

## **Zinsergram a/k/a Legal Update**



**By L. Michael Zinser**

### **NEW YORK NEWSPAPERS HAVE MAJOR LEGISLATIVE SUCCESS**

After a more than two-year battle, the New York News Publishers' Association (NYNPA) and its members have succeeded in passing legislation to make it much easier to prove the independent contractor status of newspaper carriers under the State's unemployment, workers' compensation, and wage and hour laws.

The impetus for legislative action was the New York Department of Labor's aggressive position against independent contractor status in the unemployment benefit and tax arena. In 2000, NYNPA had negotiated with the Department of Labor "Guidelines for Determining Worker Status: Newspaper and Shopping Guide Publishing Industry."

For several years, the Guidelines worked very well. Publishers could rely upon the Guidelines with certainty to structure their independent contractor relationships. The New York Department of Labor recognized those independent contractor relationships in compliance with the Guidelines.

Beginning around 2010, the Department of Labor began ignoring its own Guidelines to aggressively pursue employee status for newspaper carriers. Publishers fought back, achieving independent contractor victories at the initial level, only to see those victories reversed by the Appeals Board – which stated that it was not bound by the Guidelines.

It was at that point that NYNPA decided it needed to act. In 2015, the industry was successful in persuading both the Assembly and the State Senate to pass favorable legislation. Unfortunately, Governor Andrew Cuomo vetoed the legislation in November of that year.

The articulated reason for Governor Cuomo's veto was that, if the legislation went into effect, the State of New York would lose its Federal Unemployment Tax Act (FUTA) credit from the federal government. This was just false information fed to the administration by labor-friendly bureaucrats in the U.S. Department of Labor. Fortunately, the Cuomo administration eventually realized that its veto was not based on the facts.

In 2016, NYNPA introduced new legislation that was actually more favorable than the legislation vetoed in 2015. That legislation provides:

1. For purposes of unemployment benefits and tax, the legislation tracks the federal Direct Seller Amendment in the Internal Revenue Code. A newspaper carrier is excluded from the statute if the parties have a written contract; the contract compensation to the newspaper carrier is based on sales or output and not hours worked; and the written contract provides that the independent contractor will not be treated as an employee for federal tax purposes.
2. For purposes of workers' compensation law, newspaper carriers who deliver newspapers to the consumer are not covered, provided they meet the above-three requirements contained in the federal Direct Seller Amendment.
3. For purposes of the state wage and hour law, newspaper carriers are excluded on the same basis that they are excluded under the federal Fair Labor Standards Act.

Under the leadership of NYNPA President Diane Kennedy, the industry mobilized to get the legislation passed. Publishers wrote letters to the Governor and their state legislators, and they had face-to-face meetings at every opportunity. The bill eventually passed by large majorities in both the Assembly and the State Senate.

On November 28, 2016, Governor Cuomo finally signed the new legislation. This is a great victory for the newspaper industry in the State of New York. It was a Churchillian fight in which the industry just would not give up! It was a real team effort.

*Editor's Note:* Michael Zinser, representing Gannett Co., Inc.; Advance Publications; Community Newspaper Holdings, Inc.; and other Publishing Companies, worked closely with NYNPA throughout this two-year process. Zinser was the primary drafter of the legislation.