

Zinsergram a/k/a Legal Update



By L. Michael Zinser

UPDATE ON LITIGATION FILED TO STOP THE DOL OVERTIME RULE

As reported previously, on September 20, 2016, a coalition of more than 55 Texas and national business groups, including the U.S. Chamber of Commerce, filed a lawsuit in federal court in Texas. The lawsuit asks the court to vacate and set aside the Department of Labor's new Overtime Rule, set to take effect December 1, 2016. Further, it asks the court to issue an injunction, postpone the effective date of the Overtime Rule, and to maintain the status quo, pending the court's review of the lawsuit. A second lawsuit was also filed by the Attorney Generals of Nevada, Texas and 21 other states to enjoin the new Rule.

On October 19, 2016, the federal court consolidated the two cases. On November 16, 2016, the court will hold a hearing to consider the Motion for a Preliminary Injunction filed by the Attorney Generals of Nevada, Texas, and 21 other states. One possible result of this hearing is that the court will enjoin and halt the December 1, 2016 implementation of the Rule.

The business groups have filed a Motion for Summary Judgment. That Motion was filed on October 14, 2016. The court has scheduled a hearing on November 28, 2016 to hear arguments on that Motion.

The Judge assigned to the case is Amos L. Mazzant, III. He was appointed to be a Judge of the U.S. District Court for the Eastern District of Texas on December 19, 2014 by President Obama.

UPDATE REPORT ON CONGRESSIONAL ACTION TO LIMIT THE U.S. DEPARTMENT OF LABOR OVERTIME RULE

This writer previously reported on Representative Kurt Schrader's bill to phase in the overtime threshold over a four-year period. This legislation now has seven bipartisan cosponsors and counting.

Senator Lamar Alexander (Republican-Tennessee) has introduced Senate Bill 3464, which also would gradually phase in the Department of Labor's Overtime Rule over five years,

starting with a salary threshold increase to \$35,984 on December 1, 2016; the bill provides for salary threshold increases in 2018 and 2019, but no increase in 2017. The bill provides for the Department of Labor's \$47,476 threshold to take effect on December 1, 2020. Like the House bill, this legislation would also prohibit the automatic annual increases to the salary threshold dictated by the Department of Labor's Final Rule.

Last week, the U.S. House of Representatives passed H.R. 6094 by a vote of 246 to 177 to delay the effective date of the final overtime regulations from December 1, 2016 until June 1, 2017. Republican Senators James Langford (Oklahoma), Lamar Alexander, and Susan Collins (Maine) have introduced companion legislation to the House's delay bill.

I urge you to contact your Member of Congress and U.S. Senators, urging them to support the above-described legislation.

FLORIDA UNION ORGANIZING ON THE RISE?

The NewsGuild-CWA (formerly known as "The Newspaper Guild") is actively organizing Newsrooms in the State of Florida. On August 11, 2016, this union organized the Newsroom at the *Lakeland Ledger* by a vote of 22 to 3. On September 15, 2016, the same union organized the Newsroom of the *Sarasota Herald-Tribune* by a vote of 22 to 16.

Since the elections, the NewsGuild has sent to Florida two organizers – Shannon Duffy of St. Louis and Lou Grieco from Detroit – to unionize the newspaper. This author has had direct experience with both organizers. Previously, I had a case with Duffy when he tried to organize employees at *The Pantagraph* in Bloomington, Illinois. We ran a very strong communications campaign and beat the St. Louis Newspaper Guild by a vote of 37 to 5.

Grieco was fairly recently named to be an International Representative of the NewsGuild. Prior to this appointment, he was the Administrative Officer of the Detroit Local of the Guild; before that, he was the leader of the Guild in Dayton, Ohio. Grieco is aggressive and often files unfair labor practice charges.

Prior to the two elections, Florida newspapers had been largely union-free, and there had not been any active union organizing for many years. Only time will tell whether this is a trend or limited to these particular Florida publications. Regardless, Management would be advised to train Managers *now* to recognize the signs of union organizing activity and how to lawfully react.

For instance, unions are notorious for trespassing on private property during organizing drives. Management should post "No Trespassing" and "No Solicitation/Distribution" signs

around the premises *now*, as it is perfectly permissible to do so before there is any union organizing activity. However, if a Company waits until organizing is underway, it can expect charges that the posting of these signs is retaliation against lawful organizing activity.

D.C. CIRCUIT REVERSES NLRB ON ELECTION MISCONDUCT ISSUE

By a vote of 34 to 32, Laborers Local 1310 “eked out” a narrow victory to represent certain employees at ManorCare. The Company objected to the election results, claiming that several employees threatened to physically harm other employees and ManorCare property, thus destroying the “laboratory conditions” necessary for a fair and free election.

The NLRB rejected the Company’s arguments and certified the union. The Company refused to bargain with the union to challenge the NLRB’s findings.

The U.S. Court of Appeals for the D.C. Circuit concluded that the NLRB abused its discretion by finding that the threats did not create a “general atmosphere of fear and reprisal,” according to its own precedent. That previous NLRB precedent holds that threats creating a general atmosphere of fear and reprisal render a free election impossible.

“Punching people in the face,” “Beating people up and destroying their cars,” and “slashing their tires” are serious threats. These threats were directed at all of the voting employees “if the union didn’t get in,” and they were disseminated widely enough to have affected the outcome of the election.

The Court concluded that the employees making the threats were capable of carrying out those threats. The Court also concluded from the evidence that employees were likely to have acted in fear of the threatening statements made by other employees. Finally, the threats were stated and disseminated close in time to the election. The Employer lawfully refused to bargain under the circumstances.

The Court criticized the NLRB for its “truncated analysis” designed to encourage reviewing courts to affirm the Board’s decisions “because the reasoning is so skeletal as to thwart assessment of its reasonableness.” The Court concluded that the NLRB gave it little to evaluate and demonstrated that the Board decision was inconsistent with its own precedent. The Court also criticized the NLRB for not applying an objective test to the threats, rather than a subjective one.

THE NLRB'S WAR ON INDEPENDENT CONTRACTORS CONTINUES

The NLRB's hostility to independent contractor status seems to know no bounds. In a recent opinion issued by the NLRB Office of the General Counsel, Division of Advice, the General Counsel advised one of its Regional Offices to issue a complaint against an Employer, alleging that the Employer violated the National Labor Relations Act ("NLRA") by assuming the position that individuals were independent contractors and not employees.

The Employer had already defended a certain unfair labor practice charge on the grounds that some of its employees were independent contractors. The Regional Office of the NLRB disagreed with this characterization and took the position that the individuals were really employees eligible for unionization.

This issue often arises in many contexts. However, the difference here is that the NLRB is stating it not only disagrees with the Employer's position, but that the Employer's very assertion of this position is a violation of the NLRA. This is an outrageous perversion of the NLRA and a violation of the Employer's First Amendment rights.

This is the position the NLRB is currently taking in this particular case, which has not yet been litigated. This case should be watched closely.