Zinsergram a/k/a Legal Update

By L. Michael Zinser
The Zinser Law Firm, P.C.

1. NLRB QUICKIE ELECTION RULE ENJOINED

The NLRB had promulgated a new rule designed to take away an Employer's First Amendment right to campaign against a union in the period preceding an election. The rule was to take effect on April 30, 2012. On May 14, 2012, in a stinging rebuke to the NLRB, the U.S. District Court for the District of Columbia enjoined the rule. United States District Judge James E. Boasberg, *U.S. Chamber of Commerce et al v. NLRB U.S. District Court for the District of Columbia,* wrote:

> According to Woody Allen, 80% of life is just showing up. When it comes to satisfying a quorum requirement, though, showing up is even more important than that. Indeed, it is the only thing that matters—even when the quorum is constituted electronically. In this case, because no quorum ever existed for the pivotal vote in question, the court must hold that the challenged rule is in invalid.

On December 22, 2011, the NLRB published the new rule. Two of the Board's three members voted in favor of adopting the rule. The third member of the Board, Brian Hayes, did not cast a vote. Because Member Hayes did not participate in the decision to adopt the final rule, the other two members of the Board lacked the authority to effect its promulgation. According to the court, "Member Hayes cannot be counted towards the quorum merely because he held office." The court stated, "He need not necessarily have voted, but he had to at least show up. At the end of the day, while the court's decision may seem unduly technical, the quorum requirement, as the Supreme Court has made clear, is no trifle . . . . The Board lacked the authority to issue it, and, therefore, it cannot stand."

The final draft of the rule was circulated in the Board's internal Judicial Case Management System (JCMS). Both Chairman Pearce and Member Becker voted to approve the rule. Hayes did not vote, nor was he "asked by e-mail or phone to record a final vote in JCMA before or after the final rule was modified, approved by Chairman Pearce and Member Becker, and forwarded by the solicitor for publication December 16, 2012.

This case hinged on what constitutes "participation" in an electronic vote. The court raised the question, "When the very concept of a quorum seems designed for a meeting in which people are physically present in the same place, what does it mean to be present or to participate in a decision that takes place across wires? In other words, how does one draw the line between a present but abstaining voter (who may be counted toward a quorum) and an absent voter (who may not be) when the voting is done electronically?" Member Hayes did not vote on the adoption of the final rule when it was circulated through the JCMS system on December 16, 2011. When no vote or other response was received from Hayes, no one requested that he provide one, per the agency's usual practice. The U.S. Supreme Court clearly stated in a previous case that that Member may not be counted toward a quorum simply because he holds office. Member Hayes

was sent a notification that the final rule had been circulated for a vote, but he took no action in response. He simply did not show up in any literal or even metaphorical sense. Had he affirmatively expressed his intent to abstain or even acknowledge receipt of the notification, he may well have been legally "present" for the vote and counted in the quorum. Had someone reached out to him to ask for a response, as is the agency's usual practice where a member has not voted, it would have been a closer case, but none of that happened here. The court stated: "In our world of in person meetings, Hayes' actions are the equivalent of failing to attend. Whether because he was unaware of the meeting or for any other intentional reason. In any event, his failure to be present or participate means that only two members voted, and the rule was then sent for publication that very day."

The Court ruled that the quorum requirement was a fundamental constraint on the exercise of the Board's power. The NLRB is a "creature of statute" and possesses only that power that has been allotted to it by Congress. As the final rule was promulgated without the requisite quorum and thus in excess of that authority, it must be set aside.

2. NLRB BEGINS TO ATTACK AT WILL DOCTRINE

Acting NLRB General Counsel Lafe Solomon, recently speaking at the Connecticut Bar Association annual meeting, indicated that blanket "at-will" statements in employee handbooks will face close scrutiny by the NLRB as the agency's next enforcement target. The "at-will" doctrine is a creature of state law. The NLRB's new initiative is usurping state law and individual contract rights. Apparently, Acting General Counsel Lafe Solomon is going to use the National Labor Relations Act to regulate what is a state law employment relationship.

In a recent case, the NLRB issued a complaint against Hyatt Corp., taking issue with the Company's handbook provisions, requiring employees to acknowledge they are employed at-will and that at will status may only be altered by a Hyatt Executive.

The complaint charged that certain employee *acknowledgement* provisions are overly broad and discriminatory (although not coercive):

- "I understand my employment is at-will."
- "I acknowledge that no oral or written statements or representations regarding my employment can alter my at will employment status, except for a written statement signed by me and Hyatt's President or Executive Vice President/COO."
- "The at will's test of my employment can only be changed in writing, signed by the employee and one of two Hyatt executives."

Hyatt settled its case without litigation. However, in another case involving *American Red Cross*, an NLRB ALJ ruled that American Red Cross violated the Act with a handbook receipt provision, requiring employees to acknowledge that "the at-will employment relationship cannot be amended, modified, or altered in any way." The NLRB Acting General Counsel's position is that the employee's signing of the acknowledgement form is "essentially a waiver in which an employee agrees that his/her at-will status cannot change, thereby relinquishing his/her right to advocate concertedly whether represented by Union or not, to change his/her at-will status."

The NLRB's brief further argued that, "For all practical purposes, the employee acknowledgement requirement premises employment on an employee's agreement not to enter into any contract, to many any efforts, or to engage in conduct that could result in Union representation and in a collective bargaining agreement, which would amend, modify, or alter the at will relationship. Clearly such a clause would reasonably chill employees who are interested in exercising their Section 7 rights."

The philosophy of this new position of the Acting NLRB General Counsel is extremely dangerous. Every term of any employee handbook is potentially negotiable if the employees organize. For example, overtime, holidays, pensions, sick leave, etc. Why should "at-will" be any different? What if your handbook contains a provision that says overtime will all be paid after working forty (40) hours in a week? Under the NLRB's approach, that handbook provision would be invalid and overly broad because employees might misconstrue it as prohibiting any bargaining over the overtime premium issue. This is just nuts! It is probably going to take the U.S. Court of Appeals to fix this new problem.

3. MISSISSIPPI PASSES NEWSPAPER CARRIER PROTECTIVE LEGISLATION

The state of Mississippi, like many other states, has seen an epidemic of litigation by the State Department of Unemployment challenging independent contractor status of newspaper carriers in a naked attempt to gather any revenue. The Mississippi Press Association became part active and led the way to change the law to provide newspaper carrier-specific protection. Under the new law that becomes effective in July 2012, the term "employment" shall **not** include: "Service performed by an individual in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution."

Additionally, the new law adds a "Direct Seller" provision that excludes from the definition of employment any individual who is (1) engaged in the trader business of selling or soliciting the sale of consumer products to any buyer on a buy/sell basis, a deposit commission basis, or any similar basis, which the Department prescribes are regulations (please check this; your words were running together as you were reading—too fast); (2) substantially all of the remuneration for the performance of the services is directly related to sales or output and not hours worked; (3) the services are performed pursuant to a written contract, and the contract provides that the person will not be treated as an employee with respect to such services for federal tax purposes.

What is clear is that home delivery contractors, whether on a buy/sell basis or per-piece basis, are excluded from the definition of employment under the Unemployment Compensation law. What is unclear is whether bundle haulers are excluded. What is also unclear is whether the new provisions will exclude from the definition of employment the delivery of newspapers to retail outlets. However, the new law is a big improvement over the old law.

(Mississippi House Bill 451)