Ogletree Deakins

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EMPLOYERS AND LAWYERS, WORKING TOGETHER

The Practical NLRB Advisor

We work for *you* now

In this Issue

1 We work for *you* now

2 Brian in brief

6 The new joint employment standard: How much control is too much?

8 The Pandora's Box of joint employment

9 Other NLRB developments

12 DOL issues revised "persuader" rule

14 What the new rules hath wrought (revisited)

Acme Corp. is a mid-sized manufacturing company with 250 employees. The company contracts with Handler Logistics to manage its warehousing and distribution operations. The service agreement between the companies outlines the scope of the functions that Handler will manage, the warehouse hours of operation, and Acme's efficiency and productivity expectations. The agreement also expressly states that Handler is the sole employer of the 60 workers who staff Acme's warehouse and that nothing in the agreement creates an employment relationship between Acme and the Handler employees.

The contract also includes a rate schedule identifying the per-worker rate to be paid to Handler, although Handler alone determines the hourly wage it pays its 60 workers. Also, all Handler personnel working at the Acme facility must pass a drug test and background screening, meet minimum lifting qualifications, and comply with Acme's safety policies and procedures. Under the agreement, Handler hires, trains, manages, and disciplines its workforce, though Acme has the right to reject or discontinue the use of any Handler employees for any reason. As a fallback, Acme also reserved the right to exercise direct control over the warehouse workers, although in practice, it has never had to do so. Handler has several shift supervisors overseeing the activities of its employees at the Acme warehouse, along with a warehouse manager who also serves as Handler's on-site HR representative.

WE WORK FOR *YOU* NOW continued on page 3

BRIAN IN BRIEF

My colleagues and I were gratified by the positive feedback we received in response to the first issue of Ogletree Deakins' *Practical NLRB Advisor*. The newsletter series appears to be meeting its goal to assist companies in navigating their labor relations issues and keeping them apprised of important developments at the National Labor Relations Board (NLRB).

In this installment we focus on the complex and evolving "joint employer" doctrine. Last August the NLRB issued its much-anticipated decision in *Browning-Ferris Industries,* in which it overturned decades of Board precedent and made it much more likely that two legally separate employers could be found to be the joint employers of particular groups of "shared" employees. This new and more expansive standard impacts a host of common business-to-business arrangements, ranging from franchising to subcontracting, and employee leasing to temporary employment services. It has created significant complexities for many employers with respect to their relationships with outsourced service providers and other contractors—entities that many companies have come to rely on to conduct business in our modern economy. According to the new standard these business-to-business relationships may result in a finding that both entities are the joint employers of certain "shared" employees. Such a finding makes all employer obligations and liabilities under the National Labor Relations Act applicable to both entities.

In this issue we discuss the Board's expansion of the definition of "joint employer" to encompass companies that merely exercise indirect control over another entity's workers or that merely reserve the right to do so. We offer guidance on how to structure your relationship with your contractors and other service providers in order to best insulate your organization from the practical effects of the Board's controversial decision. We also take a look at the potential ramifications and unanswered questions that the Board's expansion of the joint-employer doctrine is likely to spawn.

Once again, I invite you to let us know if you have specific questions about the content of the *Practical NLRB Advisor* or to suggest specific topics you'd like for us to tackle. I also reiterate that our publication is for informational purposes and is not intended to replace the advice of counsel on labor relations issues that arise in your workplace.

Sincerely,

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About Ogletree Deakins' *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

Ogletree Deakins' *Practical NLRB Advisor* seeks to inform clients of the critical issues that arise under the National Labor Relations Act and to suggest practical strategies for working successfully with the Board. The firm's veteran traditional labor attorneys will update you on the critical issues in NLRB practice, with practical, "how to" advice and an insider's perspective. Assisting us in this venture are the editors of Wolters Kluwer Legal and Regulatory Solutions' *Employment Law Daily.*

The *Practical NLRB Advisor* does not provide legal advice. However, it does seek to alert employers of the myriad issues and challenges that arise in this area of practice, so that they can timely consult with their attorneys about specific legal concerns.

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WE WORK FOR *YOU* NOW continued from page 1

Acme's director of operations interacts regularly with Handler's warehouse manager to give general "big picture" direction and, occasionally, specific discrete work requests.

Acme's HR director was surprised one afternoon to find on her desk a Petition for Representation Election from the Teamsters union, which already represented a large group of Acme employees. Upon closer inspection, she discovered that the union sought to represent Handler's employees at the Acme warehouse as well, and the election petition identified "Acme/Handler" as their employer. The Teamsters were hoping to force Acme to the bargaining table over Handler's on-site workforce as a "joint employer" of those workers.

A year ago, Acme might have convinced the National Labor Relations Board (NLRB) that it was not a joint employer of Handler's warehouse employees—and thus not a proper party to the election petition or to any collective bargaining that might subsequently result. However, on August 27, 2015, a divided NLRB, in its much anticipated decision in *Browning-Ferris Industries of California, Inc. dba BFI Newby Island Recyclery* (*BFI*), revised its longstanding approach to assessing whether two entities are the joint employers of a given group of workers. And, under this new standard, the NLRB would likely conclude that Acme Corp. and Handler are the joint employers of the individuals sought by the petition.

