EMPLOYMENT, LABOR, BENEFITS AND IMMIGRATION LAW FOR EMPLOYERS

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The NLRB's Widening Reach Across the Modern Workplace

Recent National Labor Relations Board decisions have demonstrated a disturbing trend – expanding application of the National Labor Relations Act to a wider worker population and range of employment situations than ever before. Unions and their allies have urged the Board to interpret the Act to reflect "the reality" of the modern workplace. They argue that contingent and alternative employment arrangements are increasingly common, pointing to the proliferation of joint and successor employer relationships and independent contractor status.

As Board Chairman Mark Gaston Pearce said at a conference on labor and collective bargaining, "We are the agency that puts people back to work and we get them paid for the wages they lost." *It Gets Hot in the Kitchen: New Challenges for the NLRB,* The Challenge for Collective Bargaining: Proceedings of the New York University 65th Annual Conference on Labor (2013).

Yet, many within the employer and business communities view these Board decisions as extending the definitions of "employer" and "employee" beyond their intended statutory and common law limits. Former Labor Board Member Harry Johnson has used the term "überagency" to criticize the Board's muscular exercise of authority over issues within the purview of other laws and developments in modern workplace law. Taken together with other recent NLRB decisions expanding the rights of individual employees to engage in protected concerted activities, a flag has been planted, if not in new territory, then in areas where employer interests long have prevailed.

Joint Employers, Successors and Legal Obligations

Prior to the scheduled departure of Member Harry Johnson on August 27, 2015, the Labor Board issued a number of decisions while it still retained a full slate of five members. Among those decisions – many of which were by a 3-2 vote – is ***Browning-Ferris Industries of California, Inc.***, 362 NLRB No. 186 (Aug. 27, 2015), one of the most significant decisions issued by the Labor Board in recent years.

Continued

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Broadening the standard for determining joint employer status will increase labor union bargaining power.

As expected, the Board in that case (with two members, including Johnson, dissenting) adopted a new standard for determining whether two employers are joint employers for purposes of collective bargaining:

> We will no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry. . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint-employer status.

Browning-Ferris is likely to impact the labor relations and business relationships of many companies. By broadening the standard for determining joint employer status to include employers that may only affect employees' terms and conditions of employment *indirectly,* the decision likely will sweep many more entities under the "joint employer" canopy and increase labor union bargaining power accordingly. Additionally, joint employer status may result in other job-related legal obligations and liabilities in the areas of compensation, benefits, leave, and fair employment practices, among others.

The Browning-Ferris Industries (BFI) dispute arose when a union that already represented 60 employees of BFI, a waste recycling facility in California, sought to represent an additional 240 individuals who were employees of another company under subcontract to BFI. Applying the NLRB's then-current standard for determining joint employer status, the Labor Board regional director determined that BFI was not a joint employer of the subcontracted employees. BFI lacked the essential element of direct and immediate control over employment matters concerning the subcontracted employees, the regional director concluded.

The Jackson Lewis **Labor and Preventive Practices** team stays on the cutting edge of labor law developments at the NLRB. For further reading and analysis about the decisions and issues discussed here, go to **"Labor Board Sets New Standard for Determining Joint Employer Status"** and **"Teamsters Take Aim at *Browning-Ferris* Successor While Congress Entertains Legislative Roll Back Efforts"** at **www.jacksonlewis.com**.

Following the union's request for review, however, the NLRB issued a broad new standard, expressly overruling three prior cases. The new standard evaluates:

1) *whether a common-law employment relationship exists; and*

2) *whether the putative joint employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining."*

Control can be established directly or indirectly, such as through an intermediary or through contractual provisions that preserve the right to control, whether or not that right is ever exercised.

Applying the new standard in *Browning-Ferris*, the Board reversed the regional director's decision and found BFI was a joint employer of the 240 subcontracted employees as it possessed control over them. The temporary labor service agreement between BFI and the subcontracting company allowed BFI to reject any worker referred to its facility, and BFI had unilateral control over specific productivity standards, which the Board described as a "clear and direct connection between BFI's decisions and employee work performance." Moreover, the agreement between the parties essentially gave BFI control over how much the subcontracting company paid its employees under a cost-plus arrangement, and BFI set safety standards on its site that the subcontracted employees had to follow.

