

AN ICON OF TRUTH AND JUSTICE.  
BUT WHEN IT COMES DOWN TO BUSINESS,  
IT IS AGGRESSIVE AND RELENTLESS.

## Legal Update: Hot Topics and Recent Legal Developments

L. Michael Zinser  
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**THE ZINSER LAW FIRM, P.C.**

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ADVOCATES FOR MANAGEMENT FOR OVER 40 YEARS



**L. Michael Zinser**

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





# **THE DEPARTMENT OF LABOR'S FINAL RULE ON OVERTIME**



# Employer Action Plan

- Identify all exempt employees with a salary **below \$47,476**.
- For those employees who earn close to the new minimum salary, it may make sense to raise their salaries to \$47,476.
- If you have employees whose duties have changed or who have possibly been misclassified as exempt, now is a good time to reclassify them.
  - Need to make sure the employees realize that the reclassification was the government's doing, **not** the choice of your Company.
  - Review and update all job descriptions.





# Employer Action Plan

- If your Company chooses the option to pay the employees as non-exempt, ask the following questions:
  - How many hours do these employees currently work? If you do not know, consider tracking their time.
  - Will post-conversion pay and working hours replicate an employee's current situation, or will you need to restrict schedules at or near 40 hours?
  - Will you need to reassign certain tasks to other employees?



# Employer Action Plan

- Will you base the new hourly rate on current annual salary, dividing by 2,080 (40 hours a week x 52 weeks), and just eat the overtime?
- Will you assign an hourly rate that assumes the employee will work a certain amount of overtime?
- Option of “fluctuating work week” method of computing overtime.



# Employer Action Plan

- **Work with employees and their Managers to figure out how workers can get their jobs done in 40 hours a week.**
- **If people need to work late one night on a project, they can leave early another day in the week.**



# One “Cost-Neutral” Example

- **Current scenario: Employee is paid \$40,000/year salary; works 50 hours per week, on average.**
  - **Convert to hourly, non-exempt at \$14.00/hour (\$560/week).**
  - **Assume 10 hours at overtime rate of \$21.00/hour (\$210/week).**
  - **Total of \$770/week or \$40,040 per year.**





# Consider the Consequences of Your Actions

- If you convert a currently salaried Manager to an hourly employee, what is the psychological impact?
  - Will he/she identify more with non-supervisory employees and quit thinking like a Manager?
  - Many exempt employees who are reclassified to non-exempt will view it as a demotion.
  - Some may lose their flexibility in hours, or their ability to work from home.
  - The obligation to track their time will be viewed as a new administrative headache.



# Consider the Consequences of Your Actions

- **Expect some employees to feel hurt and underappreciated.**
  - Many workers place a premium on the prestige of being considered an exempt or salaried employee.
- **Example: One Circulation Manager for a small newspaper has already been converted from salary to hourly.**
  - This Manager described the change as “devastating.”
  - The Manager no longer feels part of the Management team.
  - The Manager was not permitted to attend a community event to represent the newspaper because it would have resulted in overtime.
  - This Manager feels “in limbo.”



# Consider the Consequences of Your Actions

- Another possible consequence is a change in benefits by moving from exempt to non-exempt.
- Do not forget about discrimination laws.
  - For example, a plan that increases the current male Managers' salaries but converts female Managers to hourly would draw fire as discriminatory.
- Reclassifying as hourly will adversely impact you under the National Labor Relations Act.
  - Hourly rate of pay is evidence of employee status.
  - Will be hurtful in litigating supervisory status.



# Consider the Consequences of Your Actions

- Overtime policies need to address such off-duty tasks as:
  - Understanding the importance of accurately documenting time worked.
  - The new non-exempt employees must be persuaded to accurately post *all* hours worked.
  - Taking work home and making/receiving job-related phone calls and e-mails at home.
  - Working through lunch, or before or after regular shifts.
  - If you allow newly non-exempt employees to have a flexible work schedule, they must accurately record their *non-working* time as well.