***Browning-Ferris* decision.** Overturning 40 years of precedent, the NLRB, in *BFI,* held that a company was a joint employer of its contractor's employees if it reserved the right to exercise control over those employees. According to the Board majority, it didn't matter whether BFI in fact *exercised* this potential control or if the control over the employees' terms and conditions of employment was only *indirect.* Thus, it relied on the following facts in finding a joint-employment relationship:

1. Although BFI didn't participate in the hiring process, its contract with Leadpoint, the contractor, required job applicants to pass a drug test, allowed BFI to prohibit Leadpoint from using former BFI employees deemed ineligible for rehire, and allowed BFI to require Leadpoint to meet or exceed its own hiring selection procedures and tests.
2. The contract gave BFI the "unqualified right" to discontinue the use of any Leadpoint workers. In actual practice, there were only two instances in which BFI had ever asked Leadpoint not to use particular workers.
3. The contract required Leadpoint workers, who worked as sorters at a recycling facility, to comply with BFI's safety policies and BFI retained the right to enforce those safety policies, but there was no evidence presented at trial showing that BFI actually did so.
4. The contract was based on Leadpoint's labor costs plus a specified percentage mark-up, i.e., a "cost-plus" contract, which, the Board concluded, indirectly set the Leadpoint employees' pay and included "the apparent requirement" that BFI must approve pay increases, as well as a prohibition preventing Leadpoint from paying its workers more than BFI paid its own employees for similar work.
5. The Board concluded that BFI exercised control "over the processes that shape the day-to-day work" of Leadpoint's employees by controlling the speed at which the conveyor belt moved material down the sorting line and thereby controlling the speed at which the employees were required to work. BFI also exercised control by setting productivity standards and assigning specific tasks with "near-constant oversight." Yet Leadpoint had a large on-site supervisory staff directly overseeing its own workforce.

The revised standard. Prior to the controversial NLRB ruling, to be joint employers under the National Labor Relations Act (NLRA), the companies would have to share control over the workers in question, and both would have to play a "direct" and "immediate" role in co-determining at least some of their essential terms and conditions of employment—hiring and firing, setting work hours, issuing assignments and direction, and setting pay rates. In comparison, "limited and routine" control or the *ability* to control without actually *exercising* control was not enough. What mattered, in determining joint-employer status, was the extent to which the entities jointly exercised control over the employees in *actual practice*.

However, the NLRB's new test eliminates the requirement that the exercise of control be either immediate or direct; instead, the Board considers the *potential* (e.g., contractual rights) one party has to directly *or indirectly* control the employment terms of another entity's workers. Under the NLRB's new standard, joint-employer status can be based on the rights a party reserves under a contract, the indirect control it exercises over a third party's workers due to the nature of the services it contracted to the third party, or the standards and limitations it imposes on those services. Consequently, actual practice

The "New" NLRB Standard

Direct Control? ✗

Immediate Control? ✗

Indirect Control ✓

Right to Control ✓

matters less; now the Board will scrutinize the terms of the written contract between a company and a subcontractor.

This type of control is commonly reserved or exercised by parent companies over subsidiaries, franchisors over franchisees, leasing employers over leasing or temporary services providers, contractors over subcontractors—indeed, any company that contracts with another to perform work necessary to its operations.

Nor is it necessary that the putative joint employer's exercise of control be direct and immediate. If otherwise sufficient, control exercised indirectly may establish joint-employer status.

"Essential" terms and conditions. Under its new standard, the range of essential terms and conditions of employment over which a putative joint employer may exert indirect control is more broadly construed. Essential terms and conditions had previously been defined as "matters relating to the employment relationship *such as* hiring, firing, discipline, supervision, and direction," but this was a "nonexhaustive list" of bargaining subjects, the Board majority in *BFI* explained. The Board has also found other examples of control over essential employment terms and conditions to include:

- dictating the number of workers to be supplied;
- controlling scheduling, seniority, and overtime;
- assigning work; and
- determining the manner and method of work performance.

These matters are often also part and parcel of managing a company's relationship with its contractors. According to the Board, however, they are also indicative of the kind of "indirect control" that would support a finding of joint-employer status in large part because they will be the subjects of collective bargaining with respect to the contractor's employees.

The implications. According to the NLRB in *BFI*, the newly adopted joint-employer standard serves "to better effectuate the purposes of the Act in the current economic landscape." What constitutes joint employment under the NLRA had narrowed under the previous standard, according to the Board majority, while the diversity of workplace arrangements in today's economy has significantly expanded. The dramatic growth in contingent employment relationships such as staffing agency and subcontracting arrangements was reason enough to revisit the standard, the majority asserted. In their dissent, however, Board Members Miscimarra and Johnson argued that the majority had given insufficient consideration to the "potentially massive" economic implications of its ruling.

Notably, this was not the kind of case in which a company had brought in temporary workers whom it supervised. "This was a true subcontracting relationship," notes Mark G. Kisicki, a shareholder in the Phoenix office of Ogletree Deakins. The labor contractor did its own hiring and provided its own on-site HR and supervisory staff. Now, though, the NLRB's focus is on the indirect or potential right to control. But this type of control is commonly reserved or exercised by parent companies over subsidiaries, franchisors over franchisees, leasing employers over leasing or temporary services providers, contractors over subcontractors—indeed, *any* company that contracts with another to perform work necessary to its operations. Such control happens "any time a business uses or contracts out to a third party some services that it needs," Kisicki emphasized. Consequently, the potential reach of the *BFI* decision is vast.

What remains to be seen, of course, is how the new standard will be applied by the agency's regional directors, administrative law judges, and the Board itself. Given

WE WORK FOR *YOU* NOW continued on page 6

The broader context

It should be noted that the National Labor Relations Board's move to revise its longstanding joint-employer standard did not take place in a vacuum. The NLRB also has targeted the franchising industry model as another permutation of an ostensible "joint employment" arrangement. In the most high-profile example, the NLRB's General Counsel seeks to hold McDonald's Corporation potentially liable for alleged unfair labor practices committed by the restaurant's franchisees. The hearing in the ongoing McDonald's case began in March of 2016. Other federal agencies have taken up the joint-employer cause as well.

