Zinsergram a/k/a Legal Update

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PRESIDENT OBAMA VETOES CONGRESSIONAL ACTION ON NLRB RULE

On March 31, 2015, President Barack Obama vetoed a Joint Resolution under the Congressional Review Act that would block implementation of the National Labor Relations Board's "quickie election" Rule. The Senate adopted the Disapproval Resolution by a 53 to 46 vote on March 4, 2015. The House of Representatives passed the same measure by a vote of 232 to 186 on March 19, 2015.

The quickie election Rule is designed to take away the First Amendment rights of Employers to communicate to employees the other side of the unionization issue. The new Rule also forces employees to vote quickly, without being informed voters. Currently, there are two lawsuits in federal court attempting to stop the Rule.

QUICKIE ELECTION RULE IN EFFECT AS OF APRIL 14, 2015

The NLRB's quickie election Rule went into effect on April 14, 2015. The agency has been training its personnel to implement the policies. However, as we reported previously, two lawsuits are pending in an attempt to stop the Rule.

The Associated Builders and Contractors of Texas, Inc. joined with the National Federation of Independent Business/Texas to challenge the proposed Rule in the U.S. District Court for the Western District of Texas, filing suit in January 2015. An action filed by the Associated Builders is now set for an April 24, 2015 hearing on a Motion for Summary Judgment.

Also in January 2015, the U.S. Chamber of Commerce and Coalition for a Democratic Workplace filed suit in the U.S. District Court for the District of Columbia. While Motions for Summary Judgment have been filed in this case, no hearing has been scheduled as of this writing.

Editor's Note: Let us hope that one of these lawsuits is successful in stopping the new election Rule. We will keep you updated.

QUICKIE ELECTION RULE WEAKENS EMPLOYEE PRIVACY

One part of the quickie election Rule that is not often discussed is the part that requires Employers to disclose employees' private contact information to unions. As of April 14, 2015, Employers are now required to disclose to the NLRB and the organizing unions employees' personal e-mail addresses and telephone numbers.

Under the Rule, employees do not have the opportunity to opt out of sharing this private contact information with the union attempting to organize the workforce – neither does the Rule require the Employer to notify the employees that it is disclosing the information.

This is in sharp contrast to a Pennsylvania state law that allows individuals to fight the release of their home address before it is released under the Pennsylvania Right to Know Law. A recent court decision gives the individual the ability to claim that disclosure of information about them might put them at a personal security risk. A recent case in that state involved a union fighting access to its members' personal information under the state law.

Privacy, the First Amendment, and due process are of no concern to the NLRB. Its goal is to do anything it can to help unions organize new employees. At the present time, unions represent only 6.6% of the private sector workforce.

LAS VEGAS REVIEW-JOURNAL WINS CONTRACTOR CASE

On March 4, 2015, the District Court of Clark County, Nevada (Las Vegas) granted a Motion for Summary Judgment in favor of *Las Vegas Review Journal*, finding that the newspaper carrier who had an accident was an independent contractor. In this case, the newspaper carrier, while delivering newspapers, struck the plaintiff's vehicle. As a result, the plaintiff filed a lawsuit against the carrier and the *Las Vegas Review-Journal*, claiming the carrier was an employee.

The court stated that *Las Vegas Review-Journal* is not liable for the negligence or other torts of an independent contractor. The court relied upon the following factors to rule the carrier to be an independent contractor:

- The Independent Contractor Distribution Agreement required a finding that the parties' relationship was that of an independent contractor – the court placed great reliance on the language of the contract;

- The parties fully and freely intended to create an independent contractor relationship;
- The carrier had the sole right to control the manner, mode, method, and means of delivery;
- The carrier had the right to engage in any other business, including the delivery of other newspapers, and in fact held another job while delivering newspapers for the *Review-Journal*.
- The carrier had the right to determine the sequence of delivery;
- The carrier had the right to employee others and engage subcontractors to assist him with his deliveries, without limitation;
- The carrier's compensation fluctuated up and down based on the sale of newspapers;
- The carrier was not required to pick up his papers at any particular time;
- The carrier provided his own vehicle and paid for all expenses;
- The carrier was treated as an independent contractor for all tax purposes;
- The carrier was issued IRS Form 1099;
- The fact that a District Manager showed the carrier the route on one occasion was insufficient to demonstrate that the *Review-Journal* provided training or continuously supervised the carrier's performance; and
- While customer complaints were referred to the carrier, the court found that insignificant. What was significant to the court is that the carrier contract stated he was "free to ignore any and all suggestions" from the *Review-Journal*.

This case demonstrates the importance of having a carefully drafted Independent Contractor Agreement. Significantly, the court noted that the delivery deadline was the end result – not evidence of employee status.

Editor's Note: The Zinser Law Firm, P.C. drafted the contract used by *Las Vegas Review-Journal* and was also consulted by the newspaper's insurance defense counsel regarding this matter.