



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

***NLRB “Quickie Election” Rule
and Contracting Update
September 28, 2014***

L. Michael Zinser



THE ZINSER LAW FIRM, P.C.

414 UNION STREET, SUITE 1200, NASHVILLE, TENNESSEE 37219 • 615.244.9700 • WEB. ZINSERLAW.COM

ADVOCATES FOR MANAGEMENT FOR OVER 30 YEARS

DIGITAL ARTS 1147





L. Michael Zinser

Personal Motto: “Never, never, never, never give up.”





***THE MANAGEMENT PERSPECTIVE
ON THE PROPOSED RULE TO CHANGE
RULES GOVERNING NATIONAL LABOR
RELATIONS BOARD REPRESENTATION
CASE PROCEDURES***



“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

United States Constitution, Amendment I



***The proposed rule violates
the First Amendment of the
Constitution of the United
States of America.***



- **The United States is distinguished by the protections of the First Amendment of the Constitution.**
- **Our rights of Free Speech in our society are very broad and robust, in spite of the fact that the exercise of Free Speech may offend many.**



- In 1969, the U.S. Supreme Court, in ***NLRB v. Gissel Packing Company***, ruled that Section 8(c) codified the First Amendment.



“An employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, Section 8(c) merely implements the First Amendment by requiring that the expression of any views, argument, or opinion shall not be evidence of an unfair labor practice . . . an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal, or force, or promise of benefit. He may even make a prediction as to the precise effects he believes unionization will have on his company.”



Nothing is more honored or cherished in American culture and society than a secret ballot, democratic election conducted after a vigorous and thorough debate of the issues.



- The Supreme Court, enforcing the First Amendment, in *Ex parte Jackson*, 96 U.S. 727, 733 (1877), stated, “Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.”
- Without time to circulate its perspective and point of view, an Employer’s First Amendment right of Freedom of Speech will be of little value in NLRB elections.
- Through the First Amendment, we have “staked ... our all” upon the belief that “right conclusions are more likely to be gathered out of a multitude of tongues.” *New York Times Company v. Sullivan* 376 U.S. 254 (1964).



***Congress has twice rejected
the “election now, hearing
later” and “vote now,
understand later” approaches
reflected in the proposed rule.***



- **The 1949 Taft-Hartley Amendments to the Act required the Board to conduct an appropriate hearing *before* any election, and permitting “the waving of hearings” only “by stipulation” of all parties.**
- **In passing the 1959 Landrum-Griffin Act Amendments, the legislative history indicates, “The right to a formal hearing before an election can be directed is preserved without limitation or qualification.”**



The Act's required pre-election hearing mandates that evidence be received regarding who is eligible to vote.



- **The function of the pre-election hearing is to determine voter eligibility issues, including supervisory status.**
- **In order for an Employer to properly exercise its First Amendment right to communicate its perspective, it is critical to identify Management's team before the election.**
- **It is manifestly unfair to allow a union to file post-election objections for the conduct of an individual whose status the Employer was not permitted to clarify before the election.**



***The proposed rule unlawfully
delegates to Hearing Officers
decision-making authority.***



- **The Taft-Hartley Amendments of 1947 prohibit Hearing Officers from even making “recommendations” about issues raised in pre-election hearings.**
- **There is currently a statutory right to seek Board review regarding any action by Regional Directors, including pre-election requests to “stay” the election.**
- **The currently guaranteed post-election review would become discretionary in all cases.**
- **The proposed rule will have the pernicious effect of Employers being forced to increasingly refuse to bargain to contest certifications based on erroneous unlawful decisions of Hearing Officers.**



***The proposed rule
imposes new obligations
on Employers.***



- **The proposed rule requires every Employer to commit up front on every issue it wishes to raise regarding the election.**
- **A written response must be submitted within seven days after the petition is filed.**
- **The Employer waives any argument not raised in this written response.**
- **This is manifestly unfair; it will not be possible to anticipate that quickly every possible election and/or bargaining unit issue.**
- **This raises serious due process concerns.**



Conclusion

The problems articulated above are certainly not an exhaustive list of Management-perceived problems with the proposed rule. The issues raised above, however, are some of its more significant problems.

The proposed rule suffers from several of the same defects as the Board's earlier proposed rule attempting to mandate the posting of notices in the workplace. The Board is without authority to promulgate the proposed rule. The proposed rule is in direct conflict with express statutory provisions of the Act and its legislative history. Further, the proposed rule is unconstitutional, in violation of the First Amendment of the Constitution of the United States of America.





THE CONTRACTING PROCESS



Complete IRS Form W-9

- **Contractor signs this document.**
- **Accounts Payable uses the form to set up IRS Form 1099.**
- **Contractor selects the form of business organization.**
- **Helps prove contractor is in business for him or herself.**
- **Explain to contractor that no taxes will be withheld from contract payments.**
- **Explain to contractor that he or she is responsible to pay all federal, state, and local taxes.**



