

YOUR LEASED EMPLOYEES MAY NOW JOIN A UNION WITH YOUR REGULAR EMPLOYEES - AND THEY DON'T NEED TO ASK YOUR PERMISSION

Today, in *Miller and Anderson, Inc. v. Tradesmen International and Sheet Metal Works International Association, Local Union No. 19, AFL-CIO*, the NLRB decided that, pursuant to the NLRA, temporary or leased employees who work for an employer as joint employees under an agreement with a staffing agency or similar entity do not have to have the employer's consent to join the union that covers that employer's regular employees. The full opinion can be found [here](#). This decision overturns a 2004 NLRB decision, *Oakwood Care Center*, which held that employees who were jointly employed by an employer and a staffing agency could not be in the same bargaining unit without the employer's consent. Today's decision revives a 2000 NLRB decision, *M.B. Sturgis*, which held that both temporary and regular workers could be represented by the same union without the joint consent of the employer and the staffing agency. Under *M.B. Sturgis*, temporary staffing employees could be included in a single bargaining unit with regular employees when: (1) the staffing agency and the employer were determined to be joint employers and (2) the temporary staffing employees shared a "community of interest" with the regular employees. The *M.B. Sturgis* decision by a Clinton-appointed Board upended a 1973 NLRB decision that found that a single bargaining unit of regular employees and leased employees to be inappropriate without the consent of both employers.

The political-weighted pendulum of the Obama-appointed Board continues to swing in favor of the unions by continuing to expand the scope of the NLRA to cover additional employees and additional actions, particularly in the area of joint-employers. This inclusion of leased employees in an employer's bargaining unit is just another step down that road. Employers must be aware of this decision in any situation where they have leased employees in the same or similar positions as regular employees who are represented by a union or wish to be represented by a union.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN ENACTS LAW ON FRANCHISOR JOINT EMPLOYER LIABILITY

Although federal administrative agencies such as the National Labor Relations Board, the

Occupational Safety and Health Administration, and the Department of Labor have recently pushed to expand the definition of “joint employer” under their respective laws, employers in Wisconsin can take some solace in recent legislation. Under Wisconsin Senate Bill 422, which became effective March 2, 2016, there is now a presumption that a franchisor is not an employer of a franchisee’s employees for the purposes of Wisconsin unemployment insurance, Wisconsin workers’ compensation, Wisconsin wage and hours laws, and Wisconsin fair employment laws. A franchisor can only be subject to liability for its franchisee’s employees under those laws if 1) it agrees in writing to assume liability or 2) it exercises a type or degree of control over the franchisee or the franchisee’s employees that is not customarily exercised for the purpose of protecting the franchisor’s trademarks and brand.

The law is meant to prevent franchisors who use a traditional franchisor-franchisee model from being held legally responsible for matters over which they did not exert control. Wisconsin franchisors should make sure that they are not taking any control over day-to-day operations of their franchisees, as that could expose them to liability under Wisconsin laws. Additionally, this does not impact how such franchisors would be treated under federal law, as mentioned above.

EMPLOYMENT LAWSCENE ALERT: NLRB ADOPTS NEW TEST FOR JOINT EMPLOYER STATUS

On Thursday, August 27, 2015, the National Labor Relations Board (NLRB) announced an updated test for determining joint-employer status under the National Labor Relations Act (NLRA), changing decades of precedent and significantly expanding the definition of who can be considered a joint-employer. A split Board decided it was necessary to “revisit and revise” the standard in order to keep up with “changing workplace conditions” in the current economic climate.

In the case at issue, Leadpoint Business Services, Inc. (Leadpoint), a staffing agency, provided workers to Browning-Ferris Industries of California (BFI) at a recycling plant owned by BFI to perform a variety of tasks. The temporary services agreement between the companies stated that Leadpoint was the sole employer and denied any joint-employer relationship. It also gave each company-specific aspects of the employment relationship that each was to control. The union wanted to include the Leadpoint employees in a bargaining unit it represented. A regional director determined that the staffing firm was their sole employer and that BFI, therefore, had no obligation to collectively bargain with Leadpoint employees. The union challenged that decision, and the NLRB deemed the two companies joint-employers under its new standard.