OSHA collusion? While all eyes were on the NLRB, awaiting its impending *BFI* decision, the Occupational Safety and Health Administration (OSHA) was revisiting its own standard for when an entity might be held jointly liable under federal workplace safety laws. The agency was quietly circulating an internal draft of a memo in which the agency pondered how to advise field agents who are conducting investigations, to scrutinize whether "a joint employment relationship can be found between the franchisor (corporate entity) and the franchisee so that both entities are liable as employers under the OSH Act." The OSHA memo contains uncannily similar language to that of the Board majority in *BFI*. Suspecting collusion between the agencies in their effort to impose liability on entities with only a tangential relationship to particular workers, trade groups such as the International Franchise Association have cried foul.

Noting their concerns, congressional leaders on the House Education and the Workforce Committee requested information and a briefing from Secretary of Labor Thomas Perez on the extent of coordination between top Department of Labor (DOL) officials and OSHA, the NLRB, and external stakeholders. OSHA's proposed new approach threatened to "blur the lines of responsibility for certain workplace safety and health violations and mirrors a recent National Labor Relations Board effort to benefit union leaders by expanding its joint employer standard," Workforce Committee Chairman John Kline (R-MN) and Workforce Protections Subcommittee Chairman Tim Walberg (R-MI) charged in a letter to Perez. In September of 2015, Senate Republicans on the Homeland Security and Governmental Affairs subcommittee on Regulatory Affairs and Federal Management held a hearing on the issue.

Administrator's Interpretation. Elsewhere at the DOL, Administrator of the Wage and Hour Division Dr. David Weil has been preoccupied with the notion of "fissured industries" since before joining the agency. Indeed, as a university professor, he wrote a book on the subject, which held considerable sway among Obama administration officials. A recent *Washington Post* article notes that NLRB General Counsel Richard F. Griffin Jr. in fact cited Weil's academic research in his *BFI* brief.

"Protecting workers in fissured workplaces—where there is increasingly the possibility that more than one employer is benefiting from their work—has been a major focus for the Wage and Hour Division in recent years," Weil has stated. Contending that the frequency of joint-employment situations is increasing, on January 20, 2016, he issued an Administrator's Interpretation (AI) on the topic, continuing the DOL's quest to regulate changes in the traditional employee-employer relationship due to market, technology, specialization, and other drivers.

The AI addresses the situation in which employees may have two or more employers to create a joint-employment relationship and explains how possible joint-employment relationships will be scrutinized under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act. (A related fact sheet provides guidance on the question as to the Family and Medical Leave Act.) Briefly stated: The word "employ," as set forth in those statutes, deserves an "expansive" interpretation in order to ensure that "the scope of employment relationships and joint employment … is as broad as possible."

The Wage and Hour Division will use this AI to increase aggressive enforcement of joint-employer status in its investigations. The goal is to aggregate employees' hours of work for joint employers in determining whether overtime compensation is due and to hold multiple employers jointly and severally liable for compliance. Only time will tell the extent to which courts may defer, if at all, to this guidance. However, when viewed in tandem with the related efforts of other federal agencies, the AI is a stark reminder that the Obama administration will remain steadfast in its attempts to broaden the number of entities that may be held liable for alleged violations of federal labor and employment laws.

WE WORK FOR *YOU* NOW continued from page 4

the clear objectives underlying the majority's decision to radically revamp its approach to determining whether an entity is a joint employer, however, it would be reasonable to predict that the Board will construe even the slightest reservation of rights to exercise oversight over a contractor's workforce as indicative of the kind of control that would establish joint-employer status.

"It will take years of litigation and untold cost to determine how the NLRB will apply its new standard to the diverse business arrangements that exist today," Kisicki added. "In the meantime, the economy—and the fundamental purposes of the Act itself—will have been seriously damaged."

BFI's prospects for survival. After the NLRB issued its decision in *BFI*, the company contested the validity of the certification of representative by the only means available: It refused to bargain with the union, asserting it was not obligated to do so because it was not an "employer" of the bargaining-unit employees. To no one's surprise, in January of 2016, the Board found that BFI's bargaining refusal violated the Act and granted the General Counsel's motion for summary judgment. BFI has filed a petition for appellate court review of the Board's decision in the United States Court of Appeals for the D.C. Circuit. That case is currently pending.

Failing a judicial reversal of the Board's new standard, concerned members of Congress have crafted a potential legislative fix, introducing bicameral legislation in September of 2015 to roll back the Board's revised joint-employer standard and to reaffirm that an employer must have "actual, direct and immediate" control over an employee to be considered a joint employer. The Protecting Local Business Opportunity Act (S. 2015; H.R. 3459) would amend the text of the NLRA itself by stating that, "Notwithstanding any other provision of this Act, two or more employers may be considered joint employers for purposes of this Act only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate."

Companies that regularly utilize contracted services ought not to stake their hopes on either of these developments, however. Rather, they may do well to structure their contractor relationships in as optimal a fashion possible in order to maximize the likelihood of avoiding the fate that befell the respondent company in *BFI*. In this issue of the Ogletree Deakins *Practical NLRB Advisor*, we offer guidance to that end. ■

The new joint employment standard: How much control is too much?

By Mark G. Kisicki

Companies are struggling with the National Labor Relations Board's new "joint employer" test under the National Labor Relations Act—and whether it makes them an employer over a group of workers hired, managed, and paid by another distinct entity. In *Browning-Ferris Industries*, the National Labor Relations Board (NLRB) overturned decades of precedent requiring that, to be deemed an employer of another company's workers, both entities had to exercise "direct and immediate" control over the terms and conditions of the workers' employment. Because the Board's new test considers *potential* (e.g., contractual rights) and *indirect* control, it can be applied to vastly expand businesses' obligations and liability under the Act.