The Board ordered the impounded ballots to be opened and counted, and the union was certified as bargaining representative for the 240 jointly employed workers.

"No Bargaining Table Is Big Enough"

In a strongly worded 29-page dissent, Board Members Philip Miscimarra and Harry Johnson said the decision "rewrites the decades-old test for determining who the 'employer' is." The dissent further challenged the decision as incorporating theories of "economic realities" and "statutory purpose" that extend the definitions of "employee" and "employer" far beyond the common-law limits that Congress and the Supreme Court have stated must apply.

* * *

THE IMMEDIATE IMPACT of the Board's decision, which will apply retroactively in representation cases, is significant. Many contractors and contractees, franchisors, franchisees, distributors

and their representatives, and other companies that share common operations are now at risk of being classified as joint employers. They now will be exposed to unfair labor practice liability, collective bargaining obligations, and economic protest activity, including strikes, boycotts, and picketing, based on working relationships with other, unrelated companies.

Perhaps anticipating the new joint employer standard, the Occupational Safety and Health Administration recently began gathering information about the relationship between franchisors and franchisees. OSHA already had indicated it would regard temporary service employers and host employers as joint employers for safety and health liability in certain instances. It is also likely that the Equal Employment Opportunity Commission, which filed a friend-of-the-court brief in *Browning-Ferris,* will follow the Board's lead, along with the Department of Labor. This is based, in part, on the reliance on Board precedents by other agencies in shaping the law under their own statutes.

Go to, "Protecting Temporary Workers" at **www.osha.gov**.

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Unresolved by the *BFI* decision is how the new joint employer test may affect the Board's approach to representation cases involving mixed units of temporary employees of a supplier company and employees of the host employer. In ***Oakwood Care Center***, 343 NLRB 659 (2004), the Board held a union can represent a unit including both employers' employees only if all the employers involved *consent* to such multi-employer bargaining – assuming the union wins the election.

In May 2015, the NLRB granted review in ***Miller & Anderson Inc.***, Case No. 05-RC-079249, which involves a union's request to represent in the same bargaining unit a contractor's own employees and temporary employees provided to the contractor by a staffing company. The Board invited interested parties to file "friend of the court" briefs over the continued applicability of the Board's *Oakwood Care Center* standard, which was relied upon by the regional director in dismissing the union's petition for representation.

Citing the *BFI* decision, the union has argued that the *Oakwood Care Center* decision is incorrect and that the Board should return to its prior rule articulated in ***M. B. Sturgis***, 331 NLRB 1298 (2000), which would alleviate the need for the host employer's consent to include the temporary employees in the unit. In that decision, the Board held that separating "regular" employees (those employed solely by the host or "user" employer) from the "temporaries" (who may share the same classifications, skills, duties, and supervision) creates

The immediate impact of the Board's decision, which will apply retroactively, is significant.

Expansive Interpretations and Accidental Employees

The *BFI* decision on joint employer status adds to the list of the Labor Board's creative re-interpretations of longstanding precedents and further expands the NLRA's coverage to many individuals who now find themselves to be employees almost accidentally. In another case, ***CNN America, Inc.*** 361 NLRB No. 47 (2014), decided prior to the *BFI* case, the Labor Board concluded that CNN was a joint employer of technical employees supplied by a contractor even in the absence of any direct role in hiring, firing, disciplining, discharging, promoting, or evaluating those employees. The Board relied on factors similar to those emphasized in the *BFI* decision, ignoring common practice where subcontracted employees work at client locations with substantial interaction without conferring "employer" status on the client.

In December 2014, the NLRB General Counsel began issuing complaints against a national foodservice corporation and its franchisees as joint employers. The complaints allege the corporation and certain franchisees violated the rights of employees working at restaurants at various locations across the country by, among other things, making statements and taking actions against them for engaging in activities aimed at improving wages and working conditions, including participating in nationwide worker protests. Hundreds of unfair labor practice charges have been filed nationwide against the corporation and its franchisees.

