



AN ICON OF TRUTH AND JUSTICE.
BUT WHEN IT COMES DOWN TO BUSINESS,
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KEY LEGAL ISSUES UPDATE:
Independent Contractor Developments,
New Overtime Regulations, and
the NLRB's "Quickie Election" Rule

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ADVOCATES FOR MANAGEMENT FOR OVER 35 YEARS



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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 Federal Express drivers in Connecticut are employees.
- This Decision overrules *St. Joseph News-Press*.



- **“We overrule *St. Joseph News-Press* today, insofar as the decision mistakenly suggests that the Board cannot consider evidence that a putative employer has effectively imposed constraints on an individual's ability to render services as part of an independent business.”**



- **The new Decision diminishes the significance of entrepreneurial opportunity.**
- **The new Decision 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. Department of Labor 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**
 - **Part of the administration’s overall war against independent contractors**
- **Consistent with the NLRB’s decision overruling *St. Joseph News Press***



- **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.”**
 - **It is inconsistent with much of current caselaw.**
- **Focuses on economic development of the individual contractor.**
 - **Places very 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.**



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 Ends: **September 4**
 - Employer groups and Republican senators have requested extension
 - Already more than 1,000 comments filed at www.regulations.gov
- DOL reviews/considers revisions: unknown timeframe
- Final rule issued: unknown – **some time in 2016?**
 - Legal challenges possible



EMPLOYER ACTION PLAN

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



EMPLOYER ACTION PLAN

- **Several options:**
 - **Raise employee's salary to meet the new requirement**
 - **Make employee non-exempt and pay overtime**
 - **Increase number of part-time employees to avoid overtime**



EMPLOYER ACTION PLAN

- **If you decide to make an employee non-exempt, one option would be to lower his/her hourly rate so that, coupled with the amount of overtime he/she typically works, it would equal the salary he/she earned prior to the change in salary threshold.**





**NLRB “QUICKIE ELECTION” RULE
EFFECTIVE APRIL 14, 2015**



THE ORGANIZING DRIVE - TELLTALE SIGNS

- 1. Unusual body language.**
- 2. Small groups disperse when you walk up.**
- 3. Complaints.**
- 4. OSHA inspections; EPA complaints.**
- 5. Electronic communications e-mail traffic and policies.**
- 6. Off-duty employees showing up for work one to two hours before start time.**



THE ORGANIZING DRIVE - TELLTALE SIGNS

- 7. Employees who normally go home immediately at the end of their shifts now linger, chatting with coworkers.**
- 8. Employees will be obtaining signatures for an election, using either authorization cards or a petition.**
 - Must get the signatures of at least 30% of the employees in the unit attempting to organize.**
- 9. If you observe any of the activities described in 1-8 above, immediately communicate to upper management and legal counsel.**

