Golden Gate Restaurant Association (a group of area restauranteurs) had challenged the ordinance, arguing that ERISA preempted the employer-spending requirements, either because those requirements created a "plan" within the meaning of ERISA, or because they related to employers' ERISA plans. The district court granted the Association's motion for summary judgment and enjoined the implementation of the employer-spending provisions, but, on appeal, the Ninth Circuit had ruled that the ordinance was valid and not preempted. The ordinance did not require employers to establish their own ERISA plans or to make any changes to any existing ERISA plans. Employers could choose to make up the difference between their existing health-care expenditures and the minimum expenditures required by the ordinance either by altering existing ERISA plans or by establishing new ERISA plans. However, they could also elect a "City-payment option" that allowed them to make payments directly to the City, if they so chose, without requiring them to establish or alter ERISA plans. If employers chose the City-payment option, the employees for whom those payments were made were entitled to receive either discounted enrollment in the HAP or medical reimbursement accounts with the City. Further, the ordinance was not concerned with the nature of the health-care benefits an employer provided for its employees; it was only concerned with the dollar amount of the payments an employer made toward the provision of such benefits. The Ninth Circuit held that the City-payment option did not create an "employee welfare benefit plan" within the meaning of ERISA; that the ordinance was not preempted because of any impermissible connection with an employers' benefit plans; and that the ordinance also lacked any impermissible "reference to" employee benefit plans subject to ERISA.

Subsequently, the Association petitioned for rehearing *en banc*. On March 09, a divided Ninth Circuit denied the petition. The majority distinguished this case from *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007), a case involving ERISA preemption of a Maryland law that required employees to spend at least eight percent of their total payrolls on employee health insurance costs, or pay the shortfall (the difference between the mandated amount and their actual spending) to the State. The court in that case had ruled that the law impermissibly "related to" an ERISA plan, as there was no real choice for employers but to meet the minimum spending threshold. Here, however, "[f]ar from imposing a de facto obligation on an employer to establish or alter an ERISA plan, the Ordinance offers an employer a meaningful choice."

The dissenting eight justices felt that the Ninth Circuit's decision had created a circuit split with the Fourth Circuit Court of Appeals, given that the "holdings of *Fielder* and *Golden Gate* stand in clear opposition." More importantly, however, they noted that this case concerned "an issue of exceptional national importance, i.e., national uniformity in the area of employer-provided health-care. The Fourth Circuit in *Fielder* and the district court here both considered the need for nationally uniform plan administration to be the central concern of the Supreme Court's ERISA preemption case law." If upheld, they felt, the San Francisco ordinance would "undoubtedly serve as a roadmap in jurisdictions across the country on how to design and enact a labyrinth of laws requiring employer compliance on health care expenditures, thereby creating the very kind of health care expenditure balkanization ERISA was intended to avoid." *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 558 F.3d 1000 (9th Cir. 2009).

Media Policy Invalid

Gonzalez was a detective employed by the Waterfront Commission of New York Harbor, a joint entity of the States of New York and New Jersey. At the time he was hired, Gonzalez was informed about the Commission's media policy, which placed the responsibility for all communications with the media with, and under the supervision of, the Office of the Executive Director. No staff member was to initiate contact with the media without the prior approval of the Executive Director. The reasons for this were to ensure that the agency spoke with "one voice," and that any information released to the media was accurate, in the public interest, and did not compromise the agency or any investigation. (The Commission's counsel testified that there were "no exceptions" to the policy, but allowed that an employee could offer a private opinion to the media regarding, say, the performance of a baseball team, without invoking discipline.) Gonzalez had concerns about an allegedly unsafe and hazardous condition at his workplace – the presence of dead rats in and around what Gonzalez believed to be a toxic, sludge-contaminated dirt pile in the Commission's parking lot. He had previously written to the Commission's Chief of Police to complain about the rats on behalf of his union members, and asked for copies of the lab reports regarding the testing that had been done. These were not forthcoming. He had also contacted the local Board of Health and the federal Occupational Safety and Health Administration (OSHA), but was told that OSHA lacked regulatory authority over bi-state agencies. Finally, Gonzalez contacted a reporter at NBC-TV and identified himself as the union representative, to complain about the dirt pile and his health concerns. As a result, Gonzalez was disciplined for violating the media policy. When he was given ten days' suspension, he appealed, claiming that the policy was overbroad and, therefore, facially unconstitutional, and violated his First Amendment rights.

