

WHAT'S NEXT IN LABOR LAW

Expanded Joint Employer Liability

Potentially reversing a thirty year precedent, the National Labor Relations Board (NLRB) has engaged in a two-pronged scheme to expand "joint-employer" liability to include franchisors and employers that use contractors.

The NLRB's General Counsel announced on July 29, 2014, that his office will pursue McDonald's as a "joint employer" with its franchisees in cases involving alleged unfair labor practices. Two months earlier, the Board itself signaled its intent to upend the joint-employer standard when it requested amicus briefs in *Browning-Ferris Industries*, a representation case. This one-two punch is part of a larger NLRB agenda to encourage union organizing at the expense of employers' rights and existing law.

Normally determined on a case-by-case basis, two companies can constitute a "joint-employer" under the National Labor Relations Act (NLRA) if they both exert significant control over employees or share the ability to meaningfully affect employment conditions such as hiring, firing, discipline, compensation, benefits, scheduling, and providing day-to-day direction and supervision. This clearly defined standard has been in place for more than three decades.

This clarity has allowed employers to develop business models that have led to increased flexibility, competitiveness, and growth. For example, through contracting, employers have been able to focus on the core functions that are at the heart of their businesses while allowing outside firms to handle other activities such as payroll, cleaning, and other back-office support services. This has freed up funds that can be used to invest in new products and expand operations. Through franchise arrangements, employers have been able to expand the national and international presence of their brands while giving entrepreneurs the ability to buy into a successful business they couldn't afford to establish on their own.

The NLRB's goal appears to be scrapping the current joint-employer standard and replacing it with a test based on "industrial realities," a vague concept under which a wide range of businesses could be held liable for issues involving workers they don't actually employ. Creating the legal fiction that a host facility or a company that uses subcontracted workers is the "employer" of another wholly independent company's employees will have significant impacts, such as disrupting operations, increasing costs and limiting the ability to respond to changing market conditions. The practical effects of altering the joint employer standard could also include:

- Companies inadvertently finding themselves vicariously liable for the actions of third parties they do not control.
- Forcing companies to negotiate with unions over workplaces they don't actually control.
- Allowing unions to use contract negotiations at a single franchise to force corporate-wide agreements on issues like card check and neutrality.

The bottom line is that any employer that utilizes franchising, is involved in a joint venture, engages staffing agencies, hires subcontractors, could unexpectedly be dragged to the bargaining table with a union, and face liability for unfair labor practice charges for which they had no responsibility.