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BUSINESS DAY

Labor Board Ruling Eases Way for Fast-Food Unions' Efforts

By NOAM SCHEIBER and STEPHANIE STROM AUG. 27, 2015

WASHINGTON — The National Labor Relations Board, in a long-awaited ruling, made it easier on Thursday for unions to negotiate on behalf of workers at fast-food chains and other companies relying on contractors and franchisees.

The ruling, adopted in a 3-to-2 vote along partisan lines, was immediately attacked by business groups, who called on the Republican-controlled Congress to overturn it.

Employers like McDonald's and Yum Brands are also likely to challenge the decision if unions manage to organize a group of employees at one or more of their franchises, if not well before that.

The labor board, which is charged with protecting workers' rights to organize, changed the definition of a crucial employer-employee relationship that had held in some form since the Reagan era of the 1980s.

Now, a company that hires a contractor to staff its facilities may be considered a so-called joint employer of the workers at that facility, even if it does not actively supervise them.

A union representing those workers would be legally entitled to bargain with the parent company, not just the contractor, under federal labor law.

“The decision today could be one of the more significant by the N.L.R.B. in the last 35 years,” said Marshall B. Babson, a lawyer who helped write a brief opposing the rule for the U.S. Chamber of Commerce. “Depending on how the board applies its new ‘indirect test,’ it will likely ensnare an ever-widening circle of employers and bargaining relationships.”

For example, if employees at a fast-food restaurant run by a franchisee were to unionize — something almost none have succeeded in doing to date — they would immediately be entitled to negotiate not just with the owner of the individual restaurant but also with the corporate headquarters.

If the corporate parent were to agree to pay higher wages or provide better benefits, it would apply only to that particular restaurant, in the same way that concessions granted to employees in a single unionized portion of a national company that is not franchised apply only to that portion. At the same time, however, the concessions may give unionized employees at other locations practical leverage in their negotiations with the company.

Many large companies maintain that they should not be required to bargain with employees of their contractors or franchisees, and that they should not be held liable for violations of those workers’ rights, if they exert control over the employees’ work conditions only in indirect ways, such as limiting what they can be paid for certain tasks.

The labor board explicitly rejected that logic. “It is not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace,” the Democratic majority wrote, addressing the purpose of the National Labor Relations Act. “Such an approach has no basis in the act or in federal labor policy.”

Wilma B. Liebman, a former N.L.R.B. chairwoman who wrote a crucial dissent in a 2002 case on the subject, said that the ruling was especially important because “sometimes the contractor is such a small entity, it exists on such a shoestring, that you have to get the lead firm to the table.”

The case the board ruled on involved a company called Browning-Ferris Industries of California, which the N.L.R.B. found was a joint employer of workers hired by a contractor to help staff the company's recycling center. Unions are expected to seek to apply the ruling beyond the circle of companies that rely on contractors and staffing agencies, extending it to companies with large numbers of franchisees — even, some argue, to money managers who own significant stakes in corporations.

The joint employer designation could also make it easier to unionize in the first place. There have been instances in the past in which corporations appear to have terminated a franchise or contractor when that particular outfit was on the verge of unionizing, simply to avoid a union. This is legal for the corporation to do under existing law, but the franchisee or contractor cannot shut down on its own for this reason. As a joint employer, however, the corporation could no longer resort to this tactic.

"If you are a joint employer and you decide to shut down, there may well be liability," Ms. Liebman said.

The ruling may have an immediate effect on a case the labor board is litigating against McDonald's and several of its franchisees. In that case, the N.L.R.B.'s general counsel, who essentially acts as a prosecutor, asserts that the company is a joint employer along with a number of franchisees, making it potentially liable for numerous reported violations of workers' rights, like retaliating against those who have tried to organize unions.

Business representatives said the labor board was making it much harder to operate franchises in the future, undermining a popular path for many entrepreneurs.

Richard Adams, a former McDonald's franchisee who runs a franchise consulting firm, said the ruling made no sense to him, given how most franchise businesses operate.

"It's so far from the reality of what actually takes place in the business that it can't have any practical application," Mr. Adams said. "McDonald's

doesn't control these employees — it doesn't hire them, it doesn't train them, it doesn't supervise them, it doesn't pay them, it doesn't even have their Social Security numbers."

Before the ruling on Thursday, the prevailing doctrine typically required the parent company to exert "direct and immediate" control over working conditions of employees at its franchisees or contractors to be considered a joint employer.

But the ruling moves the standard closer to its more liberal, pre-1980s interpretation. Under the new test, a company can be considered a joint employer even if it has only indirect control over working conditions — say, by requiring the use of certain scheduling software that locks in the timing and length of workers' shifts — or if it has the right to control certain conditions even if it doesn't exercise that right.

"This will clearly jeopardize small employers and the future viability of the franchise model," said Steve Caldeira, president of the International Franchise Association, an industry group. "If I'm an existing and/or aspiring franchisee, why would I want to expand my business and/or get into franchising if I don't have the ability to run the day-to-day operations of the business?"

At the Browning-Ferris recycling facility, where workers had held an election on whether to unionize, the N.L.R.B. found that that the company laid out certain criteria for hiring workers, reserved the right to terminate them, set upper limits on what they could be paid and defined the length of the shifts that they could work, among other conditions.

"This decision will make a tremendous difference for workers' rights on the job," said James P. Hoffa, general president of the International Brotherhood of Teamsters, which brought the complaint. "Employers will no longer be able to shift responsibility for their workers and hide behind loopholes to prevent workers from organizing or engaging in collective bargaining."

The board framed its ruling by noting that the proliferation of contingent workers in the labor market in recent decades had made the issue more urgent.

"If the current joint-employer standard is narrower than statutorily necessary, and if joint-employment arrangements are increasing," the N.L.R.B. majority wrote in the ruling, "the risk is increased that the board is failing in what the Supreme Court has described as the board's 'responsibility to adapt the act to the changing patterns of industrial life.' "

The labor board's action was in line with a key contention of the Obama administration. Top Labor Department officials have argued that the rise of franchising, contracting and other arm's-length arrangements in recent decades has gradually pushed millions of workers outside the formal boundaries of the organizations that effectively control their working lives.

According to David Weil, the head of the Labor Department's wage and hour division and the author of an influential book on the subject titled "The Fissured Workplace," this makes it more likely that workers will be deprived of such protections as minimum wages, overtime pay and the right to unionize.

In a testament to the dread with which they regard Dr. Weil's work on these issues, advocates for business were quick to see his influence. "Let's assume what he says is correct," said Mr. Babson, the lawyer who helped write the brief for the U.S. Chamber of Commerce. "The answer is Congress needs to look at this, not the N.L.R.B."

In a reference to a former chairman of General Electric, he added: "David Weil calls it fissurization. Jack Welch calls it common sense."

A version of this article appears in print on August 28, 2015, on page A1 of the New York edition with the headline: Labor Board Ruling Eases Way for Fast-Food Unions' Efforts.