Determinations of joint employer status are not the only way the Labor Board has broadened the reach of the NLRA. In 2014, the Board revised its approach to independent contractor status that extends the Act's coverage to route drivers previously excluded from its definition of "employee." Although the Act explicitly excludes "independent contractors," the Board relied upon common law principles of perceived economic dependence on the employing entity, giving rise to employee status. In its finding, the Labor Board determined that the employer unlawfully had refused to bargain with the union that had been certified as the employees' representative in 2010. Now on appeal to the U. S. Court of Appeals for the District of Columbia Circuit, this decision conflicts with a prior decision by the D.C. Circuit, which found that drivers with the same company performing the same jobs in two other locations were independent contractors.

In 2015, the Labor Board denied independent contractor status for door-to-door canvassers for a non-profit food distribution organization. The canvassers were deemed to be employees based on the Board's 2014 decision, and the employer was found to have engaged in numerous unfair labor practices during the employees' union organizing campaign. ***Sisters' Camelot***, 363 NLRB No. 13 (2015).

The company knew it would be legally obligated to retain the workers and would assume the status of successor employer with the obligation to bargain with the workers' union.

an "artificial division" between such employees not required or justified by the NLRA. See, **Board Invites Briefs in *Miller & Anderson, Inc.***

* * *

IT IS LIKELY that the *Browning-Ferris* decision eventually will be appealed. In the meantime, Republican lawmakers have introduced measures to overturn the NLRB's new joint employer standard. Enacted legislation on this issue is far from certain, with a gridlocked Congress, upcoming elections, and presidential veto power all likely obstacles. Change may have to await a Republican administration and Congress, and a reconstituted NLRB.

Company Must Bargain as Successor After Retaining Union Workers as Local Law Requires

In another decision issued just prior to the exit of Board Member Johnson, the NLRB ruled 2-1 that a company that purchased several properties in New York City and was legally obligated under local law to retain incumbent building service workers was a successor employer that had to bargain with the union representing those workers. The company knew it would be legally obligated to retain the workers for a period of 90 days after the acquisition and would assume the status of a successor employer under the National Labor Relations Act, the Board said. ***GVS Properties LLC,*** 362 NLRB No. 194.

Under a 1972 Supreme Court decision, *NLRB v. Burns*, a new employer that continues its predecessor's business in "substantially unchanged form" and hires its predecessor's represented employees as the majority of its workforce must bargain with the union that represents those employees. While the *Burns* decision generally allows a successor employer to set the initial terms and conditions of employment under which it will hire its predecessor's workers, if it is "perfectly clear" that the employer will retain all of the predecessor's workers, the employer has to bargain with the workers' representative over those initial terms and conditions.

In the *GVS Properties* case, the company had argued that it was not a successor employer because it did not actually choose to hire the workers, but was forced to retain them for 90 days by the local law. At the end of the 90-day retention period, the employer replaced half of the original workers. Disagreeing with that argument, the Board said that the determination of successor employer is made at the time the new employer acquires the company.

* * *

SIMILAR TO New York City's Displaced Building Service Workers Protection Act, a number of municipal laws around the country require a successor employer to retain workers for a specified period following an acquisition. Businesses in jurisdictions with such local laws should consult with labor counsel to consider the possible effects on any acquisition where some or all of the incumbent employees are unionized.

Board Goes After Collective Action Waivers in Arbitration Agreements

Another hot button issue for the National Labor Relations Board has been mandatory arbitration agreements that include a waiver of collective action claims. Beginning in 2012, and again in 2014, the NLRB decided that such agreements as a condition of employment contravene employees' rights under Section 7 of the National Labor Relations Act to engage in protected concerted activity and are a violation of Section 8(a)(1)'s prohibition on interfering with Section 7 rights.

