

Zinsergram a/k/a Legal Update
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APPEALS COURT REVERSES NLRB, FINDS INDEPENDENT CONTRACTOR STATUS

On February 3, 2016, the U.S. Court of Appeals for the 11th Circuit reversed the National Labor Relations Board's finding that stagehands are employees. The Court ruled that the stagehands are independent contractors, and that the decision of the Board was "contrary to law."

The current majority composition of the NLRB has been extremely hostile to independent contractor status. In its recent decisions, the Board has given no weight to the "**entrepreneurial opportunity**" of the independent contractors, and also has focused on **disparity of bargaining power** between a Company and an individual independent contractor. The Court of Appeals totally rejected these concepts.

The written Agreements between Crew One Productions, Inc. and the stagehands gave the stagehands the right to provide their services to competitors of Crew One. The Board ignored that factor, arguing that it is a "consequence of the part-time nature of stagehand work." The Court found this to be irrelevant, noting the fact that the Agreement with Crew One did not require the stagehands' full-time services does not diminish the significance of the fact-finding that the stagehands had the right to perform services for competing companies.

The Court then stated, "The Board committed a more fundamental error by treating bargaining power as evidence that stagehands are employees." Disparity of bargaining power does not create an employer/employee relationship. The Court concluded by stating that, under the common law of agency, the Board should have given no weight to disparity of bargaining power, with respect to negotiations about contract compensation.

The Board had found that the stagehands perform work that is essential to Crew One's operations. The Court said the relevant inquiry is "whether or not the work is a part of the regular business of the Employer." Crew One is in the business of referring stagehands to event producers. However, Crew One does *not* perform stagehand work itself – only the stagehands do. This is supportive of independent contractor status.

The Court relied upon the following additional factors to find independent contractor status:

- Crew One did not have the right to control the manner, means, and details of the work; the Court stated that control is the most important factor in the common law.
- Crew One did not withhold taxes from the contract payments; the Board erred by not giving strong weight to this factual finding. The stagehands completed IRS Form W-9, which the IRS explains is “the first step when a company has made the determination that the person it is paying is an independent contractor.”
- The written Agreements evidenced an intention to create an independent contractor relationship; the Court noted that, contrary to the argument of the Board, the significance of the Agreements is not undercut by the fact that all of the stagehands signed one.
- The stagehands provided their own basic supplies they needed for the job.
- The stagehands received no employee-like benefits; Crew One did not provide the stagehands with an employee handbook.
- The stagehands received a brief orientation and a packet of information, but no training.
- The stagehands were not required to participate in any group meetings.

The Court found that the only factor that weighed in favor of employee status is that the stagehands were paid hourly. However, the Court said that this factor is outweighed by the totality of the other factors, “especially the **lack of control.**”

ILLINOIS COURT HOLDS TRUCK DRIVER TO BE AN INDEPENDENT CONTRACTOR

The Illinois Court of Appeals upheld a decision by a Workers’ Compensation arbitrator that a truck driver was not entitled to Workers’ Compensation benefits because he was an independent contractor, rather than an employee of the Company for whom he was transporting goods. In upholding the decision, the Court found that the evidence weighed heavily for the Company because the Company did not control the driver’s performance to a great degree.

The Court considered several factors when making its determination. For instance, the Company did not tell the driver what route to take when making deliveries. The driver needed only to deliver each shipment on time, and he decided his own schedule for transporting the deliveries – including when and where to make rest stops and refuel. The only information the Company provided to the driver was where to pick up a shipment, as well as where and when to deliver it.

Additionally, the driver also owned his own truck and was responsible for expenses associated with operating the truck, including speeding tickets or driving citations. The Court also considered the method of payment. The driver received 70 to 75 percent of the value of each

shipment, rather than an hourly rate or salary. Taxes were not deducted from his paycheck. The driver provided his own accident and health insurance.

Even though the Court acknowledged that there were several factors weighing in favor of an employee status for the driver, they were outweighed by the lack of control exercised over the driver. These factors included requirements that the driver undergo training, submit to background checks, attend safety meetings, and abide by the Employer's work policies.

NLRB CHANGES RULES FOR “CAPTIVE AUDIENCE” SPEECHES BEFORE MAILED BALLOT ELECTIONS

On January 29, 2016, the NLRB changed over 50 years of precedent by altering the well-established Rule concerning when the captive audience speech prohibition begins in mailed ballot elections.

Since 1959, the Rule has been that captive audience speeches are prohibited from the time and date that the ballots are scheduled to be mailed by the NLRB Regional Office, and continuing until the time and date set forth for the return of the ballots. This Rule for mailed ballots is contrasted to the Rule for manual elections, which prohibit captive audience speeches by the parties within a 24-hour period prior to the start of the election.

In this new decision, the facts reveal that the NLRB Regional Director had improperly and incorrectly prohibited the Employer from holding a captive audience meeting with employees 24 hours before the date the ballots were scheduled to be mailed. That is, the Regional Director added an entire 24-hour period.

In its decision, the NLRB majority agreed the Regional Director had erred. Despite the 50-year-old precedent and the error of the Regional Director, the Board majority decided to change the Rule – allegedly for clarification. The Board majority stated, “We believe that it is appropriate to provide for a full 24-hour period before the ballot mailing that is free from speeches that tend to interfere from the sober and thoughtful choice, which a free election is designed to reflect.”

Board Member Philip A. Miscimarra dissented, noting:

Ironically, my colleagues deal with the Region's error by making the Region's mistake into a new requirement applicable to all future mailed ballot elections... There is no valid reason to change the Rule... although my colleagues state their goal is “to achieve... clarity, uniformity, and simplicity,” the existing Rule... was

already simple and clear... I believe my colleagues' decision does just the opposite: it creates a double standard that... lacks any rational justification and is likely to increase litigation in mailed-ballot election cases.

Bottom line, Employers have lost 24 hours during which they were previously able to engage in captive audience speeches in mailed ballot elections.