




AN ICON OF TRUTH AND JUSTICE.
BUT WHEN IT COMES DOWN TO BUSINESS,
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Independent Contractor Issues and Related Agency Investigations and Litigation

October 7, 2015

L. Michael Zinser



 **THE ZINSER LAW FIRM, P.C.**
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ADVOCATES FOR MANAGEMENT FOR OVER 35 YEARS



L. Michael Zinser

Personal Motto: "Never, never, never, never give up."





THE WAR ON INDEPENDENT CONTRACTOR STATUS



Overruling *St. Joseph News-Press*

- In a recent case against FedEx Home Delivery, the NLRB has ruled that FedEx drivers in Connecticut are employees.



St. Joseph News-Press

St. Joseph, Missouri • 146TH YEAR • WEDNESDAY, NOVEMBER 3, 2010 • NO. 193 • 75¢

TEA TIME

Republicans take control of House, fall short in Senate

By DAVID ESPO
Associated Press

WASHINGTON — Resurgent Republicans took control of the House on Tuesday after every state's Republican-leaning voters called the results "a repudiation of Washington, D.C., big government and politicians who refuse to change."

Boehner and his Republicans needed to gain 40 seats for a majority, and had exactly that number in hand a few minutes before midnight in the East. They led for another 10 minutes in the West.

Obama telephoned Boehner shortly after midnight to congratulate him, a call that underscored the transition to divided government.

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Among the House Democrats to be ousted was Rep. Tom Perriello, a first-terms for whom Obama had campaigned in Virginia.

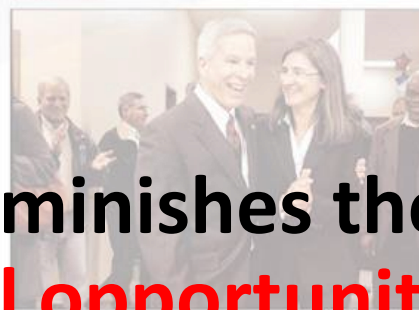
U.S. House

Rep. **190** Dem. **135**
Rep. **32** Dem. **48**

Republican U.S. Senate candidate Rand Paul vows his wife Kelley's hand in the win



34TH DISTRICT



Bob Schauf, with his wife, Dana, celebrates his win Tuesday night at his watch party in Downtown St. Joseph. Mr. Schauf defeated Martin Rucker for the District 34 Missouri Senate seat.

Blunt wins big over Carnahan

Victory assures Blunt's return to the Missouri Senate

JEFFERSON CITY, Mo. — Missouri Gov. Jay Nixon's pick for Missouri Senate on Tuesday lost to the incumbent, a campaign that tapered into voter registrations with President Barack Obama.

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Hotel/motel tax increase

St. Joseph voters rejected an increase to the city's hotel/motel tax Tuesday by a nearly 50 percent margin. The measure received 10,840 "no" votes, or 54.3 percent, to 9,000 "yes" votes, or 45.7 percent.

The City Council proposed an increase from the current 3 percent rate to 3.8 percent to pay for redevelopment projects Downtown and along the riverfront and to fund local museums, festivals and the arts. Revenue generated by the current tax pays for the operation of Civic Arena.

There's no argument now. You really won't pay a dime.

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Bob Schauf wins for state Senate

St. Joseph, who could lose his seat due to term limits, was re-elected Tuesday.

Dr. Bob Schauf will soon make the leap from representative to senator in the Missouri Legislature.

Dr. Schauf, a Republican, defeated Democrat Martin Rucker in Tuesday's election for the Missouri Senate 34th District seat, which comprises Buchanan and Platte counties. He totaled a combined 31,742 votes from both counties, or 67.2 percent, to Mr. Rucker's 20,000 votes, or 42.8 percent. He won Buchanan County with 12,857 votes to 11,677 for Mr. Rucker, and amassed an 18,885 to 11,803 margin in Platte County.

The victory, according to Dr. Schauf, can be attributed to public concerns over health care issues and the state of the economy, namely the jobs picture. In the 2011 session he will succeed state Sen.

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• This new Decision overrules *St. Joseph News-Press*.