In ***On Assignment Staffing Services, Inc.***, 362 NLRB No. 189 (2015), the Board considered a variation of the situation involved in the controversial 2012 decision, ***D. R. Horton, Inc.*** The facts were not in dispute, and the Labor Board General Counsel moved for summary judgment against the company on the basis of the prior *D. R. Horton* decision. In opposing the summary judgment motion, the employer argued that the On Assignment Staffing Services arbitration agreement contained a 10-day opt-out provision, which made the agreement voluntary and not a condition of employment.

Granting summary judgment, the Labor Board panel majority rejected the employer's argument that the opt-out procedure distinguished the *On Assignment* arbitration agreement from what the Board had found to be unlawful in the *D.R. Horton* case. Failing on two counts, the Board said the arbitration agreement was a condition of employment, despite the opt-out provision requiring employees affirmatively to take action to be exempt from the agreement, thereby burdening the exercise of their right to pursue class or collective litigation. Further, citing authority from the U.S. Supreme Court, the Board found the arbitration agreement violated the Act by requiring workers prospectively to give up their Section 7 rights to pursue collective actions.

The employer has filed a petition for review of the Board's decision with the U.S. Court of Appeals for the Fifth Circuit (No. 15-60642).

For more information on this issue, go to **"Mandatory 'No-Class Action' Arbitration Waivers Interfere with Employee Rights, NLRB Rules,"** at **www.jacksonlewis.com.** For an article on the decision by the U.S. Court of Appeals for the Fifth Circuit in *D. R. Horton, Inc.*, upholding much of the arbitration agreement, including the provision prohibiting class actions, see, **"Employer's Mandatory Arbitration Clause Waiving Employee's Right to Sue in Court Upheld."**

Single Employee Who Files Collective FLSA Action Is Engaged in Protected Concerted Activity

On a related issue, the National Labor Relations Board has decided that "a single employee who files a lawsuit ostensibly on behalf of himself and other employees is engaged in protected concerted activity." In this case, the employee filed a lawsuit under the Fair Labor Standards Act, was discharged, and subsequently filed an unfair labor practice charge alleging he was terminated for engaging in protected concerted activity. ***200 East 81st Restaurant Corp. d/b/a Beyoglu***, 362 NLRB No. 152 (July 29, 2015).

At the unfair labor practice hearing, the discharged employee testified that he had told a co-worker he planned to file an FLSA lawsuit and asked the coworker to join the case. The coworker refused, and there was no evidence that the employee told anyone else or acted on behalf of any other employee when he filed the lawsuit, purportedly on behalf of himself and others who elected to opt in.

The National Labor Relations Board nevertheless found the employee had filed a collective action under the FLSA, although without the consent of any other employees. Absent any other reason for his discharge and relying on its decisions from 2012 and 2014, the Board found the employer had interfered with the employee's Section 7 right to engage in protected concerted activity and the discharge to be unlawful.

Decision Invalidating Confidentiality Policy Turns on Section 7 Rights

In a case with potentially far-reaching implications, the National Labor Relations Board has issued a decision invalidating a confidentiality policy similar to that applied by many employers during workplace investigations. The Board panel majority concluded that an "Interview of Complainant" form used by the employer in conducting workplace investigations violated employees' Section 7 rights under the National Labor Relations Act by requesting interviewees not to discuss the matter with their coworkers while the investigation was continuing. ***Banner Health System d/b/a Banner Estrella Medical Center***, 362 NLRB No. 137 (June 26, 2015).

The disputed interview form directed the investigator to advise all interviewees that their conversation was confidential and that they should not discuss the conversation with their coworkers while the investigation was ongoing. The form further advised the investigator to notify interviewees that "any attempt to influence the outcome of the investigation, any retaliation against anyone who participates, any provision of false information or failure to be forthcoming can be the basis for corrective action up to and including termination."

In reaching its decision, the 2-1 Board majority said, "Employees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers. Such discussions are vital to employees' ability to aid one another in addressing employment terms and conditions with their employer. ... Accordingly, an employer may restrict those discussions only where the employer shows that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights."

