

## Zinsergram a/k/a Legal Update



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### **MINNESOTA CARRIER IS AN INDEPENDENT CONTRACTOR**

Burnett was a newspaper carrier for *Duluth News Tribune*. While delivering papers, he fell and broke his leg. He filed for Workers' Compensation benefits, alleging that he was a full-time employee of the Company. The Administrative Law Judge disagreed, finding the following factors weighing in favor of Burnett's independent contractor status:

- He had signed an Independent Contractor Agreement;
- He was paid per-copy and charged liquidated damages for delivery errors;
- He purchased all of his own supplies, including plastic sleeves;
- He provided his own vehicle and was not reimbursed for any maintenance or mileage expenses;
- He hired others to assist him and had the right to substitution;
- Burnett alone decided how to compensate his helpers and substitutes;
- The only requirements were the paper be delivered timely and in good condition; the manner, method, and mode of delivery were up to Burnett;
- There were no written forms or reports, nor were there any instructions or training;
- There were no group meetings;
- Burnett was free to contract with others to perform similar other competing services;
- *News Tribune* could not discharge Burnett; his contract could only be terminated with 30 days' notice;
- He had the opportunity to realize a profit or suffer a loss based upon his per-copy delivery fee;
- The paper was not responsible for his negligence or behavior.

The ALJ dismissed Burnett's claim, finding that he failed to demonstrate he was an employee while suffering his injury.

## **FACEBOOK RANT BREACHES SETTLEMENT AGREEMENT**

The 3<sup>rd</sup> Circuit Court of Appeal of Florida held that an employee's disclosure to his daughter of the existence of his settlement with his former Employer breached the confidentiality clause of the Settlement Agreement.

The employee had sued his former Employer for age discrimination. Thereafter, the parties entered into a Settlement Agreement that contained a confidentiality clause prohibiting the employee from discussing its terms with any entity or person, except his attorneys, professional advisors, and spouse.

After settling the case, the employee and his wife told their college-aged daughter about the settlement. The daughter then posted the following message on her Facebook page: "Mom and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."

Gulliver Schools refused to pay Snay \$80,000 under the Settlement Agreement, due to breach. The Appellate Court ruled in favor of the Employer. The court pointed out that Snay could have negotiated the confidentiality clause to allow him to disclose the settlement to his daughter, but he did not.

The daughter's Facebook post cost her father \$3,478.00 per word.

## **SECRETARY OF LABOR TO REVISE EXECUTIVE EXEMPTION**

President Obama has directed the Secretary of Labor to revise the executive exemption from overtime. The announced goal is to make eligible for overtime many individuals who are now exempt as executives under the Fair Labor Standards Act. Currently, if an individual earns \$455.00 or more per week, and if the individual's primary duty is supervision and/or management, the individual is exempt from overtime.

*Editor's Note:* Watch what the new regulations do to the weekly salary. Also, watch to see if the Secretary of Labor replaces the "primary duty" test with a quantitative measure that will require an Employer to spend the majority of his or her time actually performing the executive duties. Many Employers have "working supervisors" who do not perform purely managerial duties.

## **NLRB GENERAL COUNSEL OUTLINES ACTIVIST AGENDA**

New NLRB General Counsel Richard Griffin recently published a memo outlining the legal issues that Regional NLRB Offices must submit to the General Counsel's Office for guidance on how to proceed. Review of this memo gives Employers a preview of where the General Counsel is headed. He is looking for ways to help unions and to increase the NLRB's reach into the non-union setting.

Among other issues, the memo instructs Regional Directors to send to the Division of Advice cases that involve the issue of whether employees have a Section 7 right to use an Employer's e-mail system. At the present time, employees do not have a Section 7 right to use an Employer's e-mail system to try to unionize their coworkers. The current precedent is the Register-Guard case. The General Counsel has been very vocal that he wants to reverse that precedent.

The memo also indicates a desire to extend to unrepresented employees the right to have a witness present in investigatory meetings that may result in discipline. Currently, unrepresented employees have no such right. The new NLRB General Counsel would like to extend that right to the non-union workforce.