The NLRB's new standard does not meaningfully impact most companies that use the services of temporary employees provided by third parties: Employers that use temporary employees typically exercise direct control over them and, even under the prior standard, likely would have been deemed their joint employers. But in *BFI*, the third party, Leadpoint, hired, trained, disciplined, and fired its own workers; had a large staff of supervisors and HR personnel on-site; paid its workers directly; developed its own productivity standards; determined actual pay rates; retained payroll records; and was solely responsible for administering all payments and benefits under the contract.

The Board, however, emphasized BFI's potential control over Leadpoint's workers and the indirect control it exercised. For example, the contract between BFI and Leadpoint allowed BFI to retain the ability to reject Leadpoint workers from assignment.

The *BFI* decision, as applied

Although the *BFI* decision demonstrates that the new standard is quite broad, it fails to provide meaningful guidance as to where the Board will set its outer limits. Unfortunately, in

the nearly eight months since issuing the decision, the Board has not issued any decisions applying and further explaining the *BFI* standard. Even below the Board level, only a couple of regional directors have substantively discussed it.

Akima Global. In the *Akima Global* case, the company subcontracted with Akal Security for armed security officers. The regional director determined there was a joint-employer relationship over the security officers because Akima Global and Akal supervisors worked as "one team"; the Akima Global employee handbook applied to all security officers; Akima Global retained the right under its contract with Akal to approve overtime hours worked for Akal officers, to require the officers to follow Akima Global policies, and to remove the officers from assignment; plus, the contract set the Akal officers' compensation plan.

Green JobWorks. In comparison, the regional director in the *Green JobWorks* case found ACECO, a demolition company, was not a joint employer of supplemental workers provided by Green JobWorks, in part, because the contract between ACECO and Green JobWorks provided that Green JobWorks was exclusively responsible for hiring, directing, supervising, scheduling, discharging, and disciplining its employees; providing their safety equipment; determining and paying wages; and providing benefits.

Since such regional director decisions are not controlling Board law, they provide limited guidance or help in determining the scope of the new joint-employer standard. Indeed, many of the factors the Board relied upon in finding joint-employer status in *BFI* were also present in *Green JobWorks*, in which joint employment was not found.

Predictive takeaways

If one were to read the tea leaves on the basis of these decisions, two points would emerge:

(1) written agreement terms matter; and
(2) the amount of control that a putative joint employer actually exercises or reserves to itself also matters.

Written agreement terms. In situations in which a putative joint employer reserves the right to *broadly and directly* control *individual* core employment terms, joint-employer status likely will be found, even if the putative joint employer does not exercise that right. For example, in *Akima Global*, the putative joint employer (Akima Global) reserved the right to approve Akal's officers' reassignments and any overtime hours that they worked. Those restrictions might be viewed as similar to the *direct control* that BFI purportedly had over the terms and conditions of employment of Leadpoint employees, such as BFI's contractual right to limit Leadpoint's workers' pay rates. On the other hand, in *Green JobWorks*, the parties' agreement largely precluded ACECO from controlling any terms of employment. (Note, however, that the agreement reserved to ACECO the right to dismiss individual workers from particular jobsites for safety or other "reasonable" reasons.)

In situations in which a putative joint employer reserves the right to broadly and directly control individual core employment terms, joint-employer status likely will be found, even if the putative joint employer does not exercise that right.

Amount of control. The more indirect control a putative joint employer exercises, the more likely joint-employer status will be found. Akima Global indirectly controlled the employment terms of Akal's employees in a variety of ways. For example, it required Akal to utilize Akima Global's employee handbook and Akal distributed that handbook to its employees. Moreover, it appears significant that Akima Global's and Akal's managers met regularly, and Akima Global indirectly directed what the Akal employees did by instructing Akal's managers about the day's work to be completed. This was similar to the indirect control the Board noted that BFI exercised by observing the work of Leadpoint's employees and controlling their employment terms by directing Leadpoint supervisors as to BFI's expectations each day.

It will take years of litigation for the Board to articulate clear parameters for the ambiguous test it adopted in *BFI*. In the meantime, to the extent a company wants to avoid being deemed a joint employer of another company's workers, it should minimize to the greatest extent possible both the control it reserves to itself under the operating agreement, as well as its indirect control of the other company's operations with respect to matters that directly and substantially impact the terms and conditions of employment of the other company's workers. ■

The Pandora's Box of joint employment

One inevitable, but unfortunate, consequence of the National Labor Relations Board's attempt to redefine the joint-employer standard has been to create uncertainty. Thus, the labor law implications of many commonplace business-to-business relationships are far less clear today than they were a year or two ago. Basing a joint-employer determination on such ill-defined and amorphous "standards" as indirect or potential control has largely eliminated the ability to accurately predict how the current National Labor Relations Board (NLRB) and its various regional directors may view a host of typical business arrangements.

This lack of clarity unquestionably makes it difficult for employers to know how to structure their business relationships in order to legitimately avoid unanticipated liability and attenuated entanglement in collective bargaining. The confusion, however, does not stop here. The undefined but expansive reach of the new joint-employer analysis raises a host of unanswered questions that range from procedure to substance. Here are a few to consider:

Scenario 1

Company A operates a manufacturing facility. Company B provides contract laborers to Company A. The contracted employees do the same type of work and are integrated with Company A's employees. The Teamsters union files a petition seeking to represent Company A's employees but does not seek to represent the contracted employees supplied by Company B.