• The Decision diminishes the significance of **entrepreneurial opportunity** and **overemphasizes factors of perceived economic dependency.**



- **A one-factor test:**

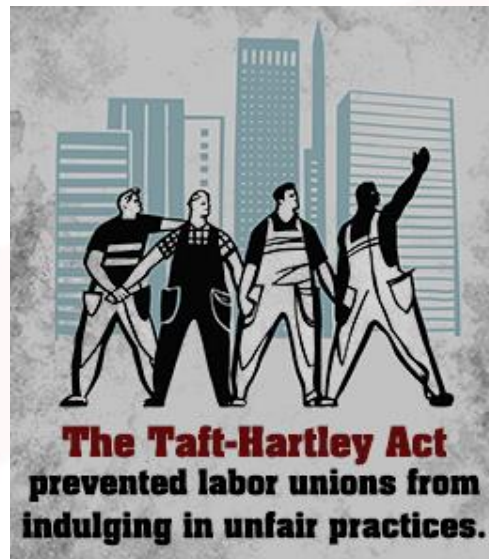
- **Disparity of bargaining power**



- **Adopted the dissent of former Chairman Wilma Liebman in *St. Joseph News-Press*.**
- **Chairman Liebman cited European precedent.**



- The new Decision is contrary to the **1947 Taft-Hartley Amendments** – the NLRB is exceeding its authority.



- The NLRB is giving no weight to economic opportunity.
- The NLRB only gives economic opportunity significance *if it is actually exercised*.



U.S. DOL Guidance Memo

- **On July 15, 2015, U.S. Department of Labor issued an interpretative Guidance Memo on the “misclassification of employees as independent contractors.”**
 - **This is potentially a game changer!**
- **Consistent with the NLRB’s decision overruling *St. Joseph News Press***



- Part of the administration's overall war against independent contractors
- The current administration is very pro-union, and **labor unions HATE independent contractors.**
- This Guidance Memo does the bidding of labor unions everywhere.



- **The Guidance Memo tries to stretch the definition of “employee.”**
 - **Inconsistent with current caselaw.**
- **Focuses on economic development of the individual contractor.**
 - **Places little value on the intention of the parties.**



It is clear that the DOL is going to take the position that most individuals are employees – *not* independent contractors.



- Employee
- Independent Contractor



NEWSPAPER-SPECIFIC EXEMPTION

- Exemption under Section 13(d) of the Fair Labor Standards Act:
 - If an individual is engaged in the delivery of newspapers to the consumer, he/she is exempt from the minimum wage, overtime, and child labor provisions of the FLSA.
- Does not apply to other types of contractors.





**U.S. DEPARTMENT OF LABOR
PROPOSED RULE ON OVERTIME
EXEMPTIONS**



Current Regulations

- **Duties Test**
 - Executive
 - Administrative
 - Professional
 - Computer-related occupations
- **Salary Basis Test**
- **Minimum salary level necessary to satisfy exemption:**
 - \$455/week, which equates to \$23,660/year
 - Higher in some states (e.g., California)
- **Highly compensated employees**
 - Shortened “duties” test
 - \$100,000/year



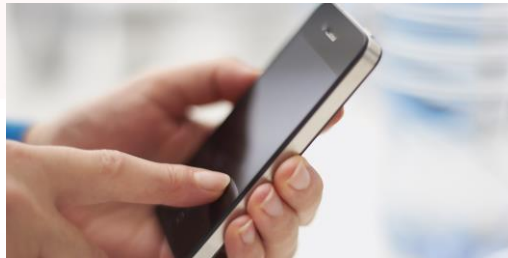
Proposed Changes

- Minimum salary level necessary to satisfy exemption
 - Would rise to **\$970/week** in 2016 (**\$50,440/year**)
 - 40th percentile of weekly earnings for full-time salaried employees
 - Higher than California rate
- If this salary floor is not satisfied, must be eligible for overtime
 - DOL's rationale: weeds out misclassification
 - No different rule for part-time employees
- Highly compensated employees
 - Would rise to **\$122,148/year** in 2016
 - 90th percentile of weekly earnings for full-time salaried employees
 - Limited ability to make catch-up pay
- Annual indexing based on inflation



Not in Current Draft – For Now

- **Inclusion of non-discretionary bonuses to satisfy minimum salary**
 - DOL is considering allowing them, if paid monthly or more frequently
 - No more than 10% of salary
 - Different than catch-up pay for highly compensated employees
- **Proposed rule change does not affect outside salespersons**
- Separately, DOL for comment on use of handheld devices after working hours.



Small Newspaper Exemption Not Affected

- The minimum wage and overtime provisions of the Wage and Hour Law do not apply with respect to:

Any employee employed in connection with the publication of any weekly, semi-weekly, or daily newspaper with a circulation of less than 4,000, the major part of which circulation is within the county where published or counties contiguous thereto.

- The proposed rule does **not** modify this exemption.



Procedure and Timetable

- Notice of Proposed Rulemaking issued: **June 30**
- Published in Federal Register: **July 6**
- 60-Day Comment Period Ended: **September 4**
- DOL reviews/considers revisions: unknown timeframe
- Final rule issued: unknown – **some time in 2016?**

Legal challenges are possible!



EMPLOYER ACTION PLAN

- Each Company should study the Rule and determine how it wants to react – there are several options.
- Review job descriptions to make sure they match actual duties.

Overtime





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