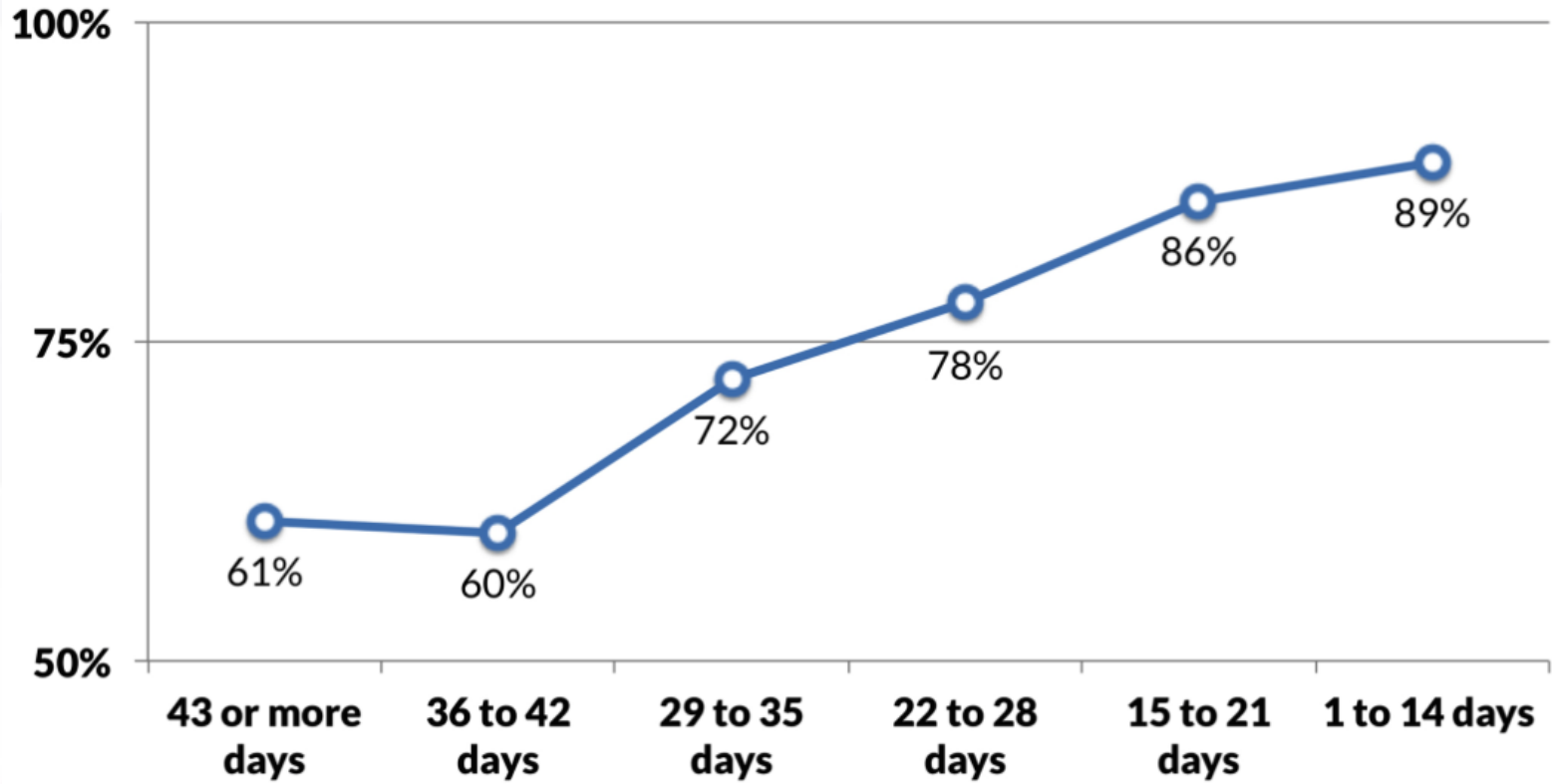


REASONS FOR THE RULE

- **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



ANTICIPATED TIMELINE UNDER QUICKIE ELECTION RULE

Day 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.

- Election Petition can be filed with NLRB electronically and served on the Employer electronically.



ANTICIPATED TIMELINE UNDER QUICKIE ELECTION RULE

Day 2: Employer must post and distribute Notice of Petition.

- If the Employer usually communicates electronically, the Notice of Election must be given to the employees electronically, as well as the physical posting.
- Failure to post or serve the Notice may be the basis for setting aside an election.



ANTICIPATED TIMELINE UNDER QUICKIE ELECTION RULE

Day 7: By noon, the 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.

- Employer must raise all issues in its position paper or they will be waived.
- May not know all the issues at this time.
- May preclude the parties from raising issues based on facts that are disclosed for the first time at the hearing.
- List of employees must include job classifications, work locations, and work shifts of all employees in the petitioned for unit.
- Failure to provide the list precludes the employer from contesting the appropriateness of the unit.
- Non-compliance can be the basis for a post-election objection.



ANTICIPATED TIMELINE UNDER QUICKIE ELECTION RULE

Day 8: Pre-election hearing is held. Election may be directed on same date. Final Notice of Election issued electronically by Regional Director.

- If the hearing is on Day 8, Election Order and Final Notice of Election may not actually be issued until Day 9 or later.
- Regional Director has discretion to decide what issues will be heard.
- Voter eligibility issues such as supervisor status will be deferred until after the election.
- Gray area employees supervisory status postponed until after the election.
- Designed to put the Employer at a disadvantage.
- Regional Director likely will deny any request to file written Briefs.
- Hearing Officer will allow Oral Argument, Offers of Proof.



ANTICIPATED TIMELINE UNDER QUICKIE ELECTION RULE

Day 9: Likely date that Decision and Direction of Election (Election Order) and Notice of Election is served.

- Under the new Rule, parties can request review, but it is discretionary with NLRB.
- Even if the review is granted, it does not postpone the election.
- 24-day minimum waiting period for review is eliminated.



ANTICIPATED TIMELINE UNDER QUICKIE ELECTION RULE

Day 10: Likely first date of posting of Notice of Election
(12:01 a.m.).



ANTICIPATED TIMELINE UNDER QUICKIE ELECTION RULE

Day 11: Assuming Election Order was served on Day 9, last date for Employer to provide final eligibility list (Voting List) to both the NLRB and to the union.

- Employee name, home address, and phone number.
- Cell phone numbers if applicable.
- Personal e-mail addresses if you have them.
- Work locations, shifts, and job classifications.
- Failure to timely provide is the basis for a possible election objection.



ANTICIPATED TIMELINE UNDER QUICKIE ELECTION RULE

Day 13: Probably the earliest possible date for election, assuming Election Order and Notice of Election were served on Day 9.

- The “default” under the new Rule would be an election no earlier than 10 days after the date by which the final eligibility list can last be filed and served.
- The union has the right to waive that 10-day waiting period.



ANTICIPATED TIMELINE UNDER QUICKIE ELECTION RULE

Day 21: Assuming Election Order was served on Day 9, earliest possible date for election if union does not waive 10-day waiting period.



ANTICIPATED TIMELINE UNDER QUICKIE ELECTION RULE

After the Election

- **Any election objections and Offer of Proof to support the objections must be filed within seven (7) days of the tally of ballots.**
- **Hearing must be held within 21 days, or as soon as practical afterward.**
- **Review of the Regional Director's Decision by the full Board is discretionary.**
- **Regional Director's Decision may be final with no review.**





ACTION PLAN FOR EMPLOYERS AFTER APRIL 14, 2015



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.**

- 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.



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

- U.S. Court of Appeals





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 elections 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, squeeze down the trigger!**



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



NO GOOD DEED GOES UNPUNISHED



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?**

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.



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