For a more detailed discussion of this decision, go to **NLRB Doubles Down in Curbing Secrecy of Employer Investigations.**

Even without the consent of coworkers to join a collective action, the Labor Board found the employer had acted unlawfully in discharging the employee who had filed an FLSA action on behalf of himself and others.

In light of the Labor Board's continued expansion of the scope of NLRA protected concerted activity, the definition of who is an "employee" under the Act, and the reach of the Act through joint employer and successorship issues, employers must evaluate carefully their employee relations strategies. This is true for actions pertaining to a single individual as well as an entire unit of employees. *Jackson Lewis assists employers in keeping abreast of the developments at the Labor Board and the courts and in implementing lawful and effective employee relations programs as part of its Labor and Preventive Practices concentration.*

Go to **Labor and Preventive Practices**, at **www.jacksonlewis.com**.

Developing Law of the Workplace

Historic Anniversaries for EEOC and ADA

The Equal Employment Opportunity Commission marked two historic anniversaries in July 2015: its own 50th anniversary and the 25th anniversary of the Americans with Disabilities Act.

Opening its doors on July 2, 1965, exactly one year following the signing of the Civil Rights Act of 1964, the EEOC was projected to receive 2,000 employment discrimination charges; instead, nearly 9,000 charges were filed that first year. In FY 2014, the agency received 88,778 charges. In addition to Title VII, the agency enforces the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Section 501 of the Rehabilitation Act of 1973, Titles I and V of the Americans with Disabilities Act of 1990, and Title II of the Genetic Information Nondiscrimination Act of 2008.

For more on the history of the EEOC, go to **http://www.eeoc.gov/eeoc/history/50th/thelaw.cfm**.

Twenty-five years after President George H. W. Bush signed the ADA into law, 30 percent of all discrimination charges filed with the EEOC allege disability discrimination; in FY 2014, nearly 25,500 such charges were filed, and the agency obtained more than $95 million for workers with disabilities. Over the past four years, approximately 35 percent of the suits that EEOC filed on the merits included allegations of discrimination under the ADA.

To commemorate the ADA's 25th anniversary, the EEOC published an **ADA Resources** webpage, which contains a digest of significant litigation initiatives by the EEOC to enforce the ADA and its 2008 Amendments Act. In its **Strategic Enforcement Plan FY 2013-2016**, the agency announced enhanced ADA enforcement efforts through targeting barriers in recruitment and hiring and in addressing emerging or developing issues concerning coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat, as well as accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act and the Pregnancy Discrimination Act.

For more on the EEOC's ADA initiatives, go to "**The ADA at 25**" at **www.eeoc.gov**.

By FY 2014, 30 percent of all discrimination charges filed with the EEOC alleged disability discrimination.

EEOC Proposes Rulemaking on Wellness Programs

The EEOC has announced that it plans to promulgate rules that address the ADA's application to employer wellness programs that are part of group health plans. The proposed rules would amend the EEOC's ADA Title I regulations to provide guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that include disability-related inquiries or medical examinations.

The EEOC acknowledges that guidance is needed on how wellness programs offered as part of an employer's group health plan can comply with the ADA consistent with provisions governing such programs in the Health Insurance Portability and Accountability Act, as amended by the Affordable Care Act. In addition, the agency announced that it soon will issue amendments to EEOC's regulations implementing Title II of the Genetic Information Nondiscrimination Act to address employer wellness programs: "Our goal is to propose rules that harmonize ADA and GINA requirements with HIPAA and the ACA, as well as to provide certainty to employers about their obligations."

Wellness programs may not be used to discriminate based on disability. Employees may not be required to participate in a wellness program, and they may not be denied health coverage or disciplined if they refuse to participate.

The EEOC's Notice of Proposed Rulemaking is published in the Federal Register at **https://federalregister.gov/a/2015-08827**, and the Commission has published a **Fact Sheet for Small Businesses** and a **Question and Answer** document.

For more information and analysis, go to **EEOC Issues Proposed Rule on Application of the ADA to Employer Wellness Programs**, at **www.eeoc.gov**, and **"EEOC Releases Proposed Rule on Workplace Wellness Programs for Public Comment"**, at **www.jacksonlewis.com**.