Under the previous standard, an entity needed not only to possess the authority to control the terms and conditions of an employee's employment but had to actually exercise direct, immediate control to be considered an employer. The NLRB claimed that the requirement of direct, immediate control had been added to the joint-employer test over the past thirty years and was not based on prior case law, in common law, or in the text of the NLRA, and unnecessarily narrowed the definition of joint-employer under the NLRA.

The new standard states that two or more entities will be deemed joint-employers if they are both employers within the meaning of common law and "share or codetermine matters governing essential terms and conditions of employment." It is no longer necessary that joint-employers actually exercise authority and control over the terms and conditions of employment or that the control be exercised directly and immediately. Under the new standard, the fact that an entity simply has the ability, even if unused, to control the terms and conditions of employment or possesses indirect control through an intermediary will suffice to establish a joint-employer relationship. The NLRB will consider the existence, extent, and object of the control. The NLRB will broadly define 'essential terms and conditions of employment' and include such things as hiring, firing, discipline, supervision, direction, wages, hours, scheduling, seniority, assignment of work, and determination of the manner and method of work performance.

This decision will have a major impact on employers, particularly those who use staffing or subcontracting agreements or contingent employee arrangements. Employers who had previously worked under the impression that their lack of direct control meant that they were not joint-employers could now be subjected to joint bargaining obligations and joint liability for unfair labor practices and breaches of collective bargaining agreements. If found to be a joint-employer, companies will need to collectively bargain with respect to the terms and conditions which it possesses the authority to control. The new standard also takes away much of the certainty with which businesses had interacted with each other.

Companies need to look at their business relationships and see who they could be considered joint-employers with, including vendors, service providers, and other entities with which the company may have indirect control over employees. This decision could also have an impact on how other federal agencies, such as OSHA and the EEOC, look at their joint-employer standards. Employers must keep an eye on any changes in order to avoid unexpected legal pitfalls.

EMPLOYMENT LAWSCENE ALERT: 2014 COULD

STILL DELIVER IMPORTANT DECISIONS FROM THE NLRB

Although we previously posted an article outlining that the mid-term elections could improve the landscape for employers regarding administrative agency enforcement, including the National Labor Relations Board (“NLRB”), employers may still see a significant pro-union push from the NLRB before the end of 2014.

Democratic-appointee Nancy Schiffer’s term on the NLRB ends December 16, 2014. The Obama Administration has nominated Senate Health Education and Pensions Committee chief labor counsel Lauren McFerran to take Schiffer’s place on the five-member board. However, the now Republican-controlled Senate must approve all NLRB nominations. If the Senate does not confirm McFerran, or any other proposed nominee, the NLRB could be locked in a 2-2 partisan stalemate. Therefore, many believe that the currently Democratic NLRB will try to get major changes pushed through while they are still in the majority. This could include changes to union election procedures and changes to the definition of joint-employer status.

The NLRB has proposed rule changes that would significantly change the union election process. If issued, they would shorten the period between filing of an election petition and the election itself to only seven days. If this happens, employers will have less time to inform workers of the pros and cons of unionizing. Among other changes, the new rules would also require employers to submit a “statement of position” on the election petition by the time the pre-election hearing is held and waive any issues not raised in the statement.

Also, the NLRB could expand the standard for determining joint employer status in the Browning-Ferris case. A decision from the Board on this important topic is expected soon. For the past thirty years, the NLRB has analyzed whether two or more companies are joint employers under a “degree of control” test. The Board, in its expected decision in Browning-Ferris, could change that standard to a “totality of the circumstances” standard. A broader standard from the Board in finding joint employer liability would be expected given the NLRB’s General Counsel recent decision to permit 43 unfair labor practice charges against McDonald’s, USA, LLC to move forward under a “joint employer” theory finding that McDonald’s should be held liable, along with its independently-owned franchisees, based upon allegations that the franchisees violated workers’ rights in responding to workplace protests. If the NLRB expands the definition of “joint employer,” as expected, more companies that do not use direct employees could potentially face unfair labor practice charges for the conduct of other companies or could even be required to recognize and bargain with unions.

