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BUSINESS

Ruling Clears Way for Unions

Fast-food, construction to feel effects of labor board decision on temp and contract workers

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WASHINGTON—Contract workers and other temporary employees will be able to more easily unionize following a landmark ruling Thursday by a U.S. federal labor regulator.

The ruling from the National Labor Relations Board will ripple through the fast-food, construction and other industries that rely heavily on contract workers and employees of franchisees. Previously, such companies were considered by law to be a step removed from many of their workers when certain labor disputes arose.

The decision, which came in a 3-2 vote on a single case before the board involving sanitation workers, is the latest to attempt to tackle the core question of who counts as an employee in a modern economy that is increasingly reliant on shift work, contract workers and other temporary employees.

The Labor Department, for example, has been cracking down on companies it says misclassify employees as independent contractors to avoid paying taxes, overtime pay and benefits. Uber Technologies Inc. is facing such accusations by drivers in California that the company has disputed.

Meanwhile, the NLRB has pending cases that claim franchisers such as McDonald's Corp.should be held responsible for alleged labor law violations at independently owned restaurants.

Many businesses have fiercely opposed the change, and not surprisingly. Companies increasingly have been turning to temporary contract workers, a business model that gives them more flexibility to add or shed workers as needed.

"If this decision stands, the economic rationale for hiring a subcontractor vanishes," said Beth Milito, senior legal counsel for the National Federation of Independent Business. "It will make it much harder for self-employed subcontractors to get jobs and of course it will drive up operating expenses for the companies that hire them."

Union groups, meanwhile, have complained to regulators that many businesses exercise control over the pay and working conditions of certain workers but shirk their duties by refusing to claim them as employees.

Larry Daugherty, principal officer of the Teamsters local that brought the case, said, "We are pleased with this decision, which will provide justice to workers who have been fighting for fairness in the workplace for a long time."

The board itself was starkly divided on the move, which revised its "joint employer" standard for determining when one company shares responsibility for employees hired by another. In its 3-2 ruling, the board was split along party lines. The change was supported by the board's three Democrats, with the two Republicans dissenting.

The change alters a decades-old approach that previously said one business couldn't be held liable for employment-related matters at another unless they had direct control over the employees in question. That approach has meant companies could keep at arm's length contract workers supplied by staffing firms, and has allowed franchise arrangements to flourish.

In making its decision, the NLRB conceded that it hasn't kept pace with an evolving workplace in which an increasing number of U.S. workers are employed through temporary staffing agencies. They cited in their decision a "dramatic growth in contingent employment relationships" that "potentially undermines the core protections of the act for the employees impacted by these economic changes."

The ruling came in a case where a Teamsters local union, the Sanitary Truck Drivers and Helpers Local 350, asked the NLRB to consider Browning-Ferris Industries of California Inc. and Leadpoint Business Services, a Phoenix-based staffing firm that provides the company with temporary workers, joint employers of a group of subcontracted workers hired through the staffing agency. The union said it couldn't adequately bargain for the workers unless Browning was at the bargaining table.

In the past, companies generally had to share decision-making on employment matters such as firing, hiring and discipline in ways the board said would have a meaningful effect on the workers. Under the revised standard, the NLRB also will consider if a business exercises indirect control through an intermediary, or has reserved the right to do so. The board will consider this on a case-by-case basis, board officials said Thursday.

"Our aim today is to put the board's joint-employer standard on a clearer and stronger analytical foundation, and, within the limits set out by the act, to best serve the federal policy of 'encouraging the practice and procedure of collective bargaining,'" the Democrats said.

The board's dissenting Republicans said: "The result is a new test that confuses the definition of a joint employer and will predictably produce broad-based instability in bargaining relationships."

Republicans on the board said the ruling will have a sweeping effect.

"The new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the act," they said, referring to the National Labor Relations Act.

The board's Democrats disagreed with the Republican's assertions. "None of those situations are before us today, and we decline the dissent's implicit invitation to address the facts in every hypothetical situation in which the Board might be called on to make a joint-employer determination."

A McDonald's spokeswoman said, "This particular case focuses on issues involving Browning-Ferris and its subcontractors, not McDonald's, therefore it's inappropriate to comment on their case." She added, however, "We do not direct or co-determine the hiring, firing, wage rates, hours, or any other terms of employment of our franchisees' employees—which are the well-established criteria governing the definition of a 'joint employer.'"

The union vote in the Browning case occurred in April 2014 while the matter was under review at the NLRB. The votes were impounded at the time and will be counted within 14 days.

"If the employees voted yes to unionization and the local union tries to bring us into negotiations, we will appeal in order to not be forced to be drawn into collective bargaining negotiations with another employers' employees," said Darcie Brossart, a spokeswoman for Republic Services Inc., the parent company of Browning-Ferris that is based in Phoenix. The company would have to lodge its appeal in federal court.

One group that is pushing back aggressively against the change, the International Franchise Association, urged Congress to overrule the labor board.

"IFA and its allies are asking Congress to intervene to halt these out-of-control, unelected Washington bureaucrats to preserve the established joint employer standard," said Steve Caldeira, IFA president and chief executive.

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