Labor Rules: Union Walk Around Rule and Broadened Joint Employer Standard

*By Karen Harned**

Note from the Editor:

This article is about new labor rules, including the so-called union walk around rule and the broadened joint employer standard. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. Generally, the Federalist Society refrains from publishing pieces that advocate for or against particular policies. However, when we do, as here, we will offer links to other perspectives on the issue, including ones in opposition to the arguments put forth in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

• Abigail Rubenstein, *OSHA Inspections Could Become New Union Organizing Tool*, Law360 (May 10, 2013), http://www.law360.com/articles/440624/osha-inspections-could-become-new-union-organizing-tool.

• Jeff Spross, *How McDonald's Puts the Squeeze on Both Franchise Owners and Workers*, The Week (August 31, 2015), http://theweek.com/articles/574355/how-mcdonalds-puts-squeeze-both-franchise-owners-workers.

• Shan Li, *On the Record: UCLA's Victor Narro Explains NLRB 'Joint Employer' Ruling*, Los Angeles Times (September 3, 2015), http://www.latimes.com/business/la-fi-qa-nlrb-20150903-story.html.

I. Labor Regulation by the Occupational Safety and Health Administration and the National Labor Relations Board

One cabinet level agency and two independent agencies regulate the majority of issues relating to the American worker. The Department of Labor houses various administrations, including the Wage and Hour Administration, which ensures that workers are paid a fair wage, and the Occupational Safety and Health Administration (OSHA), which ensures that working conditions are safe. The National Labor Relations Board (NLRB) serves as the arbiter of conflicts between labor and management and protects workers' right to organize. Finally, the Equal Employment and Opportunity Administration protects workers against illegal discrimination.

Examples of executive overreach can be found within each of these agencies, but two recent examples stand out as especially egregious. OSHA's "Union Walk Around Rule" and NLRB's pursuit of a much broader "joint employer standard" have the potential to impact a great number of employers and workers, along with the vitality of the American economy.

Both OSHA and NLRB are arguably acting outside the scope of their statutory authority in pursuing these policies. In addition, neither agency provided an opportunity for public comment as envisioned under the Administrative Procedure Act prior to proposing or implementing these changes.

II. OSHA's Underground "Union Walk Around Rule"

a. OSHA's Rule

On Feburary 21, 2013, Former Deputy Assistant Secretary for OSHA, Richard Fairfax, announced OSHA's "union walk around rule" in a controversial opinion letter responding to a union official.[1] The so-called "Fairfax Memo" concludes that an employee may ask that a union official accompany OSHA officials during safety inspections of a worksite, regardless of whether the company is unionized or has a collective bargaining agreement in place. Accordingly, the Fairfax Memo provides that a union representative may accompany an OSHA inspector as an employee's "personal representative," provided that the employee has requested the union official's presence and the OSHA inspector agrees to allow it.[2] The employer has no say in the arrangement. Under the Fairfax Memo, employers must allow union officials to walk around the worksite with OSHA inspectors.

b. The Rule's Context

Under the Occupational Safety and Health Administration Act, employees are permitted to have a "personal representative" present during OSHA inspections.[3] But the "union walk around rule" stretches the text of the Act quite liberally. A plain reading of the pertinent statutory language would not suggest that a non-employee union official should be considered a personal representative:

> The representative(s) authorized by employees shall be an employee(s) of the employer. However, if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer . . . is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection.[4]

This seems to require a showing of "good cause" on an individualized basis for any third party to be present in an OSHA inspection.[5] The Fairfax Memo's blanket conclusion that union representatives may be present without such a showing runs contrary to the text of the regulation and OSHA's interpretation of the statute, regulations, and Field Manual.[6] Indeed, it makes little sense to assume that the presence of a union official will necessarily do anything to facilitate a proper inspection or be deemed "necessary" for "an effective and thorough physical

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inspection." Furthermore, this significant change of longstanding OSHA policy was implemented without any notice to the public or opportunity to comment, both of which are required by the Administrative Procedure Act. Finally, the Fairfax Memo raises constitutional concerns since it requires business owners to allow physical invasions of their property by parties who are not essential to an administrative inspection.[7]

