Zinsergram a/k/a Legal Update

By L. Michael Zinser

NLRB ISSUES LONG-AWAITED JOINT EMPLOYER DECISION

In a broad sweeping 3-to-2 Decision in *Browning-Ferris,* the Obama NLRB recently rewrote the decades-old test for determining who is the "Employer." Under the previous caselaw, a Company had to exercise ***direct control*** over wages, hours, and working conditions to be an "Employer." Now, under the new standard, the Company is a "Joint Employer" if it exercises "***indirect control*** over working conditions, or if it reserves the authority to do so."

The Board majority redefined and expanded the test that makes two separate, independent entities a "Joint Employer" of certain employees. In direct defiance of legislative history and Supreme Court decisions, the Board majority incorporates theories of "economic realities" and "statutory purpose" that extend the definition of "Employee" and "Employer."

The NLRB continues to base its approach on the philosophy, "We are going to do what we want – stop us if you can!"

This Decision is a further expansion of revisions the Board majority made in *FedEx Home Delivery*, where the Board revised longstanding definitions of independent contractor status in a way that will predictably extend the National Labor Relations Act's coverage to many individuals previously considered to be excluded as independent contractors.

In a blistering dissent, Republican members Miscimarra and Johnson made the following points:

1. The Board's new test incorporating theories of "economic realities" and "statutory purpose" exceeds the Board's statutory authority because, in 1947, Congress amended the NLRA to expressly reject these theories.

2. The Board majority's claim that the new Decision is necessary to deal with relationships that are unique to our modern economy is just wrong. Many forms of subcontracting, outsourcing, and temporary or contingent employment date back to long before the 1935 passage of the NLRA. Supreme Court precedent makes clear that the NLRA did not confer "Employer" status on third parties merely because

commercial relationships made them interdependent with an "Employer" and its employees.

3. The Board majority has engaged in legislative action, invading the province of Congress. The common law standard, as codified by the Act, puts a premium on ***direct*** control before making an entity the Joint Employer of certain workers:

> Our fundamental disagreement with the majority's test is not just that they view indicia of indirect, and even potential, control to be probative of Employer status, they hold such indicia can be *dispositive* without *any* evidence of direct control. Under the common law, in our view, evidence of indirect control is probative only to the extent that it supplements and reinforces evidence of direct control.

4. The Board majority abandons a longstanding test that provided certainty and predictability, and replaces it with an ambiguous standard.

5. Like in the *FedEx Delivery* case, the Board majority is trying to correct what it perceives to be a disparity of bargaining power. "The Board needs a clear Congressional command – and none exists here – before undertaking an attempt to reshape this aspect of economic reality." In a 1970 U.S. Supreme Court case, the Court made clear, "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." Thus, the Board lacks authority to correct its perception of disparity of bargaining power.

Editor's Note: This writer anticipates that the *Browning-Ferris* Decision will lead to significant court challenges, as well as efforts to amend the NLRA to reverse the Decision.

"ACTING" NLRB GENERAL COUNSEL SERVED ILLEGALLY

On August 9, 2015, the U.S. Court of Appeals for the D.C. Circuit tagged President Obama for abuse of Executive Authority. The Federal Appeals Court struck down a ruling of the National Labor Relations Board because its Acting General Counsel was holding the job illegally. The then-Acting General Counsel was Lafe Solomon.

The President named Solomon to be Acting General Counsel in June 2010. Six months later, he nominated Solomon for the General Counsel position. The Senate refused to confirm Solomon, and he remained in the Acting General Counsel capacity until November 2013. In the

case before the Court, Solomon had issued the Complaint against the Company after he was nominated for the job – but still serving as "Acting" General Counsel.

The Federal Vacancies Reform Act of 1998 provides that, once Solomon was nominated to be General Counsel, he could no longer serve as Acting General Counsel. The law prohibits a person from being "both the acting officer and the permanent nominee."

The Court ruled that because the Company at issue, Southwest Ambulance had invoked the defense that Lafe Solomon was acting unlawfully, the NLRB's Decision against that Company was void. The D.C. Circuit vacated the Board's Order.

This is just one more piece of evidence of the lawlessness of the Obama administration, as it involves the NLRB. Previously, the D.C. Circuit ruled against Obama's recess appointments in 2013, and the U.S. Supreme Court did the same thing in 2014.

D.C. CIRCUIT TO NLRB: "USE COMMON SENSE"

While they were at work, union employees of AT&T wore shirts stating "Inmate" on the front and "Prisoner of AT$T" on the back. The Company asked its public technicians who interacted with customers or worked in public places to remove the shirts. Those who refused were issued one-day suspensions. After the suspensions, the union filed an unfair labor practice charge, stating that the employees' Section 7 rights were violated when they were forced to remove the shirts.

AT&T cited the "Special Circumstances Doctrine" and argued that it could lawfully ban union messages on publically visible apparel on the job when the Company reasonably believes that the message may harm its relationship with its customers or its public image. The Board found in favor of the union; the Company appealed to the U.S. Court of Appeals for the D.C. Circuit.

The Court found that customers could be confused and possibly believe that convicts were working for the Company. It further found that the Company could reasonably believe that the message might harm its public image or its relationship with its customers. In rebuking the Board's reasoning, the D.C. Circuit stated, "***Common sense*** sometimes matters in resolving legal disputes. This case is a good example." [Emphasis added]

The Court reversed the Board and found in favor of the Company, noting that banning the shirts was lawful and specifically tailored only to the public employees – not the employees who had no interaction with the public.

OHIO NEWSPAPER CARRIER NOT ELIGIBLE FOR WORKERS' COMPENSATION

Laymon Whitt was a newspaper delivery person performing services for Gary's News Deliveries as an independent contractor, pursuant to a written Independent Contractor Agreement. Whitt delivered *USA TODAY* around the Greater Columbus marketplace. Whitt was killed while delivering the newspapers, and his estate filed for Workers' Compensation benefits in Ohio. These benefits were denied, and the estate appealed into the court system.

The Ohio Court of Appeals for the 4th Appellate District reviewed Whitt's contract relationship with Gary's News to determine whether the Company exercised control over Whitt. The Court found that the Company did not exercise the right to control the manner or means of performing the work.

Further, the Court found that the contractual provisions stating the paper had to be delivered in a timely manner and in a dry, readable condition were not controlling, because the contractor could deliver the papers in any order. The Court also gave significance to the fact that Whitt used his own vehicle to deliver the papers, and was free to exercise control over how the products were delivered, within the time constraints set by the Company.

The Court affirmed the grant of Summary Judgment in favor of the Company, and dismissed the Workers' Compensation claim.