Zinsergram a/k/a Legal Update

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OUTSIDE SALES EXEMPTION IS CONSTITUTIONAL

The Ohio Constitution has a minimum wage amendment stating, in pertinent part, that "employer," "employee," "person," and "independent contractor" all have the same meanings as they do under the Federal Fair Labor Standards Act ("FLSA"). Additionally, the Constitution says that laws may be passed to implement its provisions.

The Ohio Legislature passed a law stating, in pertinent part, that "employee" does not mean individuals who are excluded from the definition of "employee" under the Federal Wage and Hour Law or individuals who are exempt from the minimum wage requirements of the Federal Wage and Hour Law.

The plaintiffs objected to the incorporation of the outside sales exemption contained in the Federal Wage and Hour Law. The Ohio Supreme Court rejected that argument. The Court held that the constitutional amendment states that "employer" and "employee" have the same *meanings* as under the Federal Wage and Hour Law. The constitutional amendment incorporates the FSLA without limitation.

The Court stated that the legislation intended that the term "employee" was to be defined consistently with federal law, and this necessarily includes the exemptions. Bottom line, the Court concluded that both federal law exclusions and exemptions are to be considered when determining whether an individual is an employee under Ohio law.

Editor's Note: While not specifically discussing this case, federal law also excludes from the Wage and Hour Law individuals who deliver newspapers to the consumer. The same exclusion should also apply under Ohio law.

GAWKER INTERNS WERE NOT EMPLOYEES

In a test of the Second Circuit's recent decision in *Glatt v. Fox Searchlight Pictures*, a Federal District Court has held that two unpaid interns were not employees of Gawker, a media

blogging company.

The plaintiffs brought the lawsuit and putative class action for unpaid wages under the Fair Labor Standards Act ("FLSA"). The FLSA requires Employers to pay employees the minimum wage. However, some internships are not considered "employment" under the FLSA.

Using the so-called "primary beneficiary analysis," the Court concluded that the interns' time with the Company were bona fide internships, in which the interns "traded labor for significant vocational and educational benefits… [that] outweighed those [benefits] received by [the employers] in the form of [the interns'] work and the ability to evaluate [the interns] for future employment."

The Court considered the fact that the interns received mentorship from their editors, as well as opportunities to learn journalistic skills that were not offered to full-time employees – who were expected to already possess those skills. The interns spent many weeks writing and tweaking drafts under the supervision of their mentors, when full-time employees were supposed to produce comparable pieces in time frames as short as one or two days.

One of the interns, Mark, admitted that his relationship with his mentor/editor was similar to his journalism school editor. In other words, it was the same sort of hands-on instruction that he received in school. The Court also considered the fact that the interns received academic credit for the internship.

Under the totality of the circumstances, the Court declared:

> A journalism student… received the opportunity to practice journalism in a workplace context. He did so under the oversight of a mentor who edited his work… provided him opportunities to develop skills, and helped him produce full reported pieces for his portfolio and [the intern's] practical experiences… were connected directly to his course of study via his internship class, where [the intern] wrote papers, reflected on his experience, and was held accountable for his time.

The Court granted Summary Judgment for the Employer. However, before the case reached this stage, Gawker had already ceased its internship program for fear of labor law liability in the future. Employers should note that internships meeting the standard articulated in this case will not be covered by the FLSA, and therefore will not require compensation.

COURT OF APPEALS REVERSES NLRB ON SUPERVISORY STATUS

The Employer appealed a National Labor Relations Board decision that Dispatchers are not Supervisors under the National Labor Relations Act. The issue on appeal is whether the Dispatchers have authority to "assign" other employees. If the Dispatchers have the right to "assign" other employees, and the exercise of this authority in the interest of the Employer requires the use of independent judgment, they are Supervisors – and therefore excluded from coverage under the Act.

The U.S. Court of Appeals for the Fifth Circuit held that the NLRB ignored significant portions of the record showing how Dispatchers arguably exercise independent judgment when deciding how to allocate field workers. The Court noted that the Dispatchers' judgment about how to allocate field workers is guided by a range of *discretionary* factors. The Court noted that the evidence shows the Dispatcher may have to decide whether to send his crew to a critical location with the most customers *or* to a hospital with medical needs *or* to a manufacturing plant.

The Court determined that the Dispatchers must use lots of judgment in determining whether to prioritize their field employees to handle problems. Because the NLRB ignored this evidence, the Court vacated the Board's decision that Dispatchers do not exercise independent judgment when assigning employees to locations. The Court remanded the case back to the Board for further proceedings.

NLRB: GPS TRACKING DEVICE IS LAWFUL

The Employer suspected that one of its truck driver employees was "stealing time" while he was supposed to be working on his truck route. The Collective Bargaining Agreement contained a provision against stealing time.

The Employer hired a private investigator to help collect evidence. The past practice was that the union had not objected to the use of private investigators. What differed in the particular case was that the investigator placed a GPS tracking device on the employee's company truck to help with the investigation.

Based upon the investigator's observations of the employee's misconduct, the Company terminated the employee. The union filed an unfair labor practice charge, claiming unilateral change because the Company had the GPS tracking device placed on the truck without bargaining.

The National Labor Relations Board's Division of Advice directed the local NLRB Regional Director to dismiss the charge. The rationale was that the use of the GPS tracking device did not amount to a "material, substantial, or significant change" in the terms and conditions of employment. This is because there was an existing practice of using a private investigator to monitor employees suspected of misconduct.

The GPS tracking device was just "a mechanical method to assist in the enforcement of an established policy." The GPS tracking device merely added to information the private investigator had collected through personal observation and did not increase the likelihood of discipline.