). In 2017, the Legislature, in Senate Bill 954, amended the Labor Code to clarify that employers may take a wage credit to support their prevailing wage contributions to IAFs *only if* their employees consented to doing so through a collective bargaining agreement (“CBA”). The U.S. Court of Appeals for the Ninth Circuit upheld SB 954 against Constitutional challenge.

Interpipe Contracting, Inc. (“Interpipe”) and Associated Builders and Contractors of California Cooperation Committee, Inc. (“ABC-CCC”) challenged SB 954 claiming it was unconstitutional. Before SB 954 took effect, Interpipe took a wage credit for its contributions to ABC-CCC. After SB 954 went into effect, Interpipe ceased making payments to ABC-CCC.

Both plaintiffs argued SB 954 was unconstitutional because it discriminated against some forms of advocacy, and asserted that SB 954 violated the Supremacy Clause because it frustrated the purposes of the National Labor Relations Act (“NLRA”). ABC-CCC also claimed that SB 954 violated its First Amendment right to free speech.

The trial court denied plaintiffs’ motion for a preliminary injunction and dismissed their action, holding that the NLRA did not preempt SB 954, and that SB 954 did not infringe ABC-CCC’s First Amendment rights. Plaintiffs separately appealed, and the Court consolidated their appeals. The Ninth Circuit affirmed the trial court’s decision.

NLRA Preemption

Interpipe argued on appeal that SB 954 impermissibly interfered with the federal National Labor Relations Act (“NLRA”) provisions protecting labor speech and favoring open debate on matters between unions and employers. It argued that SB 954 had discriminatory effects on Interpipe’s pro-open shop speech, because unionized employees would be more likely to consent to wage-crediting that benefits pro-union IAFs, but would not approve wage-crediting benefitting pro-open shop IAFs.

The Ninth Circuit found Interpipe’s arguments unpersuasive because SB 954 is a legitimate labor standard unrelated to the collective bargaining process that regulated no one’s labor speech. It did not limit employers’ use of their own funds to engage in whatever labor speech they like. It imposed no burdens or litigation risks that pressured appellants to forgo their speech rights in exchange for state funds. It simply barred employers from diverting their *employees’* wages to the employers’ preferred IAFs without their employees’ collective consent. The Court found insufficient evidence that SB 954 actually impaired Interpipe’s ability to engage in labor speech. Thus, SB 954 was a legitimate exercise of California’s legislative power to regulate labor conditions.

First Amendment

ABC-CCC also asserted that SB 954 violated the First Amendment. The Ninth Circuit rejected this argument. The Court stated there is no standalone right to receive the funds necessary to finance one’s own speech. Because IAFs are free to spend their own funds on expressive activities as they wished, it did not burden ABC-CCC’s First Amendment speech rights.

Moreover, SB 954 targeted employer conduct that is not inherently expressive – the payment of wages. SB 954 merely ensures employee approval before employers may re-route employee wages to third party advocacy groups. In addition, SB 954 did not favor a pro-union viewpoint over a pro-open shop viewpoint. SB 954 left IAFs- regardless of viewpoint, free to engage in whatever speech they like, and did not regulate IAFs at all. At most, it only indirectly affected ABC-CCC, and also protected employees’ First Amendment speech right to contribute to causes of their choosing.

Interpipe Contracting, Inc. v. Becerra (9th Cir. July 30, 2018, No. 17-55248, No. 17-55263) _ F.3d_ [2018 WL 3613378).

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