Zinsergram a/k/a Legal Update

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1. Obama Recess Appointments to NLRB are Unconstitutional

On January 25, 2013, the U.S. Court of Appeals for the D.C. Circuit, in *Noel Canning v. NLRB*, struck down President Obama's recess appointments of three NLRB members as unconstitutional. Chief Judge David Sentelle wrote that the recess appointments were unconstitutional for two reasons. First, the NLRB appointments were not made during "the Recess," as the term is used in the Constitution. Second, the vacancies filled by the President's "Recess appointments" did not "happen" during "the recess" of the Senate, as required under the Constitution.

The appointments did not take place during "the Recess" because this time is limited to the period between one session of the Senate and the next – when the Senate is unavailable to receive and act upon nominations. When President Obama made the appointments, the Senate was not in recess, but was rather holding *pro forma* sessions after the second session of the 112th Congress was convened.

In a stunning rebuke to the President, Judge Sentelle wrote:

> *An interpretation of 'the Recess' that permits the President to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the President free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction. This cannot be the law.*

If the Supreme Court agrees with the D.C. Circuit, the 200 or more decisions issued by the NLRB from January 24, 2012 to the present will be invalid

2. New NLRB Discipline Rule

On December 14, 2012, the NLRB came down with a new decision that specifically addresses an employer's imposition of discipline or discharge while that employer is negotiating a first-time contract with a labor union. The Board ruled that an employer must provide its employees' Bargaining Representative notice and the opportunity to bargain with it in good faith before exercising its discretion to impose certain discipline on individual employees, absent a binding agreement with the Union in providing for a process, such as a grievance-arbitration system to resolve such disputes.

The decision makes the following rules:

- Disciplinary actions such as suspension, demotion, and discharge plainly have an inevitable and immediate impact on employees' tenure, status, or earnings. With respect to this type of discipline, the Board now requires an employer to provide the Union with notice and an opportunity to bargain after the employer has decided to impose the discipline but before actually imposing it.

- The employer is not required to bargain to agreement or impasse at the stage; rather, if the parties have not reached agreement, the duty to bargain continues after imposition. Thus, an employer need not await an overall impasse in bargaining before imposing discipline, so long as it exercises its discretion within existing standards.

- The new case allows an employer to act unilaterally and impose a suspension, demotion, or discharge without providing the Union notice and an opportunity to bargain in any situation that presents exigent circumstances, defined as "where an employer has a reasonable, good faith belief that employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel." This will be reviewed on a case-by-case basis.

- There will still be an obligation to bargain with the Union after imposing discipline to agreement or impasse.

- In exigent circumstances, whereby the employer may act immediately, the employer must promptly afterward provide the Union with notice and an opportunity to bargain about the disciplinary decision and its effects.

- If the employer has properly implemented its disciplinary decision without first reaching agreement or impasse, the employer must bargain with the Union to agreement or impasse *after* imposing discipline.

- The new duty to bargain requires sufficient advance notice to the Union to provide for meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline chosen, to the extent that this choice involved an exercise of discretion.

- The new rule will also entail providing the Union with relevant information, if a timely request is made, under the Board's established approach to information requests.

- Lesser types of discipline, such as oral and written warnings, may be imposed and bargaining may be deferred until after they are imposed. After imposition, notice to the Union giving it an opportunity to bargain is required with the lesser forms of discipline.

It is significant to note that this decision was decided by the NLRB recess appointees and is invalid if the D.C Circuit decision in *Noel Canning* is upheld.

3. What is coworker.org?

Coworker.org is a recently launched website that allows employees to "start, run, and win" campaigns to change their workplaces. Employees can create online petitions through this website. Currently, coworker.org has one active campaign against Walmart, which seeks the reinstatement of an employee who was allegedly fired for speaking out against having to work on Black Friday.

Employers should pay attention to coworker.org to see if their employees are complaining about their workplaces. Note: retaliation against any employees who post on coworker.org "may" be illegal under the National Labor Relations Act, depending upon the post. On the other hand, it may be "cause" for discharge if the post goes beyond complaining about wages, hours, and working conditions.

4. Parting the Independent Contractor Seas

The State of New York, Department of Labor is waging a "Holy War" on the independent contractor status of newspaper carriers in a naked grab for additional tax revenue. In 2000 the DOL negotiated and published guidelines to help properly clarify when a carrier should be classified as independent contractor. Recently, the DOL has chosen to ignore the commandments set forth in these guidelines; initially classifying every newspaper carrier seeking unemployment as an employee. In the month of January, Rochester *Democrat and Chronicle* crusaded towards eleven (11) independent contractor status victories.

The DOL initially argued that all eleven cases should be lumped together and a previous unfavorable determination should be controlling due to *res judicata*. ALJ Covey dismissed this argument and stated that each case must be decided on its own individual facts. Though the DOL argued that the Guidelines were "old" and should not apply, ALJ Covey found that the Guidelines were held out to the public by the DOL as the "only significant factors in determining worker status" and that publishing the Guidelines and then arguing that they do not apply amounted to a "'bait and switch' situation which is inherently unfair" to the Publishers who relied on the Guidelines.

In applying the Guidelines, ALJ Covey found that the following significant factors lead to independent contractor status for the newspaper contractors:

- Received no training;
- Could deliver the route in any order he or she chose;
- Was not required to attend group meetings;
- Found his or her own substitute and paid that substitute directly;
- Could use substitutes without any limitation;
- Did not provide any written reports about delivery activities;
- Was free to add and drop customers without prior approval;

- Could engage in other business activity while delivering papers;
- Could deliver competing products at the same time;
- Purchased papers at a wholesale rate and resold to subscribers at a retail rate, the difference was his profit; delivered other publications for a per-copy fee;
- Could negotiate his contract compensation;
- Did not receive any business cards, uniforms, placards or signs identifying him as a part of the company;
- Had the ultimate responsibility to resolve complaints;
- Did not receive any instructions on how to perform his job duties; and
- Provided his own vehicle and paid all insurance and maintenance.

Each and every independent contractor status case is fact intensive. In this holy war, the devil is truly in the details.

Editor's Note: The Zinser Law Firm, P.C. represented *Democrat and Chronicle.*