

## Zinsergram a/k/a Legal Update



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### **OHIO NEWSPAPER CARRIER IS AN INDEPENDENT CONTRACTOR**

The Ohio Industrial Commission, in a case involving the *Akron Beacon Journal*, has ruled that a newspaper carrier is an independent contractor for purposes of Workers' Compensation.

The carrier slipped on ice while delivering newspapers. There is no question that she was injured. The key question is whether she was an independent contractor. If so, she was not entitled to recovery. The Hearing Officer determined that the carrier was an independent contractor, based upon the following factors:

- Contractor signed a written Agreement;
- The contract states that the newspaper is interested only in the result to be obtained;
- Contractor is free to utilize more than one vehicle;
- Contractor is free to set his or her own working hours;
- Contractor controls sequence of delivery;
- Contractor is not required to attend meetings;
- Contractor is free to perform delivery services for competitors;
- Contractor is free to accept or reject suggestions, tips, or other instructions provided by Publisher;
- Contractor provides the vehicle and pays all expenses;
- Contractor is required to purchase supplies;
- Contractor had the free right of substitution;
- Contractor was given IRS Form 1099 and completed a Schedule C for self-employment.

Based on all of the above factors, it was ruled that the carrier was an independent contractor. *Editor's Note:* The Zinser Law Firm, P.C, counseled *Akron Beacon Journal* in this case.

## **CALIFORNIA CARRIERS MAY BE CERTIFIED AS A CLASS TO DISPUTE THEIR STATUS**

A group of newspaper carriers claimed employee status and sought class certification for their Wage and Hour suit. The Los Angeles County Superior Court found class certification improper because common questions did not predominate. The Court of Appeals found that the trial court had misunderstood the class certification analysis and remanded the case for reconsideration. Antelope Valley appealed this decision to the California Supreme Court, which in turn affirmed the remand and outlined the appropriate test for class certification of an independent contractor claim.

The Supreme Court noted that California applied the common law test for independent contractor status determining “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” The Supreme Court further noted that “what matters is whether the hirer retains all necessary control over its operations.” The Court pointed out that the strongest evidence of the right to control is “whether the hirer can discharge the worker without cause.”

The California Supreme Court determined that the trial court had improperly focused on the *actual exercise* of control, rather than looking at Antelope Valley’s right to control the carriers’ activities. The Supreme Court noted that the trial court should analyze whether the contracts gave Antelope Valley a common right to control over its carriers, as well as “whether its rights to control the carriers’ activities varied substantially, such that they might subject some carriers to extensive control, as to how they delivered... while as to others it had few rights and could not have directed the manner of delivery, even had it wanted.”

The California Supreme Court directed the trial court to apply the common law test and analyze Antelope Valley’s *right to control* its carriers.

## **KENTUCKY INDEPENDENT CONTRACTOR NEWSPAPER CARRIERS FREE FROM WORKERS’ COMP**

The State of Kentucky passed S.B. 105, which became effective this past July. The bill amended K.R.S. §342.640 to prevent newspaper carriers from being classified as employees of the Publishing Company for Workers’ Compensation purposes.

The law formerly stated:

Subject to the provisions... every person regularly selling or distributing newspapers on the street or to customers at their homes or places of business...

for the purposes of this chapter, the person shall be deemed an employee of an independent news agency for whom he is selling or distributing newspapers, or, in the absence of an independent agency, of each publisher whose newspapers he sells or distributes.

That section was stricken from the law in its entirety. Now, newspaper carriers are not automatically considered employees for Workers' Compensation purposes in Kentucky. Currently, whether a newspaper carrier is an independent contractor or an employee is a factual analysis, analyzing the nature of the work performed by the carrier, the extent of control exercised by the alleged employer, the professional skill of the alleged employee, and the true intent of the parties.

This fact intensive analysis will look at the actual relationship between the parties and alleviate the burden of paying Workers' Compensation insurance premiums for independent contractors.

### **BLOGGER CONSIDERED MEMBER OF THE PRESS**

Obsidian Finance Group sued Internet blogger Crystal Cox, alleging defamation for her blog posts. Several of Cox's posts highlighted perceived corruption by the Company's bankruptcy trustee, who was hired to marshal funds for the benefit of a Chapter 11 bankruptcy filing.

The U.S. District Court for the District of Oregon found that an Internet blogger was not the same as a press member, and was not entitled to some of the First Amendment protections enjoyed by the traditional press. The District Court further found that the bankruptcy trustee was not a public figure, which lowered the burden of proof Obsidian had to overcome to recover damages. The District Court did not require the proving of negligence or actual damages, and found that the trustee was not a public figure, and therefore, Obsidian was entitled to presumed damages. The District Court instructed the jury to this effect and Cox appealed to the 9<sup>th</sup> Circuit.

The 9<sup>th</sup> Circuit reversed the District Court's findings and indicated that there is no distinction between media respondents and a non-institutional respondent. The 9<sup>th</sup> circuit stated:

The protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others' writings, or tried to get both sides of a story.

The 9<sup>th</sup> Circuit elaborated, stating, “With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred.”

The 9<sup>th</sup> Circuit found that Cox was protected by the First Amendment’s freedom of the press, meaning that Obsidian had to prove at least negligence on the part of Cox to recover damages. The 9<sup>th</sup> Circuit ordered a new trial and reversed and remanded the case back to the District Court.