III. NLRB's Proposed Change to the Joint Employer Standard

a. NLRB's Proposed Change

On August 27, 2015, in *Browning-Ferris Industries of California, Inc.*, NLRB overturned the existing joint employer standard, which had been in place since 1984.[8] Under the old standard, an entity was a joint employer if it exercised *direct and immediate control* over another business' employees by, for example, having the ability to hire, fire, discipline, supervise, or direct individual employees. Entities were joint employers only when they shared that *direct control* over the terms and conditions of employment for the same employees. Under the previous standard, franchisors, franchisees (independent businesses), and subcontractors operate as separate businesses.

In May 2014, NLRB announced that it would treat McDonald's USA LLC (McDonald's) and its franchisees as joint employers.[9] Then, in December 2014, NLRB filed 13 complaints asserting that McDonald's and its franchisees should be held jointly liable for numerous alleged violations of labor law stemming from alleged misconduct on the part of McDonald's franchisees.[10] There is a serious question as to whether McDonald's may be held liable, as a franchisor, for the actions of its franchisees.

The decision to treat McDonald's as a joint employer is highly controversial. With this move, NLRB effectively announced new rules that will have far-reaching implications for businesses working with independent companies. As one business owner put it, NLRB's newly announced rule throws "a hand-grenade in the middle of the [franchising] business model."[11] NLRB's new approach treats franchisors as joint employers with franchisees, or other independent contracting firms, so long as they exert "significant control" over the same employees—a standard that NLRB now argues can be satisfied simply by demonstrating that a franchisor has exerted signifiant control over every-day business operations, without regard to whether the franchisor has exercised any control over personnel decisions.[12] This not only jeopardizes the entire franchisor-franchisee model, but it contravenes 30 years of case law establishing that a franchisor is not a joint employer unless the franchisor actively exerts control over employment decisions, such as by setting wages or administering discipline.[13]

b. The Change in Context

NLRB first advanced this new rule in an amicus brief filing before an Administrative Law Judge (ALJ) in June 2014.[14] In the case of *Browning-Ferris Industries of California, Inc.*, NLRB argued that the ALJ should change the 30-year-old joint employer rule because today's franchising practices demonstrate the need for a change in order to promote "meaningful collective bargaining . . . [because] . . . some franchisors effectively control [] wages 'by controlling every other variable in the business except wages . . . .'"[15] Accordingly, *Browning-Ferris* may well pave the way for NLRB's enforcement actions against McDonald's. The case also could result in other "fishered" industries—like staffing companies—to be considered joint employers under the new rule.

The new rule imposes regulatory burdens, including expanded liabilities, on businesses throughout the country. In addition, NLRB's position would cause major disruptions for thousands of companies across the nation, as franchisors would be forced to take a more hands-on role in the franchisee's employment decisions, and an independent business would need permission from the franchisor to hire, fire, or discipline its employees.

IV. Discussion of OSHA's and NLRB's Rationales for the Rules

There has been a precipitous decline in union membership over the last thirty years. Many believe that the practical effect of both of these rules will be to help increase union membership. The OSHA rule could incentivize unions to use OSHA complaints as an organizing tactic. Through an OSHA inspection, union officials could gain access to non-union employees and begin laying the groundwork for a unionization campaign.[16]

The NLRB rule also promises a significant increase in union membership. The new broader standard will make it easier for unions to gain access to a larger company. By organizing a subcontractor first, the union can say that the company who uses the subcontractor should also be unionized. Similarly, in the franchising model, unions will no longer need to fight unionization campaigns on a piecemeal basis in every franchisee location. Instead, unions can seek to unionize all non-corporate franchisees in one election.[17]

V. Guiding Principles Going Forward

OSHA's union walk around rule and NLRB's recent decision to broaden the joint employer standard completely overturn decades of labor and employment law upon which businesses and workers have relied. Absent significant evidence that such fundamental legal changes are necessary, the executive should not change the law. If evidence suggests that such legal changes should be made, Congress—not unelected agency officials—should propose and consider them. Executive agencies should not be permitted to change decades of law for millions of businesses and workers through a memorandum or enforcement position. That is the constitutional system America's founders envisioned and upon which America's job creators rely.

