

Zinsergram a/k/a Legal Update



By **L. Michael Zinser**

U.S. DEPARTMENT OF LABOR OVERTIME RULE LITIGATION UPDATE

As we have previously informed the readers of this column, the U.S. Department of Labor immediately appealed the nationwide injunction to stop the implementation of the agency's final Overtime Rule. That appeal was filed with the U.S. Court of Appeals for the Fifth Circuit.

In the original briefing schedule, briefing was to be completed on January 31, 2017. Prior to that date, the Department of Labor had filed a Motion to extend by 30 days the due date for its Reply Brief – i.e. until March 2, 2017. The Court granted that Motion.

On February 17, 2017, the Department of Labor filed another Motion to extend by an additional 60 days the time for filing its Reply Brief. The Department of Labor's reason for requesting the second extension was to "allow incoming leadership personal adequate time to consider the issues..."

On February 22, 2017, the Court granted the Department of Labor's Motion, making May 1, 2017 the new due date for the Reply Brief. This is very good news. By May 1, there will certainly be a new Secretary of Labor, who will then have the authority to stop or withdraw the appeal and accept the decision of the lower court. Let us hope that happens.

Using its authority under the Congressional Review Act, there is still a second possibility that Congress could pass a resolution disapproving of the Rule. The bill would then go to President Trump for signature, which he certainly would do. This is yet another track for stopping the Overtime Rule.

EMPLOYER MUST PAY MEDICAL PREMIUMS FOR STRIKERS

On February 23, 2017, in a 2-to-1 decision with Acting Chairman Miscimarra dissenting, the National Labor Relations Board ruled that an Employer had to continue health insurance premiums during a strike.

The issue before the NLRB was whether the National Labor Relations Act required the Employer, after contract expiration, to provide Employer-paid medical benefits to employees not performing work.

It has been firmly established for more than 50 years that an Employer is not required to finance a strike by paying wages for work not performed, and that wages include “health insurance premiums.” Despite this clear caselaw, the NLRB two-person majority overstepped its bounds and engaged in a dubious interpretation of the expired Collective Bargaining Agreement, ruling that the Employer was required to continue paying the premiums.

In its overreaching contract interpretation, the NLRB ignored language stating that benefits would only be provided to “employees covered by this Agreement.” Note that the contract was *expired* and the individuals were *on strike*. The Board majority also ignored language that defined the term “employee” to mean a “person who performs work for the company.” The individuals on strike were clearly not performing work for the Company.

Dissenting Member Miscimarra stated, “The majority could not point to a single case in which the Board has found that an employer violated the Act by withholding medical benefits from striking active employees.”

The NLRB majority used its decision-making power to weigh in in favor of the union, which lacked the bargaining power of the Company. This also violates clear U.S. Supreme Court precedent. Member Miscimarra quoted the U.S. Supreme Court:

Our labor policy is not presently erected on a foundation of government controls of the results of negotiations... Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union.

This decision follows a 2016 decision, in which the Board limited an Employer’s right to hire permanent replacements. I reported on this development in the January 2017 edition of the SPPI Review, noting the NLRB ruled that the Company violated the Act because its motivation in replacing employees was “to punish the strikers and the union and to avoid future strikes.” Prior to this decision, an Employer’s motive was considered irrelevant. Member Miscimarra also wrote a blistering dissent in the 2016 case.

As I write this article, there are two vacancies at the NLRB. Let us hope that President Trump fills these vacancies as soon as possible. The composition of the Board would then be three Republicans and two Democrats. Hopefully, the newly constituted Trump Board can begin

the process of rolling back these bad decisions designed to help weak unions, as well as take away Management's right to hire permanent replacements and cease paying health insurance premiums for striking employees.

PRESIDENT TRUMP NOMINATES ALEX ACOSTA FOR SECRETARY OF LABOR

This writer is extremely disappointed that Andy Puzder withdrew as the nominee for Secretary of Labor under President Trump. Mr. Puzder had written many articles for the *Wall Street Journal*, indicating that he understood very well the danger of the \$15.00 per hour minimum wage and the Department of Labor's Overtime Rule.

However, I also believe Alex Acosta, President Trump's new nominee, to be well-qualified for the position. Mr. Acosta was a Bush Republican appointee to the NLRB in 2002. While he served at the NLRB, I met him in my capacity of the American Bar Association's Standing Committee on Practice and Procedure under the National Labor Relations Act. During Mr. Acosta's tenure at the NLRB, he was fair to Management in his decisions.

Mr. Acosta is a former Supreme Court Clerk and U.S. Attorney. He is also a former Assistant Attorney General for the Civil Rights Division of the Department of Justice. Currently, Mr. Acosta serves as the Dean of the Florida International University College of Law.

Let us hope Mr. Acosta is confirmed and does whatever he can do to end the Department of Labor's final Overtime Rule, raising the salary thresholds for overtime exemption.

UNION MEMBERSHIP DECLINES IN 2016

In a release dated January 26, 2017, the Bureau of Labor Statistics announced that union membership in the private sector workforce fell from 6.7% to 6.4% in 2016, and overall union membership dropped from 11.1% to 10.7%.

According to the report, in 1983, the first year for which comparable union data is available, the overall union membership rate was 20.1%. The percentage of unionized workers has steadily decreased since that time. This decline can be attributed, in part, to the increase in the number of right-to-work states, which give employees the freedom to choose to join or not join a labor union.

On February 6, 2017, Governor Eric Greitens signed legislation making Missouri our country's 28th right-to-work state.

A week earlier, on January 31, 2017, Representatives Joe Wilson of South Carolina and Steve King of Iowa introduced into Congress a bill that would amend the National Labor Relations Act and the Railway Labor Act to prohibit union security clauses. This national right-to-work legislation would give *all* employees across the United States the right to choose to join or not join a union.

THE ZINSER LAW FIRM, P.C. LAUNCHES NEW WEBSITES

The Zinser Law Firm, P.C. is excited to announce our redesigned company website at www.zinserlaw.com. The new and improved, user-friendly website seeks to inform current and future clients about our firm's history and our attorneys' extensive experience.

The newly launched site includes a "Zinsergram" blog feature to keep Management informed on all the latest important legal developments. Upcoming webinars and speaking engagements are now listed on one convenient page. You will also find easy access to our firm's Twitter and LinkedIn accounts, as well as digital access to our print newsletter. We urge you to check back frequently as we continue to add new features to the site.

In addition to the main site, we have developed individual URLs to detail our specific experience in particular areas of labor and employment law. These topic-specific sites can be found at independentcontractor.law, newspaperlabor.law, and medialabor.law. An additional website on outdoor advertising law is forthcoming.

We hope you will enjoy these new sites and encourage clients to provide us with feedback on the new features and design.