Company A, however, in its required position statement filed the day before the Representation (R) case hearing, asserts that it is a joint employer with Company B and that the contracted employees share an overwhelming community of interest with the petitioned-for employees and must be included in any bargaining unit found appropriate.

This type of claim, while it might not endear Company A to Company B, is by no means as unlikely as one would think, particularly where the addition of the other employees is likely to alter the result of a representation election. Under such circumstances, can the Board properly process the petition without Company B being given adequate notice and an opportunity to be heard and to present its position and evidence in the R case proceeding? Given the imprecision and elasticity of the joint-employer test, are there now multiple instances in which a petitioned employer may legitimately claim the absence of an indispensable party in an R case proceeding? What risks does a region run by simply proceeding? If the region does decide notice must be provided, what happens to the Board's new expedited R case procedures?

Scenario 2

Company A provides services to a federal, state, or local government entity. As with all government contractors, the terms of Company A's services are incorporated in a written contract. More often than not, such government service contracts grant the government far more indirect or potential control over a private contractor than are typically found in private commercial contracts. Under such circumstances, and under the current Board's standard, isn't the federal, state, or local government, along with Company A, the joint employer of the employees performing the contracted service? If so, doesn't the NLRB lack statutory jurisdiction over that joint employer since the statute specifically excludes "political subdivisions" from coverage? If a government contractor is ever willing to enmesh its government customer in its NLRB proceedings, this issue will be a very difficult one for the Board to credibly navigate.

Scenario 3

Company A subcontracts work to Company B. They are party to a written contract that gives either party the right to terminate on the anniversary date of the contract. Neither company is unionized when they enter into the contract; however, the employees in Company B subsequently become unionized. If there is a claim that the two companies are joint employers, is Company A barred from exercising its right to terminate its pre-existing commercial contract with Company B without first bargaining with the union that represents the employees of Company B? Can federal law properly trump a pre-existing state-based contract right? Is Company A's right now contingent on its motivation? When contractual flexibility becomes compromised what are the economic implications?

Scenario 4

Restaurant A operates a branded restaurant in California pursuant to a franchise agreement with Corporation X.

Restaurant B operates an identical branded restaurant in Florida under an identical franchise agreement with Corporation X. Apart from the fact that both restaurants are signatory to the same franchise agreement, they do not have anything else in common.

Restaurant A's employees are unionized and engage in a strike over their bargaining demands. In furtherance of those demands the Restaurant A union sets up a picket line at Restaurant B. Does Restaurant B have secondary boycott protection or will they be considered the same "employer" as Restaurant A by virtue of their common connection with Corporation X, which is the national franchisor?

Unintended consequences

The decision to alter well-settled principles like the joint-employer standard does not occur in isolation. The National Labor Relations Act is an internally interdependent statute. When one attempts to alter a part of the statute it often has remote and unexpected consequences. When the alteration involves the very basic issue of which organization is an "employer," those consequences are likely to be profound. ■

Other NLRB developments

Here is a brief summary of other noteworthy National Labor Relations Board decisions handed down in recent months:

Recording a workplace right? A divided three-Member Board panel recently held that Whole Foods unlawfully maintained two rules prohibiting employees from making workplace recordings and found that employees would reasonably construe the rules to prohibit Section 7 activity (*Whole Foods Market, Inc.*, December 24, 2015).

One rule prohibited audio and/or video recordings of company meetings, phone calls, conversations, or images, without prior management approval or the consent of all parties. The second prohibited the recording of any workplace conversations without prior management approval. The rules, which were applicable to employees and managers alike, applied to all areas of the store property.

Although an administrative law judge (ALJ) found the rules did not explicitly restrict Section 7 activity, the Board found that photography and audio or video recording in the workplace, as well as posting photographs and recordings on social media, are protected by Section 7 if employees are acting in concert for their mutual aid or protection and the employer does not have an overriding interest. Such protected conduct could, for example, include recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions. Thus, photography and audio and video recording at the workplace are protected under certain circumstances.

In dissent, Member Miscimarra argued that the rules were obviously intended to *foster* collective activity and free expression, *including* communications protected by Section 7. They specifically stated that it was their purpose "to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust" and "to eliminate a chilling effect on the expression of views . . . especially when sensitive or confidential matters are being discussed," he noted.

McDonald's can't sever joint-employer cases. McDonald's Corp. lost its appeal of an ALJ's ruling that consolidated six separate complaints for hearing in a single proceeding. The complaints allege that the fast-food company is a joint employer with each individual franchisee and allege in the underlying cases that these joint employers committed various violations of Section 8(a)(3) of the NLRA. While each of the complaints allege the joint-employer claim, there are 22 separate cases involving 31 different respondents. Beyond the joint-employer issue, each case has individual facts and differing respondents. Notwithstanding these considerations, a divided three-member Board panel held that the ALJ did not abuse her discretion in denying the respondents' motions to sever the case and that the General Counsel did not abuse his discretion by consolidating the cases in the first place (*McDonalds USA, LLC*, January 8, 2016).

The Board found the General Counsel provided a reasonable basis for his decision: The bulk of the evidence he intended to present in support of the joint-employer allegations applied on a corporate, nationwide basis and was therefore applicable to all franchisees. Accordingly, the General Counsel elected to have one proceeding that would result in a single decision in which the ALJ would make all of her findings with respect to McDonald's alleged joint-employer status with each franchisee, as well as on the merits of each unfair labor practice (ULP) allegation. Having all of the ALJ's rulings, findings, and conclusions in the single proceeding would allow the Board to review them all in a single decision and ultimately result in a single appeal to the federal courts.