The Jackson Lewis **Disability, Leave and Health Management** practice group takes a multi-disciplinary and collaborative approach to address the complex issues facing employers striving to comply with an array of laws while administering policies and programs to facilitate a productive and healthy workforce. For further reading and analysis in this area, go to **www.jacksonlewis.com**.

Jackson Lewis News & Events

Read about the latest developments and achievements in our **Press Room** at **www.jacksonlewis.com**.

Jackson Lewis Opens 57th Office in Madison, Wisconsin

We have expanded our presence in Wisconsin with a new Madison office. Six attorneys formerly with the Constangy, Brooks, Smith & Prophete law firm established our second Wisconsin office. The firm's Milwaukee location opened in 2010. The new office is led by Office Managing Shareholder Mark P. Tilkens. Other new Shareholders are Daniel D. Barker, Elizabeth A. Erickson and Tony H. McGrath. Sharon Mollman Elliott and James K. Pease, Jr. join the Firm as Of Counsel. We look forward to combining the new Madison attorneys with our current Milwaukee team and other Midwestern offices as we continue to grow regionally.

Jackson Lewis Designated BTI Employment Litigation 'Powerhouse'

We are pleased to announce that for the **fifth consecutive year** the firm has been designated a **Powerhouse in both Complex and Routine Litigation** in the ***BTI Litigation Outlook 2016: Changes, Trends and Opportunities for Law Firms***. The results of this in-depth analysis of today's litigation market are based on extensive one-on-one interviews with over 300 corporate counsel from Fortune 1000 companies.

More Jackson Lewis Lawyers Included in *Best Lawyers in America 2016*

Jackson Lewis P.C. is pleased to announce **137 of the firm's attorneys** have been named to the 2016 edition of ***Best Lawyers***. In addition, **10 attorneys were named "Lawyer of the Year"** in their respective specialties and metropolitan areas. The firm's presence in this prestigious publication has grown steadily each year, with the number of attorneys listed more than tripling since the 2010 edition.

"We are pleased to again have so many of our attorneys recognized in the 2016 edition of ***'Best Lawyers in America,'*** *and I am proud to see our presence on this list continue to grow,"* said Chairman **Vincent A. Cino**. *"These practitioners help distinguish Jackson Lewis as one of the country's leading workplace law firms."*

Jackson Lewis Receives Top Rankings in 2016 "Best Law Firms" Report

Jackson Lewis P.C. is pleased to announce the Firm has again been recognized for excellence and ranked in the **First Tier nationally in Employment Law – Management; Labor Law – Management; and Litigation – Labor & Employment** in the *U.S. News – Best Lawyers*® 2016 "Best Law Firms" report. **Eighty percent of the firm's 57 regional locations were recognized for excellence in Tiers 1 and 2 of the Metropolitan Rankings in various labor and employment categories.** These rankings follow the recently released ***2016 Best Lawyers in America***© list in which almost 140 Jackson Lewis attorneys were recognized.

"*We are proud to again be selected as a Top Tier firm by our peers,*" said Firm Chairman **Vincent A. Cino**. *"This recognition is a testament to the talent, drive and passion of our attorneys, and underscores our commitment to providing our clients with superior client service and the absolute best in labor and employment representation."*

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Countdown to Election 2016: Impact on the Workplace

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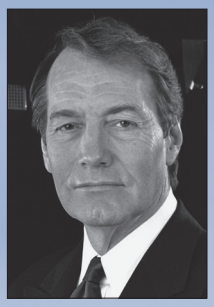

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Founded in 1958, Jackson Lewis is dedicated to representing management exclusively in workplace law. With 800 attorneys practicing in major locations throughout the U.S. and Puerto Rico, Jackson Lewis is included in the AmLaw 100 and Global 100 rankings of law firms. The firm's wide range of specialized areas of practice provides the resources to address every aspect of the employer/employee relationship. Jackson Lewis is a leader in educating employers about the laws of equal opportunity and, as a firm, understands the importance of having a workforce that reflects the various communities it serves.