Endnotes

1 Letter from Richard Fairfax, Deputy Assistant Secretary, Occupational Safety & Health Administration, to Steve Sallman, Health and Safety Specialist, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (Feb. 21, 2013), *available at* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604 (last visited Feb. 11, 2015).

2 Roy Mauer, Union Reps Arrived with OSHA at Safety Inspections, Society for Human Resource Management (Mar. 27, 2014), *available at* http://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/union-reps-osha-inspections.aspx (last visited Feb. 11, 2015).

3 29 C.F.R. § 1903.8(c).

4 *Id.*

5 Brennan W. Bolt, OSHA Says Nonunion Employees Can Select Union Representatives to Participate in OSHA Inspections, Labor Relations Today, McKenna Long & Aldridge LLP (Apr. 19, 2013), *available at* http://www.laborrelationstoday.com/2013/04/articles/unions/osha-says-nonunion-employees-can-select-union-representatives-to-participate-in-osha-inspections/ (last visited Feb. 11, 2015) ("This OSHA Interpretation is significant to labor relations because it appears to dilute OSHA's own regulations requiring that the employee representative be employed by the employer being inspected except in limited circumstances.").

6 Testimony of Maury Baskin on behalf of the National Association of Manufactures and Associated Builders and Contractors, Inc., before the U.S. House of Representatives Committee on Education and The Workforce, Subcommittee on Workforce Protections on "OSHA's Regulatory Agenda: Changing Long-Standing Policies Outside the Public Rulemaking Process" (Feb. 4, 2014).

7 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

8 362 NLRB No. 186, *In re: Browning-Ferris Industries of California, Inc.*, National Labor Relations Board Case 32-RC-109684, (Aug. 27, 2015).

9 NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer, National Labor Relations Board, Office of Public Affairs (Jul. 29, 2014), *available at* http://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-authorizes-complaints-against-mcdonalds (last visited Feb. 11, 2015).

10 Adam C. Abrahms, Steven M. Swirsky, and D. Martin Stanberry, NLRB Issues 13 Complaints Alleging McDonald's and Franchisees Are Joint Employers, Management Memo, Epstein Becker Green (Dec. 19, 2014), *available at* http://www.managementmemo.com/2014/12/19/nlrb-issues-13-complaints-alleging-mcdonalds-and-franchisees-are-joint-employers/ (last visited Feb. 11, 2015).

11 Kate Taylor, Franchise Industry Strikes Back at NLRB's 'Joint Employer' Decision, Entrepreneur (Sept. 23, 2014), *available at* http://www.entrepreneur.com/article/237759 (last visited Feb. 11, 2015).

12 *Supra* note 9.

13 Kenneth R. Dolin, Review of NLRB's Specialty Healthcare Test for "Appropriate" Bargaining Units—Part II, Employer Labor Relations Blog, Seyfarth Shaw LLP, *available at* http://www.employerlaborrelations.com/.

14 https://www.dlapiper.com/en/us/insights/publications/2014/08/employment-fissuring-in-franchising/ (last visited Feb. 11, 2015).

15 In re: Browning-Ferris Industries of California, Inc., National Labor Relations Board Case 32-RC-109684, Amicus Curiae Brief of NLRB, 14-15, *available at* http://www.laborrelationsupdate.com/files/2014/07/GCs-Amicus-Brief-Browning-Ferris.pdf (last visited Feb. 11, 2015).

16 Lipkin, Harriet A. and LaRocca, Dianne Rose DLA Piper LLP (US); Michael J. Lotito, Littler Mendelson PC, "NLRB Joint Employer Redinition Threatens Franchisors," *available at* http://www.law360.com/articles/613307/nlrb-joint-employer-redefinition-threatens-franchises.

17 U.S. Chamber of Commerce, Workforce Freedom Initiative, "Opportunity at Risk: A New Joint-Employer Standard and the Threat to Small Business" (2015), *available at* http://www.workforcefreedom.com/sites/default/files/Joint%20Employer%20Standard%20Final_0.pdf.