Even applying a very lenient abuse-of-discretion standard, this mega-consolidation will create greater costs and delays for everyone, including the Board, employers, charging parties, and any reviewing courts, dissenting Member Miscimarra argued.

In a related decision, the Board ruled that the respondents failed to show the ALJ abused her discretion in a case management order, which the majority found provided for an orderly presentation of evidence helping to protect each employer's confidentiality and due process rights and control the efficiency and costs of the litigation.

Dissenting, Member Miscimarra pointed out that this case involved an unprecedented consolidation of 61 ULP charges filed in six NLRB regions against 31 different employers (including McDonald's USA as an alleged joint employer). Before reaching the merits of the alleged violations, the Board was required to determine whether the structure of this consolidated case was appropriate. Even applying a very lenient abuse-of-discretion standard, this mega-consolidation will create greater costs and delays for everyone, including the Board, employers, charging parties, and any reviewing courts, Miscimarra argued, contending that the consolidation itself will detract from the merits, unnecessarily complicate the manner in which evidence can be taken, and potentially require years of litigation.

With respect to the case management order, Miscimarra faulted the ALJ for allowing the General Counsel and charging parties to present evidence regarding McDonald's joint-employer status before evidence relating to the alleged ULPs. He argued that the ALJ created made-to-order procedures largely built around specifications devised by the General Counsel, where the joint-employer evidence takes precedence over whether or what types of alleged ULPs have been committed, requires employers to participate in litigation that, for the most part, has nothing to do with them, and forces them to forego active participation in most of the proceedings.

Captive audience confusion. Citing its own confusion, including that of a Board agent and dicta from a five-member 1998 Board decision in which it claimed all members got the rule wrong, a divided four-member NLRB panel ruled that captive audience meetings are prohibited in mail-ballot elections within the 24 hours prior to the scheduled mailing of the ballots. As a result, an employer that was told—incorrectly, under then-existing precedent—that it could not conduct a captive audience meeting, on the morning that ballots were scheduled to be mailed, could not overturn the subsequent election results on that basis (*Guardsmark, LLC*, January 29, 2016).

In its 1953 *Peerless Plywood* decision, the Board prohibited mass captive-audience speeches by parties within the 24-hour period prior to the start of a manual election. The mail-ballot rule, which the Board adopted six years later in *Oregon Washington Telephone Co.*, provided that the prohibition begins when the ballots are scheduled to be mailed—as opposed to 24 hours *before* ballots are scheduled to be mailed. Calling this "counter-intuitive," and "to avoid perpetuating that confusion," the majority overruled *Oregon Washington Telephone* and aligned the mail-ballot rule more closely with the manual-ballot rule.

The majority pointed to the Board's own confusion in its 1998 *San Diego Gas & Electric* decision, in which all five members—despite their awareness of the *Oregon Washington Telephone* decision—agreed that the prohibition begins 24 hours before the ballots are scheduled to be mailed. This was dicta, but the statement reflected "a shared misreading of *Oregon Washington Telephone*—and they represent the Board's most recent articulation (or misarticulation) of the *Oregon Washington Telephone* rule." Given that confusion, the majority (quoting *Peerless*

Plywood) reasoned that *Peerless Plywood,* which applies "in all election cases," prohibits employers and unions "from making election speeches on company time to massed assemblies of employees *within 24 hours before the scheduled time for conducting an election*."

Dissenting, Member Miscimarra found it ironic that the majority dealt "with the Region's error by making the Region's mistake into a new requirement applicable to all future mail-ballot elections." He found no valid reason to change the rule established by *Oregon Washington Telephone* that, in a mail-ballot election, the prohibition against captive-audience speeches begins when the ballots are scheduled to be mailed.

In adhering to its class action waiver position, the NLRB is defying the United States Court of Appeals for the Fifth Circuit, as well as other federal courts, which have almost unanimously rejected the agency's position.

Guard lieutenants aren't statutory supervisors. Nuclear power plant security guard lieutenants lacked authority to "responsibly direct" other guards using independent judgment, a divided NLRB panel held. Nor did they have authority to assign work or impose discipline under the framework set forth in the Board's *Oakwood Healthcare* decision. As such, they were not supervisors within the meaning of Section 2(11), ruled the Board, affirming a regional director's decision and direction of election (*G4S Government Solutions, Inc.*, February 10, 2016).

Noting the guards' "critical national security function," Member Miscimarra argued in dissent that the very success of the security team's tactical response depends on the lieutenants' direction of the guards under their command. In his view, it defied reason to conclude that the lieutenants did not exercise "responsible direction" within the meaning of Section 2(11).

This case, Miscimarra contended, illustrates the folly of the Board's approach to issues of supervisory status. Congress provided that, to be a supervisor, one need possess just one of the 12 different types of supervisory authority. "However, perhaps because a finding of supervisor status effectively denies representation to the individuals in question, the Board has tended to evaluate each Section 2(11) factor in isolation, and then construe each factor so narrowly as to compel a conclusion that nobody is a supervisor," he argued.

Quoting a 2015 case, he urged the Board to adopt a more realistic model for determining supervisory status—one based, in his view, on the "practical realities" of running a business. He suggested a three-part analysis, taking into account: (1) the nature of the employer's operations; (2) the work performed by employees; and (3) "whether it is plausible to conclude that all supervisory authority is vested in persons other than the putative supervisors." Were this test applied here, it would "strain credulity" (to use *Buchanan Marine* parlance) to conclude that the lieutenants were not supervisors, he asserted.

