Zinsergram a/k/a Legal Update

By L. Michael Zinser
CSCMA General Counsel

NLRB "QUICKIE ELECTION" RULE UPDATE

The NLRB "quickie election" Rule went into effect on April 14, 2015. As of May 8, 2015, 209 election petitions had been filed by unions around the United States. The average number of days from the date of the filing of the Election Petition to the date of the election was 25 days. The shortest period was 10 days from the date of the filing of the Petition.

Prior to the April 14 implementation of the Rule, the average number of days from the date of the filing of the Petition to the date of the election was 42 days. Thus, so far under the new Rule, on average, Employers have 17 fewer days to prepare for the election.

On April 24, 2015, Judge Robert L. Pittman of the U.S. District Court for the Western District of Texas heard Oral Argument on a Motion for Summary Judgment filed by the Associated Builders and Contractors of Texas. That Motion for Summary Judgment seeks to stop enforcement of the quickie election Rule and to rule it as invalid. The court heard Oral Argument from all parties. Judge Pittman, an Obama appointee, has not yet issued a Decision.

On May 15, 2015, U.S. District Judge Ketanji Brown Jackson of the U.S. District Court for the District of Columbia heard Oral Argument on a Motion for Summary Judgment filed by the U.S. Chamber of Commerce in a separate lawsuit to stop implementation of the Rule. The hearing lasted for almost four hours. Judge Jackson has not yet ruled, but rather, took the case under advisement. Judge Jackson is also an Obama appointee.

NLRB GENERAL COUNSEL: BE CAREFUL WITH VOTING LIST INFORMATION

Employers and employees everywhere are concerned with the privacy rights of employees under the new "quickie election" Rule. In particular, they are concerned about the personal cell phone and e-mail addresses that must be turned over to unions and the NLRB by Employers.

This April, the NLRB General Counsel issued a memo advising agency staff not to misuse the voter list. They were advised not to sell the list to telemarketers, provide it to political campaigns, or use the information to harass, coerce, or rob employees. Both the NLRB and the unions get this list. Do not bet on unions abiding by the restriction.

This writer predicts there will be many issues surrounding this voting list, including giving it to political campaigns. This Rule is a terrible blow to personal privacy.

LEGISLATIVE ASSAULT ON CONTRACTOR STATUS IN NORTH CAROLINA

A bill has passed in the North Carolina Senate that is a broadside attack on independent contractor status, especially for the newspaper industry. Previously, state statutes contained an express rebuttable presumption that a newspaper carrier was an independent contractor. That provision had pretty much ended independent contractor assaults under the Workers' Compensation law.

The Senate has repealed that rebuttable presumption, and, in addition, has passed a new statutory independent contractor definition that is not favorable.

As of this writing, the measure has not passed the State House of Representatives. The North Carolina Press Association has sprung into action, in an effort to prevent its passage or limit the damage.

Currently, the bill is lodged in the House Rules Committee. The North Carolina Press Association is working with the Speaker of the House and the Chairman of the House Commerce Committee to preserve the industry's "rebuttable presumption" in the Workers' Compensation law – and to change the unfavorable language of the definition of independent contractor status contained in the Senate version of the bill.

The Press Association is expected to get lead-time before the House version of the bill is scheduled for any hearing. The Press Association is guardedly optimistic that no action will be taken on the House version at this time.

NOT SHOWING UP IS NOT A REASONABLE ACCOMMODATION

Harris, a steel resale buyer for Ford Motor Company, had Irritable Bowel Syndrome. She requested an accommodation to telecommute four days per week. Her job was highly personal and involved face-to-face meetings and interactions at the Company. Ford denied Harris' four-day-per-week telecommuting request. After a long period of attendance issues and poor performance, she was terminated.

The 6th Circuit previously found for the employee in a panel decision. Ford petitioned for a rehearing *en banc*, and the petition was granted. The full court found for the Company and affirmed the Decision of the U.S. District Court for the Eastern District of Michigan.

The court noted, "Regular and predictable on-site attendance was essential for Harris' position," and, "Harris' repeated absences made her unable to perform the essential functions of a resale buyer." The court found that Harris' four-day-a-week telecommuting proposal was unreasonable. It further distinguished the notion that Harris could perform some functions from home as distinct from the ability to "perform the vast majority of her work *as effective* off-site."

The Sixth Circuit concluded by dismissing Harris' claim against the Company, noting, "Ford had made substantial steps to keep her in the workplace and Harris never proposed a reasonable accommodation after her four-day-per-week telecommuting proposal was denied." The court stated that Harris "must do more than simply show that there is some metaphysical doubt as to the material facts" to overcome the Company's Motion for Summary Judgment.