# After-Hours E-Mail Usage

- You will need to create an effective e-mail usage/curfew policy.
  - Exempt Supervisors should limit after hours communication with newly reclassified non-exempt employees to make e-mail curfews work. Communication should be in emergency situations only.
  - Allowable exceptions to the e-mail curfew should be written into the policies.
  - Needs to be clear communication to non-exempt employees on what constitutes an emergency, allowing them to respond to the Supervisor communication.



# Telecommuting Employees

- The work habits of telecommuting employees may need to change.
- May need to limit a telecommuting employee to certain core working hours.
- Reclassified telecommuting employees will need to carefully record all time worked.



# Develop a Communications Strategy

- Don't wait until the last minute to develop your plan; reduce the element of surprise.
- Who will deliver the news to the employees currently classified as exempt?
- When will the news be delivered?
- Give consideration to the format for communicating your plan.
  - E-mail, one-on-one meetings, video presentations, etc.



# Develop a Communications Strategy

- Develop talking points and FAQs for your Management team.
  - Get prepared now to answer the question, “Are you going to raise my salary to meet the new DOL salary threshold?”
  - Be prepared to honestly communicate the dramatic impact on the budget, if everyone’s salary was increased to meet the new threshold.
  - Share with employees **why** the change is happening so they understand that it is not a reflection on their performance.





# Develop a Communications Strategy

- Training should be for exempt Managers and non-exempt employees.
  - Exempt Managers need to understand clearly that the policy is real.
  - Engaging non-exempt employees after hours impacts the budget.
  - Developing new habits regarding the recording of time will be difficult; this will require *vigilant monitoring*.



# Develop a Communications Strategy

- The Employer must have records of hours worked for all non-exempt employees.
  - Can be physical time card.
  - Can be a computerized HR system.
- The law obligates the Employer to maintain accurate time records for all non-exempt employees.