Class action waivers. Continuing its assault on mandatory arbitration agreements containing class action waivers, the Board, with Member Miscimarra often dissenting, has handed down a number of decisions finding that an employer acted unlawfully by maintaining and/or enforcing such agreements. In *Ralph's Grocery Company* a divided Board held that the employer's policy and its enforcement violated the Act because it contained such a class action waiver. It also found the policy unlawful because it was ambiguous and would reasonably be construed by employees as prohibiting them from pursuing Board charges (*Ralph's Grocery Company*, February 23, 2016).

The NLRB has systematically invalidated a spate of employer arbitration agreements in recent months, steadfastly adhering to its holdings in *D.R. Horton, Inc.*, and *Murphy Oil USA, Inc.* despite their rejection in the federal courts. As Board Member Philip Miscimarra repeatedly points out in dissent in these cases, in adhering to its class action waiver position the NLRB is defying the United States Court of Appeals for the Fifth Circuit, as well as other federal courts, which have almost unanimously rejected the agency's position. The labor board has recently invalidated the arbitration policies of Kmart Corporation, GameStop Corp., Domino's Pizza, and Waffle House, Inc., among other employers. Even policies with opt-out provisions and policies expressly permitting employees to file claims with administrative agencies that might then pursue a judicial remedy on behalf of employees as a group, have not escaped the Board's scrutiny intact.

DOL issues revised "persuader" rule

On March 24, 2016, the U.S. Department of Labor (DOL) published new regulations that dramatically expand the obligations of employers and their labor relations consultants (both attorneys and non-attorney consultants) to report certain information related to providing labor relations guidance under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).

Employers often engage consultants for guidance in developing preventive labor relations strategies or in responding to an imminent union organizing effort. For over 50 years, the LMRDA "persuader activity" regulations required the reporting of these services only when consultants were hired to communicate directly with employees in an effort to persuade them concerning

Call for briefs

The NLRB has invited briefs in recent months on several cases pending before it, including the hot-button issue of whether university graduate students are statutory employees under the Act.

Finding "substantial issues warranting review," the NLRB agreed to review a regional director's decision dismissing Columbia University graduate assistants' election petition, thus reinvigorating their attempt to organize a union. Consistent with the Board's 2004 holding in *Brown University*, which held that graduate assistants who perform services at a university in connection with their studies are not statutory employees under the Act, the regional director had administratively dismissed their petition, concluding that they were not employees within the meaning of Section 2(3).

However, signaling its intention to revisit *Brown University*, a divided Board granted review and, in January of 2016, invited the parties in *Columbia University* and interested amici to file briefs addressing the issues raised in the pending case, seeking input specifically on whether to overrule the 2004 decision. NLRB General Counsel Richard Griffin has stated that there is a "very good possibility" that the Board will issue a decision in *Columbia University* by August of 2016. Griffin's prediction is supported by Board tradition: "The board member whose term is up is able to get his colleagues to address a list of issues that he or she wants to have decided before he or she leaves," Griffin said, suggesting that the end of Member Hirozawa's term in August will spur a decision.

In February, the Board issued a call for briefs in two other cases. The Board asked the parties in *King Soopers,* and interested amici, to weigh in on whether it should revise its treatment of search-for-work and interim employment expenses when awarding a make-whole remedy to unlawfully discharged employees. At the compliance stage, the Board has traditionally treated job-search and interim employment expenses as an offset cost, reducing the amount of interim earnings subtracted from gross backpay. Contending that this practice is inequitable, the General Counsel has urged the Board instead to award such expenses regardless of whether the discriminatee received interim earnings.

At issue in *United States Postal Service* is whether the Board may continue to permit ALJs to unilaterally issue a "consent order" adopting settlement terms proposed by a respondent in an unfair labor practice case over the objection of the General Counsel and the other parties to the litigation. The NLRB granted the General Counsel's request for special permission to appeal an ALJ order adopting a settlement offer to which all other parties in the case had objected. The Board invited the parties and interested amici to address whether the NLRA allows an ALJ to issue a consent order over the General Counsel's objection in such circumstances and, if so, whether the practice should be discontinued, as a matter of policy.

unionization. Under what has been traditionally known as the "advice exception," neither employers nor their consultants were required to report engagements in which the consultant communicated only with management. With its new "persuader" rule, the DOL has eliminated this exception.

In the case of attorney consultants, providing purely "legal advice" still does not trigger a reporting requirement. However, if that advice is combined with services that have, directly or indirectly, an object to "persuade," then the entire arrangement must be reported by both the consultant and the employer. If the consultant reports persuader activity, he or she then must include that information in an annual report of receipts and disbursements for "all labor relations advice and services," even though such additional advice and services are not persuader activities.

Increased reporting burden. Under the revised regulation, a consultant's services will be reportable even if there is no direct contact between the consultant and the employer's employees, as long as the object of those services is to directly or indirectly "persuade" employees.

Under the revised regulation, a consultant's services will be reportable even if there is no direct contact between the consultant and the employer's employees, as long as the object of those services is to directly or indirectly "persuade" employees.

These triggering services include such activities as: planning, directing, or coordinating supervisors or managers in their meetings, or less structured interactions, with employees; drafting or selecting persuader materials for an employer to disseminate or distribute to employees; revising employer-created materials if the reason for doing so is "to enhance [its persuasive effect], as opposed to ensuring legality"; and conducting training for supervisors that covers "labor-management relations matters, including how to persuade employees concerning their organizing and bargaining rights."

In addition to the consultant's reporting obligations, the employer has to file its own report disclosing the date of each reportable arrangement; the amount paid for that arrangement; the person with whom the agreement or transaction was made; and "a full explanation of the circumstances of all payments made, including the terms of any agreement or understanding pursuant to which they were made." The failure to file, or the filing of false or incomplete information, exposes both the employer and the consultant to civil and criminal penalties.

