Zinsergram a/k/a Legal Update

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PHILIP MISCIMARRA NAMED NLRB CHAIRMAN

On April 24, 2017, President Trump appointed Philip Miscimarra to the position of NLRB Chairman, after announcing his intention to do so on April 21, 2017. Chairman Miscimarra, who has been a Member of the Board since August 7, 2013, previously served as Acting Chairman of the NLRB.

Before joining the Board, Miscimarra – a Republican – served as a Management-side labor lawyer. This is great news for Employers everywhere!

Currently, the Board is constituted of Chairman Miscimarra and two Democrats, Mark Gaston Pearce and Lauren McFerran. President Trump will nominate Republicans to fill the two vacancies. Let us hope that President Trump does this promptly so that Chairman Miscimarra can begin the task of reversal of many bad precedents of the Obama Board.

ALEX ACOSTA CONFIRMED AS 27TH U.S. SECRETARY OF LABOR

On April 27, 2017, by a 60 to 38 vote, the U.S. Senate confirmed Alex Acosta as the nation's 27th Secretary of Labor. He was then sworn in by Vice President Mike Pence on April 28, 2017. Acosta is highly qualified for this position, having served on the National Labor Relations Board and worked as an Assistant Attorney General and U.S. Attorney for the Southern District of Florida.

Now that that Acosta has been confirmed, he will first determine whether the U.S. Department of Labor will continue its appeal of the Overtime Rule, which is currently enjoined nationwide.

As previously reported, the Overtime Rule injunction was promptly appealed by Thomas Perez, President Obama's Secretary of Labor. Briefing of the issue was originally to be completed by January 31, 2017 – 11 days after the inauguration of President Donald Trump. 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, next making May 1, 2017 the new due date for the Reply Brief – well after Acosta was originally expected to be confirmed.

When Acosta had not yet been confirmed by mid-April, the Department of Labor filed on April 14, 2017 an unopposed Motion for a third extension of the briefing schedule. On April 19, 2017, the additional 60-day extension was granted, making the new due date for the Reply Brief will be June 30, 2017. With Acosta now confirmed, this should be the final due date.

In Acosta's March 22, 2017 confirmation hearing before the Senate Health, Education, Labor and Pensions Committee, he discussed his thoughts about the Overtime Rule – questioning the legality of even enacting a new salary threshold and noting that the currently enjoined Rule goes way too far.

Acosta plans to consult with the Department of Justice to determine whether the DOL has the authority to enact a salary increase in the first place. Referencing the current statute's duties test that determines overtime exemption, Acosta asked, "Does a dollar threshold supersede a duties test, and as a result, is it not in accordance with the law?"

If the Rule were to be revised, Acosta believes the currently proposed $47,476 salary threshold would create a "stress on the system." Accounting for inflation since the dollar amount was last adjusted in 2004, Acosta stated that he believes the correct salary threshold figure should be "somewhere around $33,000."

Let us hope that Acosta decides to abandon the U.S. Department of Labor's Overtime Rule once and for all!

U.S. COURT OF APPEALS REVERSES NLRB "EMPLOYEE" RULING

On March 3, 2017, the U.S. Court of Appeals for the D.C. Circuit reversed a decision of the National Labor Relations Board, which had ruled that FedEx truck drivers located in Hartford, Connecticut were employees for purposes of the National Labor Relations Act. This new decision rules that the FedEx route drivers are independent contractors and not eligible for unionization under the NLRA.

This is a very significant case because the NLRB had ruled in the FedEx Connecticut decision that it was not going to give weight to "entrepreneurial opportunity." Instead, the NLRB was only going to give weight to the actual exercise of entrepreneurial opportunity by independent contractors. However, this Court recognizes the importance of a written Agreement that gives the independent contractor the right to engage in entrepreneurial opportunities.