# **NLRB “QUICKIE ELECTION” RULE EFFECTIVE 4-14-2015**



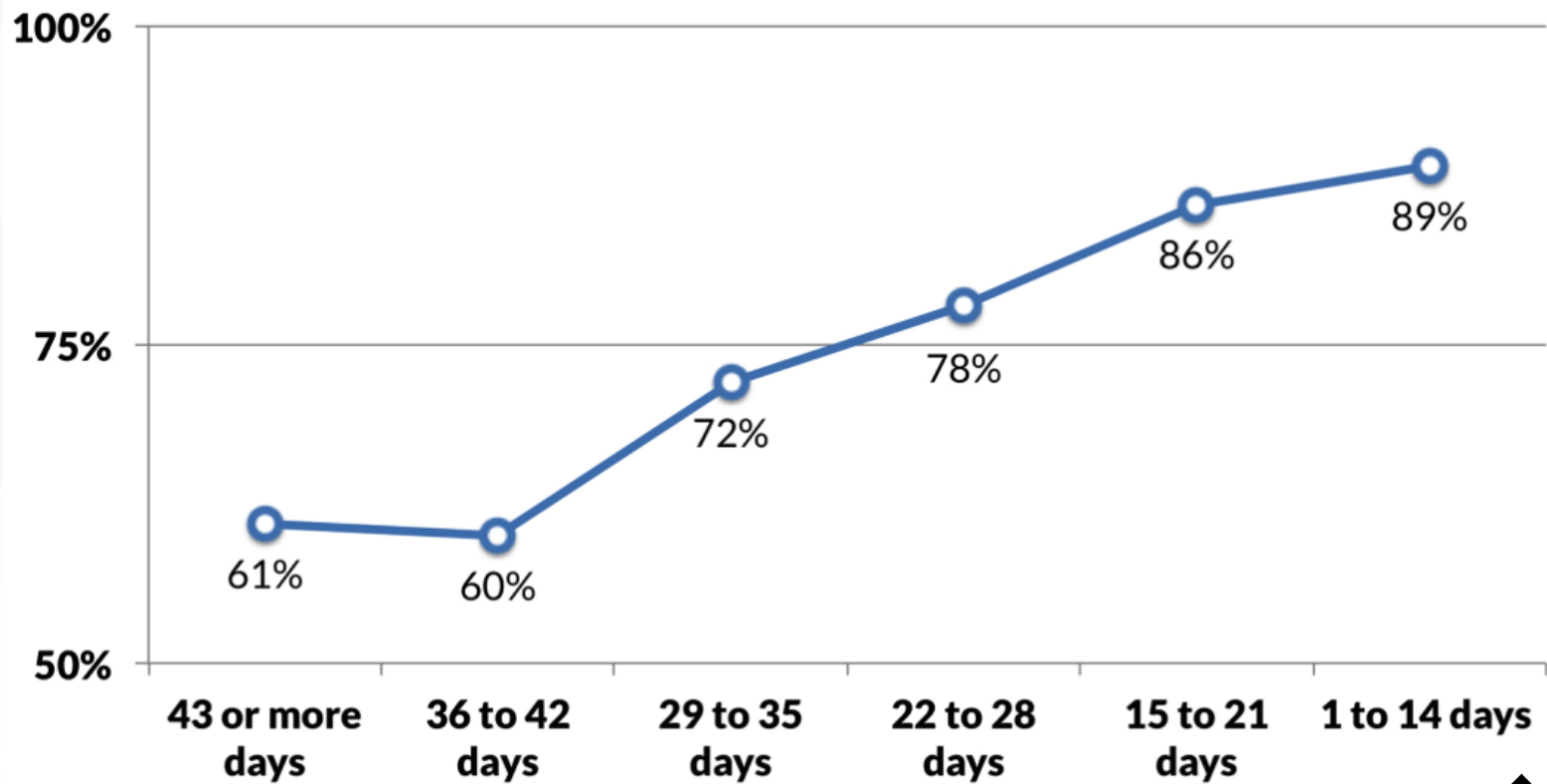
## REASONS FOR THE RULE

- **Employee Free Choice Act did not pass.**
- **Unions represent only 6.6% of the private sector workforce.**
- **The bright light of the First Amendment must be darkened.**
- **Idea is for unions to win more elections.**





**Union Win Percentage By Campaign Days, RC Elections 2004-2014**



## THINK FAST! ANTICIPATED TIMELINE UNDER NLRB'S NEW RULE

DAY	ACTION REQUIRED
ZERO	Petition filed with NLRB and served on employer. NLRB Regional Director serves electronic Notice of Petition, and Notice of Hearing to take place eight days later.
2	Employer must post and distribute Notice of Petition.
7	By noon, parties must file and serve Statement of Position. Employer must also file and serve initial list of employees in petitioned-for unit as well as any proposed changes.
8	Pre-election hearing is held. Election may be directed on same date. Final Notice of Election issued electronically by Regional Director. (If hearing is on Day 8, election order and Final Notice of Election may not actually be issued until Day 9 or later.)
9	Likely date that Decision and Direction of Election (Election Order) and Notice of Election is served.
10	Likely first date of posting of Notice of Election (12:01 a.m.).
11	Assuming Election Order was served on Day 9, last date for employer to provide final eligibility list ( <i>Excelsior</i> voting list) to both the NLRB and to the Union.
13	Earliest possible date for election, assuming Election Order and Notice of Election were served on Day 9. NOTE: The "default" under the new rule would be an election no earlier than 10 days after date by which the final eligibility list can last be filed and served, but the petitioner (that is, the Union) has the right to waive that 10-day waiting period.
21	Assuming Election Order was served on Day 9, earliest possible date for election if Union does not waive 10-day waiting period.





