Zinsergram a/k/a Legal Update

By L. Michael Zinser

The Zinser Law Firm, P.C.

A LABOR DAY MESSAGE FOR MANAGEMENT

Let us remember that Labor Day is not a day to honor and celebrate "unions." This a day to honor **all** working Americans. Today the working American is under assault by the Obama administration, the NLRB, and unions. The NLRB has gone rogue, doing all it can to deprive employers of First Amendment free speech rights, disrespecting employer private property rights, and encouraging the use of social media to disparage managers and the management team. The NLRB does all these things at the urging of unions. None of this promotes job creation and capitalism.

Obamacare is destroying the "full-time" job. The overwhelming number of new jobs created last year were part time jobs – below 30 hours per week to avoid coverage under Obamacare. Unions did all they could to help pass Obamacare.

It was not always this way. In 1886, Samuel Gompers founded the American Federation of Labor. In 1924, Gompers said in a speech, "No lasting gain has ever come from compulsion." Gompers also is quoted as saying, "The worst crime against working people is a company which fails to make a profit." Today's union movement is all about brute force (think Occupy Wall Street) and disparagement about capitalism and profits. And it is no wonder unions represent less than 7% of the private sector workforce.

Peggy Noonan wrote in 2013, "Work gives us purpose, stability, integration, shared mission. And so to be unable to work – unable to find or hold a job – is a kind of catastrophe for a human being... And what I have been thinking in the weeks leading up to this weekend is very simple: Thank you God that I have a job. May many more of us be able to say those words on Labor Day 2014."

So my message to all of my friends in management is do all you can to make profits. Only a truly profitable company can be a fun place to work. Only a truly profitable company can provide good wages, hours and working conditions to full-time employees.

Celebrate the management team and its victories. Do not tolerate incivility in the workplace. Prize and honor fairness, dignity, and respect. Be not afraid to be respected as managers and a management team. Be not afraid to communicate to employees that you prefer a "**union free**" workplace – an exercise of your First Amendment rights. Be not afraid to "weed the garden" – rid the workplace of employees who do not perform. Do all of these things to secure a strong workplace for those good employees who do a good job every day.

"QUICKIE ELECTION" RULE UPDATE

The NLRB still has not finalized its proposed rule to dramatically expedite the NLRB election process. We affectionately call it the "quickie election" rule. Ostensibly, the NLRB is reviewing the thousands of comments about the rule.

Conventional wisdom is that the rule probably will be made final after the November elections, but before January 1, 2015. The publicity surrounding the rule prior to the November elections would be hurtful to Democrats running for reelection. However, it is considered critical to the unions that the proposed rule be finalized while the U.S. Senate is still under the control of the Democratic Party.

Stay tuned.

NOMINATION OF SHARON BLOCK TO NLRB

The term of NLRB Member Nancy Schiffer (Democrat) expires in December 2014. Fearing the possible loss of Democratic control in the U.S. Senate, the President has already nominated Sharon Block to fill that seat when it becomes vacant.

Readers may remember that Block is one of the *unconstitutionally* appointed Recess appointees. Demonstrating contempt for the U.S. Supreme Court decision against the Recess appointments, the President has nominated Block to fill the vacancy that will exist after the expiration of Schiffer's term.

In reaction to the possibility of the loss of the Senate in the November elections, Majority Leader Harry Reid, to "grease the skids," has scheduled the hearing on the nomination of Block for 10:00 a.m. on September 9, 2015. With the filibuster no longer available, Block's nomination will pass along party lines. If Block's nomination is not approved while Democrats still control the Senate, the NLRB will no longer have a pro-union majority.

U.S. District Court Blasts NLRB

The NLRB alleged in a Complaint that the University of Pittsburgh Medical Center (UPMC) was a single Employer with Presbyterian Hospital. The Service Employees International Union (SEIU) served extremely broad subpoenas on UPMC, which then petitioned to revoke the subpoenas before an Administrative Law Judge. Those petitions were denied. UPMC refused to comply with the subpoenas and the NLRB petitioned the U.S. District Court for enforcement.

Characterizing the three subpoenas, the court stated that it "has never seen a document request/*subpoena duces tecum* of such a massive nature." It continued:

> The Court does see how these requests have any legitimate relationship or relevance to the underlying unfair labor practices; instead, the requests seek highly confidential and proprietary information; the requests have no proportionality to the underlying charges; and the requests seek information that a union would not be entitled to receive as part of a normal organization effort.

The court further stated:

> Indeed, the scope and nature of the requests, coupled with the NLRB's efforts to obtain said documents for, and on behalf of, the SEIU, arguably moves the NLRB from its investigatory function and enforcer of federal labor law, to serving as the litigation arm of the union, and a co-participant in the ongoing organization effort of the union.

However, the District Court felt compelled to enforce the subpoenas because of bad precedent at the U.S. Court of Appeals for the Third Circuit, involving the EEOC. The court, however, said it will *stay the implementation* of its order so that UPMC can appeal its decision.

The court noted that if this legal predicament is to be altered, it must be done by the Court of Appeals. If the Court of Appeals will allow it, the District Court is prepared to address the issues of whether the subpoenas served legitimate purposes, whether the inquiry is relevant to the purpose, and whether the subpoenas are unduly broad or burdensome.

The Indiana Right-to-Work Law is Constitutional

On September 2, 2014, the U.S. Court of Appeals for the 7th Circuit ruled that the Indiana Right-to-Work law did not violate the Constitution of the United States of America. The court further ruled that the Indiana law was not preempted by the federal scheme of labor law.

To quote the majority opinion:

> The statutory question posed is whether Indiana's new law is preempted by federal labor law, or threatens the unions' First Amendment rights. The answer is an emphatic, "No." Right-to-Work laws like Indiana's have existed since before the passage of the Taft-Hartley Act and the inclusion of Section 14(b) of the NLRA. Congress specifically reserved to the states the power to write and enforce laws of this nature, in accordance with individual states' needs and wisdom. It is not our province to wrest this authority, which has been intact and undisturbed for over 65 years, from the states and erase the distinction between right-to-work states and non-right-to-work states.

Chief Judge Wood dissented in this 2 to 1 Decision. Judge Wood, a Clinton appointee, adopts the preposterous position that the Right-to-Work law is an unconstitutional taking of property from unions and union members who pay dues. Judge Wood believes that a compromise must be struck, under which states may insist that no employee be required to become a member of a union, but at the same time, non-members must pay for the services that the unions are required by law to render to them.

Because in Right-to-Work states, unions have a duty of fair representation to represent both members and non-members in a bargaining unit, Judge Wood believes it to be an unconstitutional taking to force the union to render this representation without compensation.

Editor's Note: If President Obama gets to fill another Supreme Court vacancy, Judge Wood's very pro-union dissent reads like an audition for the job. Judge Wood's name has been mentioned in the past as a potential Obama nominee.