The regulation was found to be overbroad and unconstitutional on its face. "It is well-established that a public employee does not relinquish his or her First Amendment right to comment on matters of public interest, otherwise available to citizens, simply as the result of the fact of public employment." Because the claim involved a facial, rather than as-applied, challenge to the policy, the Commission's burden of justifying the restraint was greater than that existing if only an isolated disciplinary action was involved. The Commission's

policy, prohibiting all employee contact with the media without the prior approval of the Executive Director, was "functionally indistinguishable" from regulations previously invalidated on First Amendment grounds: the policy acted as a prior restraint that was overbroad in its scope, "potentially acting to chill comment by Commission employees, rendered in a private capacity, about non-confidential matters of public concern." The matters upon which Gonzalez spoke were matters of public concern; thus, his speech was that of a citizen, rather than that of an employee. The agency's interests in employee security and the confidentiality of its investigations did not outweigh any interest Gonzalez may have had in expressing his concerns, because his "conduct did nothing to jeopardize" the employer's interests. *In re Disciplinary Action Against Gonzalez*, 964 A.2d 811 (N.J. Super. A.D. 2009).

Finance
Appropriations

In 2008, the Arizona Legislature passed a general appropriations bill, H.B. 2209, for the coming 2008-2009 fiscal year. Section 47 of the bill required Arizona counties, incorporated cities, and towns to pay approximately $30 million into the state general fund (the cities' and towns' share was roughly $18.3 million). The amount for each local entity would be determined by legislative budget committee staff. The League of Arizona Cities and Towns contacted the Governor's Office to express its view that forcing localities to pay into a general fund was unconstitutional under the Arizona Constitution. Meetings between the two parties failed to result in a compromise, and the League sued. The Arizona Constitution stated that, "[t]he general appropriation bill shall embrace nothing but appropriations for the different departments of the State, for State institutions, for public schools, and for interest on the public debt. . . . Any legislation in a general appropriations bill that is neither an appropriation of money for a specific purpose nor a provision necessary for the proper expenditure of that money is improper."

The primary question for the Arizona Supreme Court was whether the legislation was an "appropriation." The court referred to a prior case, *Hunt v. Callaghan*, 32 Ariz. 235 (Ariz. 1927), in which it held that an appropriation was "the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money." The "essential parts of this definition" were the "certain sum," the "specified object," and the "authority to spend." Applying this approach to the case before it, the court found the legislature "did not expressly attach the assessed amount to any public revenue that it had previously set aside for the cities and towns. Because Section 47 fails to identify any prior appropriation, it fails to meet the definition of an appropriation." Addressing the State's argument that the cities and towns had received monies from the State far exceeding the $18 million at issue and the court should "infer that these were the prior appropriations intended to be reduced by Section 47," the court declined to agree. Section 47 did not identify either the urban revenue-sharing funding, or the various discretionary grants made for the benefit of the cities and towns, as appropriations that the legislature designated for reduction. In any event, the various discretionary grants were often subject to restrictions (e.g., use or reimbursement limitations imposed by the federal government) and were not always appropriated to the cities and towns themselves, but to various executive agencies for use by the cities and towns. Because Section 47 did not reduce any identified prior appropriation, it violated the State constitution's limit on the contents of general appropriations bills and was, therefore, unconstitutional. *League of Arizona Cities and Towns v. Martin*, 219 Ariz. 556, 201 P.3d 517 (Ariz. 2009).

Land Use
Vested Rights in Zoning

In 1998, the plaintiff property owners, Alzamora, Dunn, and Creative Homes, Inc., applied for a special use permit to construct a multi-unit seniors' residential building in the Village of Chester, New York. In 2004, while the application was pending, the Village adopted amendments to its zoning law that prohibited the plaintiffs' planned construction under the permit. The plaintiffs alleged that the Village did so knowing that the plaintiffs' construction project was the only pending project in the Village to be affected by the change in law, yet it failed to provide them with actual notice of the meeting at which the proposed amendments were discussed. In 2005, the Village extended the amendment to all multiple dwelling projects, not just those for senior citizens, which meant that the plaintiffs could not use the property to operate a regular adult community to avoid the new requirements. They received no notice of the meeting at which this amendment was passed, although public notice of each hearing was given once by means of publication in the local newspaper. The plaintiffs brought suit pursuant to 42 U.S.C. § 1983, claiming that the special use permit was deemed approved by reason of the Planning Board's failure to approve or disapprove the application within 62 days of its 2002 hearing on their application; second, that the failure to notify them of the meeting was a violation of their procedural due process rights, guaranteed by the Fourteenth Amendment. The Village and its Planning Board moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), which motion was granted. Under New York law, a property owner had no right to the existing zoning status of his land unless his right had become vested; for it to vest, the owner had to have undertaken substantial construction and must have made substantial expenditures prior to the enactment of the more restrictive zoning ordinance. The lower court held that, because the plaintiffs had not begun any construction at all, they had no vested right that allowed them to construct and operate the project despite the prohibitory changes in the zoning law; thus, they had no protected property interest as required for the due process claim to succeed.

On appeal, the U.S. Circuit Court of Appeals for the Second Circuit affirmed. It declined to address whether the plaintiffs had, in fact, obtained the special use permit by operation of the default provision in the law, as the failure to complete substantial construction meant that they had "no

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