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On August 27, 2015, the National Labor Relations Board ("NLRB"), the federal agency responsible for regulating labor law, issued a controversial landmark decision, which overturned 30 years of established precedent and has the potential to upend traditional labor relations. In the *Browning-Ferris* decision, the NLRB was sharply divided, with its three Democratic members ruling in favor of the new rule, and its two Republican members issuing a lengthy and scathing dissent.

Specifically, the majority changed the test for determining who an "employer" of a particular worker is, opening up employers who use contract workers or temporary employees to increased organizing and labor dispute concerns, whether or not those employers are unionized.

In recent years, unions and politicians alike have increasingly questioned the use of temporary workers, contract employees, and independent contractors. For example, Uber has been in the news recently over whether its drivers are employees of the company or independent contractors, and McDonald's has been challenged on the amount its franchises pay employees. Even Democratic presidential hopeful Hillary Clinton has stated that the "on demand or so called 'gig' economy is creating exciting opportunities and unleashing innovation, but it's also raising hard questions about workplace protections and what a good job will look like in the future."

The NLRB majority drew upon these concerns, pointing out the increased use of contract labor, and observing that the Board's prior test was "increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships."

Given the increased attention government agencies and politicians are bringing to

workforce through Leadpoint (its staffing company), and the union filed a petition seeking to represent those workers. The union wanted to bargain with both Browning-Ferris and Leadpoint, arguing that they were both joint-employers of the contract workers and that it could not adequately bargain for the workers unless Browning-Ferris was at the table. Browning-Ferris challenged its joint-employer status, arguing that Leadpoint hired the employees, supervised the employees, directed their work, disciplined them, and terminated them. Browning-Ferris argued that it did not control the Leadpoint employees at all.

Initially, the NLRB Regional Director ruled that Browning-Ferris was not a joint-employer of the Leadpoint employees. The Regional Director applied the traditional joint-employer test and found that Browning-Ferris did not meaningfully control the Leadpoint employees or direct any of their work. The union appealed the decision to the NLRB, and the NLRB took the opportunity to solicit *amicus* briefs on whether it should overrule the traditional joint-employer test.

Under the traditional joint-employer test, the NLRB would only find a joint-employer relationship where separate business entities "share or codetermine those matters governing the essential terms and conditions of employment," including hiring, firing, discipline, supervision, and direction. Importantly, the employer had to actually exercise control over the employees, and the control had to be "direct, immediate, and not limited and routine."

On August 27, 2015, a Democratic NLRB majority, in a strongly contested decision, overturned this traditional test and replaced it with a much more amorphous and flexible standard, one which the dissent stated has no "limiting principle." Instead of the traditional requirement that the employer *actually* exercise control over employees, the NLRB found that the *right* to control, regardless of whether exercised or not, and regardless of whether direct or indirect, is sufficient to find joint-employer status.

As the dissent explained, under the majority's test, even a private homeowner hiring

and even parent/subsidiary structures. Some of the implications include:

- Obligation to Bargain with Contract Employees. The first ramification of the decision is the obligation of an employer to bargain with contract employees if they move to unionize. Such an obligation could also open up an employer to liability for unfair labor practices committed by the contracting company, or the obligation to produce financial/proprietary information during contract negotiations.
- Managing Multiple Units. An employer who utilizes multiple contract workers for various tasks, such as sanitation services and security services, could find itself with two sets of contract workers, both represented by different unions, and both requesting very different contracts. In addition, the majority's decision does not make clear whether other companies that use the same contracting service for similar workers will also be obligated to bargain. In theory, there could be multiple employers required to bargain, along with the contract company.
- Susceptibility to "Micro-Units." When this recent decision is read in conjunction with the NLRB's prior decision in *Specialty Healthcare*, where the Board essentially allowed the union to choose the scope of a bargaining unit, employers that utilize contract employees are especially vulnerable to unionization of small "mirco-units" of employees or contract workers.
- Boycotts and Pickets. The majority's decision also erodes protection against illegal secondary boycotts, strikes, and picketing. Once an employer is deemed to be a joint-employer, if a union representing contract workers pickets the employer's facility, such a picket will no longer be illegal under federal labor law.

It is too early to determine exactly what the practical effect of the NLRB's decision will be, but it is clear that employers who utilize staffing or contract workers need to think about the potential impact.

What To Do Next

- **Understand the politics.**

Many of the actions involved with recent NLRB activity revolve around unions trying to increase their numbers after years of declining membership. In many cases, unions are being met with sympathetic responses from elected officials and appointed boards. In order to ensure the best interests of organizations and their employees, companies need to be realistic about the political, legal, and economic environment that is driving many NLRB rulings and decisions.

- **Stay on top of new developments.**

Unfortunately, the *Browning-Ferris* decision was not the only joint-employer case pending before the NLRB. McDonald's is currently involved in a high-profile case before the NLRB concerning labor law charges against the McDonald's corporate parent and franchisees. Any decision from the NLRB could further disrupt the application of labor law to non-union companies and their workforces.

In addition, employers should keep an eye on whether the NLRB's expansive rationale is adopted by any other enforcement agency. The Department of Labor recently issued a memorandum explaining its position that many employees have been misclassified as independent contractors. All similar decisions warrant monitoring.

- **Consider action through trade groups.**

Many trade groups are working to educate those inside and outside their industries about the potential effects that broadening the definition of joint-employer could have. Companies should consider working with relevant trade groups and others to make sure their voices are heard and their concerns are addressed before it is too late.

The NLRB's recent decision has the potential to dramatically alter the relationship

Labor and the National Labor Relations Board. Rick is a prolific writer on labor and employment law and conducts frequent seminars to client companies and trade associations across the country. Questions about this article, or requests to subscribe to receive Rick's monthly articles, can be addressed to Rick at (281) 833-2200 or ralaniz@alaniz-schraeder.com.

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