Employers should monitor the NLRB’s decisions and actions through the end of the year and

look for rulings that could impact them and their employees.

EMPLOYMENT LAWSCENE ALERT: NLRB'S GENERAL COUNSEL DETERMINES THAT MCDONALD'S IS A JOINT EMPLOYER WITH ITS FRANCHISEES

In a decision that could have far reaching implications for industries that rely on the franchisor/franchisee business model, the NLRB's General Counsel, Richard Griffin, Jr., determined that 43 unfair labor practices charges against McDonald's, USA, LLC may move forward under a "joint employer" theory finding that McDonald's should be held liable along with its independently owned franchisees based upon allegations that the franchisees violated worker's rights in responding to workplace protests. The NLRB General Counsel's decision to move forward against McDonald's not only attempts to extend liability under the National Labor Relations Act to franchisors for acts of its franchisees, but it may also open the door for unions to more easily organize multiple independently owned franchise locations operating under agreement with a single franchisor.

The "joint employer" theory is a legal concept that treats two allegedly separate employers as one. The "joint employer" theory does not depend upon the existence of a single integrated enterprise, but, rather, assumes in the first instance that companies are "what they appear to be" - independent legal entities that have merely chosen to handle jointly... important aspects of their employer-employee relationship. Typically, a joint employer relationship is found between two companies where the non-employing company actively and significantly exerts control over the same employees on those matters governing the essential terms and conditions of employment such as hiring, firing, discipline, supervisions, and direction.

The NLRB General Counsel's decision to target McDonald's as a joint employer comes in unison with big labor's recent efforts to protest wage and benefits levels for fast food workers. These recent protests over wages and benefits is big labor's attempt to attack the franchisor/franchisee business model by deeming independently owned stores to have the deep pockets of its franchisors - ignoring the economic realities of the franchisor/franchisee business model. For example, the SEIU has staged protests at different fast food establishments across the country demanding wages as high as \$15/hour for all fast food workers based upon the fallacy that that such wages are appropriate given the corporate franchisor's finances. Wage demands of this type ignores the economics of operating an

independent and locally-owned franchise where wages and benefits are often set based upon local market conditions as well as a franchisee's own profit and loss rather than upon the finances of its franchisor.

The NLRB General Counsel's decision to move forward with complaints that attempts to now treat McDonald's as a joint employer with its franchisees provides ammunition to big labor to further its war over wages and benefits against fast food franchisees by blurring the line between a small independently and locally-operated franchisee and its affiliated large corporate franchisor. In addition, with the NLRB willing to make clear that a corporate franchisor can now be held liable for unfair labor practices as a joint employer with its franchisees, it is only logical that the NLRB's next step will be to permit unions to organize fast food establishments based upon petitioned collective bargaining units that consist of multiple franchisee locations of a single franchisor even though the locations are independently owned and operated by different independent owners.

The NLRB General Counsel's decision to treat McDonald's as a joint employer does not currently have the effect of law. Once the NLRB issues the complaints, these cases will have to proceed through the adjudicative process leading up to a hearing before an administrative law judge before the cases might reach the full National Labor Relations Board for a decision.

Given the political make-up of current NLRB members, political ideologies will definitely pave the way for the NLRB's General Counsel's viewpoint on joint employer liability to prevail against McDonald's before the NLRB despite three decades of legal precedent that would hold otherwise. Needless to say, the battle will not end at the NLRB, as it would be expected that this issue will most likely wind-up before the U.S. Supreme Court who will make the ultimate decision on this important issue.

At this point, the NLRB will try to achieve settlement with McDonald's before proceeding to hearing with these cases. It would be expected that McDonald's will oppose any attempts to settle these cases and try to move these cases beyond the NLRB and into the courts where strong legal precedent has mostly rejected the joint employer theory for businesses set up under the franchisor/franchisee business model. It is in the federal court system where McDonald's has the best opportunity to defeat the NLRB's new approach against the fast food and other industries that rely on the franchisor/franchisee business model.

We will keep you informed of these cases before the NLRB as they develop.