Legal challenges. Despite the DOL's claims to the contrary, these mandated disclosure requirements force attorney consultants to reveal attorney-client confidences, in violation of their professional obligations, and interfere with access to legal counsel. A client's identity, the parties' financial arrangements, and the specifics of the services rendered are all deemed to be attorney-client "confidences."

Typically, state bar ethics rules prohibit attorneys from disclosing client confidences in the absence of the client's informed consent. Because of these ethical considerations, as well as the regulation's interference with the attorney-client relationship, the American Bar Association, Association of Corporate Counsel, and numerous state attorneys general have strongly opposed the regulation.

Citing a number of objections to the new regulations, several business groups have mounted legal challenges to the reporting requirement. Three separate lawsuits have already been filed seeking to invalidate the rule. Ogletree Deakins is representing the National Federation of Independent Business (NFIB), the National Association of Home Builders (NAHB), and other trade groups in one of those actions, which commenced in federal district court in Texas. Similar challenges by other business groups are pending in federal district courts in Arkansas and Minnesota. All of the lawsuits seek to enjoin implementation of the rule for the duration of any litigation challenging its underlying validity. If injunctive relief is not granted and the rule takes effect as scheduled, it will apply to arrangements, agreements, and payments made on or after July 1, 2016.

Employers should carefully monitor all developments relating to these regulations and the pending legal challenges to determine if or when they will have additional reporting obligations. ■

What the new rules hath wrought (revisited)

In our first issue of the *Practical NLRB Advisor*, we focused on the National Labor Relations Board's "ambush election rule," which took effect on April 14, 2015, and offered a look at how the revised representation election procedures had impacted the number of petitions filed and union win rates over the first six months.

Here is what the union election landscape looks like under the new rule, a full year since implementation:

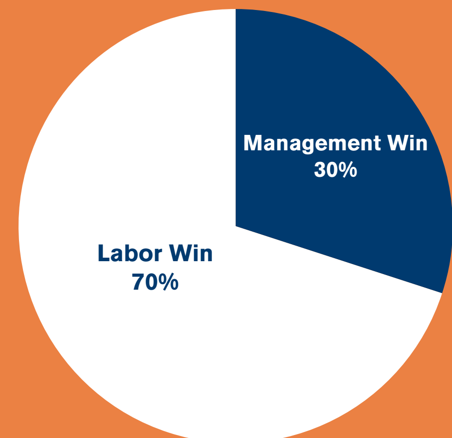
NLRB Ambush Election Statistics

[April 14, 2015, through March 31, 2016]

- **Number of petitions**: 2,083
- **Average time to election (all ballot types)**: 26 days
- **Number of elections held**: 1252
- **Win rate**: Company - 30 percent; Union - 70 percent

- **Smallest unit size**: 1 employee
- **Largest unit size**: 6,300 employees
- **Average unit size**: 63 employees

Outcomes in Ambush Elections



Top five states for petitions filed:

State	Petitions	State	Petitions
NY	341	MI	80
CA	283	MA	65
IL	125	WA	64
NJ	121	OH	64
PA	120	TX	57

Union	Petitions Filed
Teamsters	426
SEIU	209
IAM	168
IBEW	144
UFCW	128
IUOE	127
United Steel Paper	61
AFSCME	35
CWA	34
LIUNA	34
Grand Total	1,366

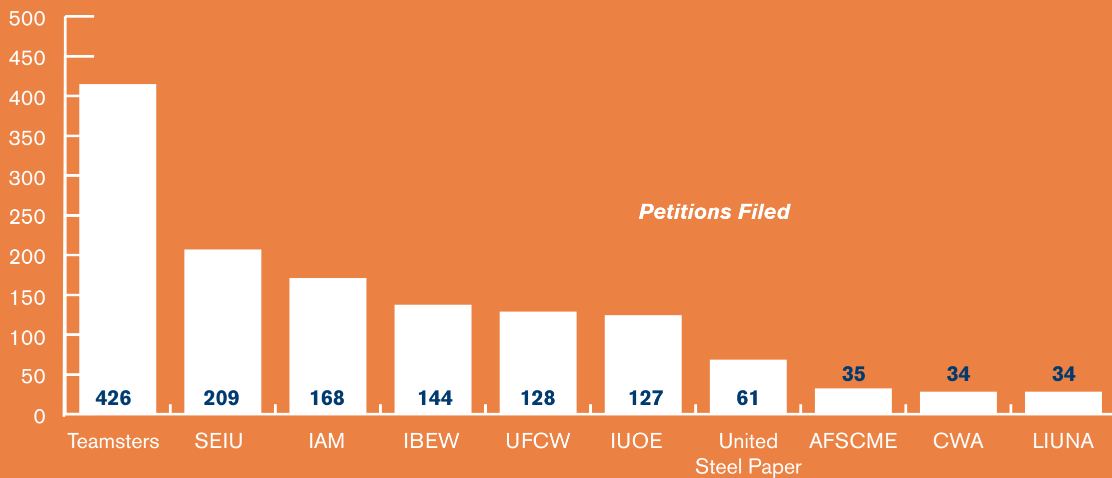
What the new rules hath wrought

Top five industries by petition count:

1) Healthcare and life sciences
2) Transportation
3) Construction, engineering, and landscape
4) Manufacturing
5) Security

Industries generally	No. of petitions	Percent of petitions
Healthcare and Life Sciences	358	17%
Transportation (Passenger and Freight)	189	9%
Construction, Engineering, and Landscape	177	8%
Manufacturing	145	7%
Security	144	7%
Retail	99	5%
Energy, Oil, and Utilities	80	4%
Education and Childcare	79	4%
Wholesalers	77	4%
Hospitality	76	4%

Top 10 unions by petition count:



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