Sample IRS Form W-9

W-9 Form (Rev. October 2007) Department of the Treasury Internal Revenue Service		Request for Taxpayer Identification Number and Certification		Give form to the requester. Do not send to the IRS.			
Print or type See Specific Instructions on page 2.	Name (as shown on your income tax return)						
	Business name, if different from above						
	Check appropriate box: <input type="checkbox"/> Individual/Sole proprietor <input type="checkbox"/> Corporation <input type="checkbox"/> Partnership <input type="checkbox"/> Limited liability company. Enter the tax classification (D=disregarded entity, C=corporation, P=partnership) ▶ <input type="checkbox"/> Other (see instructions) ▶			<input type="checkbox"/> Exempt payee			
	Address (number, street, and apt. or suite no.)		Requester's name and address (optional)				
	City, state, and ZIP code						
	List account number(s) here (optional)						
Part I Taxpayer Identification Number (TIN)							
Enter your TIN in the appropriate box. The TIN provided must match the name given on Line 1 to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see <i>How to get a TIN</i> on page 3.							
Note. If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.							
<table border="1"><tr><td>Social security number</td></tr><tr><td>or</td></tr><tr><td>Employer identification number</td></tr></table>					Social security number	or	Employer identification number
Social security number							
or							
Employer identification number							
Part II Certification							
Under penalties of perjury, I certify that:							
1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and							
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and							
3. I am a U.S. citizen or other U.S. person (defined below).							
Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. See the instructions on page 4.							
Sign Here	Signature of U.S. person ▶		Date ▶				



Review of Written Contract

- **Important for Company representative to spend time reviewing the written Agreement with the contractor.**
- **Explain up front to the individual that he/she will be an independent contractor and NOT an employee.**
- **There should be a page-by-page review that allows the contractor to ask any questions he or she may have.**
- **Have the contractor initial each page as it is reviewed; this cements the contractor's intention to be an independent contractor.**
- **It is important that the Company representative is trained to understand the written Agreement.**



Sample Contract Page

\$_____. As an independent contractor, Contractor retains the right to directly contact subscribers in writing and otherwise. Contractor has no obligation to report complaints to Company when complaints are communicated directly by the subscriber to Contractor.

3

I have read and understand this page.

Contractor's Initials



Review of Written Contract

- **Start the process with a “blank slate.”**
- **Document rate negotiations.**
- **Give contractor the option to have the contract reviewed by legal counsel.**
- **Do not be afraid of negotiations.**



Review of Written Contract

- **Be sure contractor reads and understands the English language.**
- **Explain to contractor that he or she has the right to determine the sequence of delivery.**
- **Explain to contractor that he or she will not be eligible for Workers' Compensation or Unemployment Compensation.**



The Contracting Process:

Next Steps

- **Review sample invoice with contractor.**
- **Review daily computer-generated bundle top.**
- **Obtain proof of contractor's valid driver's license and vehicle insurance information.**



Independent Contractor Carrier Accident Insurance

- **Explain the coverage to the contractor.**
- **It is important that the Company representative is trained to understand the product.**
- **Have contractor complete the enrollment card or the rejection card.**
- **If contractor purchases the insurance, give contractor a copy of the policy.**
- **Explain to contractor that he or she pays the entire premium.**



Management Contracting Checklist

The following factors should be reviewed when contracting with any independent contractor newspaper carrier. After completing the item, the Circulation Manager and prospective contractor involved should place their initials by the numbered item:

1. The circulation management representative reviewed the entire Independent Contractors Distribution Agreement with the prospective contractor and had him or her initial each page.

2. Completion of negotiations:

- The Company's proposed rate was _____.
- The prospective independent contractor made a counter offer or counter offers of _____.



Management Contracting Checklist

- 3. The prospective independent contractor completed IRS form W-9.**
- 4. The carrier accident insurance for independent contractors was reviewed with the prospective independent contractor.**
 - The prospective independent contractor completed the acceptance/rejection card.**
 - The prospective independent contractor was provided information explaining the coverage.**



Management Contracting Checklist

- 5. The prospective independent contractor provided proof of vehicle insurance.**
- 6. The prospective independent contractor provided a photocopy of his or her valid driver's license.**
- 7. The prospective independent contractor provided the Company with a copy of his or her most current motor vehicle report revealing his or her driving record.**



Management Contracting Checklist

- 8. After both parties signed the Independent Contractor Distribution Agreement, a photocopy of the signed document was provided to the contractor.**
- 9. The prospective independent contractor completed the Bond application.**
- 10. The circulation management representative provided a route list to the independent contractor.**
 - Audio tape**
 - Written list**



Management Contracting Checklist

11. The circulation management representative explained to the prospective independent contractor that he or she has the right to determine the sequence of route delivery.

12. The prospective contractor reads and understands the English language.

- The prospective contractor cannot read English; however, (name and address) acted as a translator.**
- The prospective contractor cannot read English; however he or she was provided a contract in _____ language, which he or she can read and understand.**



Management Contracting Checklist

13. The circulation management representative reviewed and explained a sample statement provided to contractors.

14. The circulation management reviewed and explained an example of daily messages relayed by the Company to the contractor from subscribers.

15. The circulation management representative specifically informed prospective contractor that he or she is responsible to pay federal income taxes and that no taxes will be withheld by_____.



Management Contracting Checklist

16. The circulation management representative specifically informed the prospective contractor that he or she, as an independent contractor, is not eligible to receive with Workers' Compensation benefits or Unemployment Compensation benefits.

After reviewing and initialing each item on the checklist, this form should be signed by both the contractor and a management representative of the Company.





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

***NLRB “Quickie Election” Rule
and Contracting Update
September 28, 2014***

L. Michael Zinser



THE ZINSER LAW FIRM, P.C.

414 UNION STREET, SUITE 1200, NASHVILLE, TENNESSEE 37219 • 615.244.9700 • WEB. ZINSERLAW.COM

ADVOCATES FOR MANAGEMENT FOR OVER 30 YEARS

DIGITAL ARTS 1147