# **“QUICKIE ELECTION” ACTION PLAN FOR EMPLOYERS**



- 1. Review job titles, job descriptions, and organizational charts. Identify which employees clearly satisfy the NLRB test for supervisory status, and which do not.**
- 2. Review handbooks and policies for compliance with the NLRB's recent rulings to avoid interference charges and election objections that might result in a rerun election.**





### **3. Train frontline Supervisors and other Management on lawfully and effectively communicating with employees about unions and sharing the Employer's position.**

- The training should also help Supervisors and Managers identify potential problems.**
- Communicate in writing Management's position on labor unions.**



4. Post “No Trespassing” and “No Solicitation/ Distribution” signs on your property, including loading dock areas and distribution centers.

- Issue of leased vs. owned property.
- Do this *now*, before there is organizing activity.



**5. Designate an Employer Management action response team to be responsible for a campaign if and when an organizing drive begins.**

**6. Prepare in advance draft campaign materials and a campaign calendar to meet the compressed schedule of the new “quickie election” Rule.**





# **HOW TO MAINTAIN A UNION-FREE ENVIRONMENT**





**Union-free is only the beginning –  
maintaining a union-free environment is  
a major challenge.**



## **A. Quality supervisory team is an essential ingredient.**

- 1. Mediocrity will cause a union.**
- 2. Mediocrity will keep unions.**



### **3. Quality.**

- **Knowledgeable → Education, Training, Development**
- **Communication (upward, downward)**
- **Supervisors should report upward employee issues that do not rise to the level of formal complaints.**
- **Decisive**
- **Fair**
- **Supervisors must be knowledgeable about employees' families, life events, etc.**



**4. If you have a poor Supervisor, coach him/her up  
or coach him/her out.**





## **B. Properly Administered Merit Pay System**

**1. Have the courage to reward good performance,  
not mediocre or poor performance.**

**- What does your Department Head do when you  
tell him/her that you have budgeted a 2% pay  
increase in the payroll?**



**2. Who monitors pay raises?**

**3. Do the raises bear a direct relationship to performance?**

**4. Rule of 10%.**

- If top performers are well-paid, you will not have a union.**

- Supervisors are key.**

**5. Have your employees' wages been frozen for a long time?**



## **C. Weed the Garden**



**1. When someone needs to be fired, do it!**

**2. A Supervisor must:**

- Be empowered to suspend indefinitely, without pay.**
- Appear decisive.**
- Keep all options open.**



### **3. Disgruntled, marginal employees cause more union drives than you'll ever know.**

- They know they are marginal.**
- They know they need protection.**
- I cannot tell you how many elections I have been involved in where the Publisher says, "We had the perfect opportunity to fire him last year and did not take it."**
- If the disgruntled employee walks into the crosshairs, take action!**





**4. You cannot make good decisions based upon fear of a lawsuit – you make decisions based upon the probability of winning!**

**“Victory at all costs, victory in spite of all terror, victory however long and hard the road may be; for without victory, there is no survival.”**

**- Winston Churchill**



## **D. Make careful hiring decisions.**

- 1. Take care, even with part-time hiring decisions.**
- 2. Do background checks; industry sources.**



## **E. Nurture the Company – Employee Relationship.**

### **1. Give them a reason to join the Company.**

- No one really wants to join a union.**
- Budget \$\$\$ for fun.**
- Celebrate success and victory.**



## **2. Give care and feed the night shift or you will regret it.**

- Many newspaper organizing drives start on the night shift.**
- Is HR open for the night shift?**
- When is the last time the Publisher visited the night shift on a Saturday night?**
- What is the night shift supervisory staffing?**





**3. Pay and benefits must be competitive for your market.**

- Are your wages up-to-date?**
- Review of employee handbook.**

**4. Have multiple communications platforms.**



## **F. Quality Human Resources Team –**

**Critical position; this is the “go to” department when there is no union steward.**



# A Cautionary Note Concerning Union Organizing in Florida

- Expect the union to make proposals claiming a desire to protect a reporter's "autonomy" in journalism ethics.
- The real goal is content control.
- *Santa Barbara News-Press v. NLRB*: **The First Amendment affords a *Publisher* – not a reporter – absolute authority to shape a newspaper's content.**



**“Any Company Has a Perfect Right  
to be Opposed to a Union”**

**- United States Court of Appeals**





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