The Court also took the NLRB to task for reaching its employee ruling because the facts were virtually indistinguishable from another case involving FedEx drivers in Massachusetts. In 2009, the U.S. Court of Appeals for the D.C. Circuit ruled that those FedEx drivers were independent contractors and not employees under the NLRA.

The Court stated that it did not have to give deference to the NLRB's decision in this case. Whether a worker is an "employee" or "independent contractor" under the NLRA is a question of pure, common law agency principals, involving no special administrative expertise.

In ruling against the NLRB, the Court stated:

> It is as clear as clear can be that the same issue presented in a later case in the same court should lead to the same result… doubly so when the parties are the same. This case is the poster child for our law of the circuit doctrine, which ensures stability, consistency, and even-handedness in circuit law.

The reversal of this case by the Court is significant. The Court recognized the correctness of the NLRB's 2005 Decision finding independent contractor status in *St. Joseph News-Press.*

This is the second Federal Appellate Court to reverse the NLRB in an independent contractor case where the Board refused to give any weight to "entrepreneurial opportunity." Unfortunately, the NLRB operates under a policy of "non-acquiescence." Under this policy, the NLRB does not feel bound by decisions of the U.S. Court of Appeals. The NLRB only follows its own precedent and that of the U.S. Supreme Court.

As the NLRB is currently constituted (two Democrats and one Republican), Companies will continue to have to pursue their cases to the U.S. Court of Appeals for justice. As noted above, there are two vacancies at the NLRB. If President Trump promptly fills those vacancies with two solid, qualified Republicans, a reconstituted Board can reverse the NLRB's failure to recognize the importance of "entrepreneurial opportunity."

CONFIDENTIALITY POLICY RULES

Many Employers desire to maintain a Confidentiality Policy that explicitly directs employees not to discuss coworkers' "private employee information," such as salaries, disciplinary action, etc., unless that information was "shared by the employee" whose information is being discussed.

The U.S. Court of Appeals for the D.C. Circuit recently upheld a determination by the National Labor Relations Board that such a policy violates the National Labor Relations Act. The Court ruled that the policy unlawfully barred the employees from sharing information at the heart of labor law's concern: information about salaries and employee discipline.

The Court said the policy was not salvaged by its safe harbor allowing employees to discuss information about salaries and discipline when "shared by the employee" whom the information concerned.

The Court stated that the NLRB has recognized that restricting employees' "use of information innocently obtained" interferes with Section 7 rights. The Court also noted that the information could be leaked inadvertently, such as by leaving a pay stub on the photocopier.

Employers are also usually concerned about maintaining confidentiality when conducting sexual harassment, hostile work environment, and suspicion of abuse investigations. The need for confidentiality is paramount in these types of cases. The NLRB has ruled that such investigative non-disclosure policies may only be applied on a "case-by-case basis," following a threshold determination that confidentiality is necessary to the particular investigation.

For example, the NLRB would invalidate a rule that mandated confidentiality in *every* investigation of claims of sexual harassment. Rather, the NLRB says you must first make an independent threshold determination that confidentiality is necessary. Then, on a case-by-case basis, you can require confidentiality.

In a recent case, the NLRB ruled that a Company's investigative confidentiality requirement violated the law. However, the U.S. Court of Appeals for the D.C. Circuit disagreed and refused to enforce the Board's order. The Court held that the NLRB did not present substantial evidence to justify its decision.

The evidence revealed that the Employer "in practice" did not request non-disclosure in all cases. The Employer also testified that it would request non-disclosure only when an investigation required the investigator to speak to more than one person and only in the most

sensitive situations, which were identified as sexual harassment, hostile work environment, and suspicion of abuse cases.

The Court ruled that the NLRB made unwarranted logical leaps that the evidence did not support. Even though the Employer identified the types of cases it thought were sensitive enough to seek confidentiality, there was no evidence that the Employer necessarily required confidentiality in all cases.

The NLRB simply never asked key questions to established whether, "in practice," the Company had a policy of categorically requesting non-disclosure regarding any particular kind of investigation.