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BUSINESS DAY

Labor Board Says Contractors' Workers Can Bargain With Parent Company

By NOAM SCHEIBER AUG. 27, 2015

WASHINGTON — The National Labor Relations Board in Washington on Thursday made it substantially easier for unions to bargain for higher wages and benefits, potentially opening the door for organized workers at fast-food chains and other franchises to negotiate with corporations like McDonald's and Yum Brands, rather than with individual restaurants, where they might have a harder time achieving their goals.

"This is about, if employees decide they want to bargain collectively, who can be required to come to the bargaining table to have negotiations that are meaningful," said Wilma B. Liebman, a former N.L.R.B. chairwoman who wrote a crucial dissent in a 2002 case on the subject.

The ruling, which may eventually be challenged in court in a variety of individual disputes, changes the definition of a crucial employer-employee relationship that had held in some form since 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 now be legally entitled to bargain with the upstream company, not just the contractor, under federal

labor law.

“The ruling is 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,” Ms. Liebman said.

In the case, the N.L.R.B. held that a company called Browning-Ferris Industries of California was a joint employer of workers hired by a contractor to help staff the company’s recycling center. But the ruling could apply well beyond companies that rely on contractors and staffing agencies, extending to companies with large numbers of franchisees.

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

Beyond Browning-Ferris, the ruling may have a significant 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.

Thursday’s N.L.R.B. ruling, by enshrining a broader joint-employer definition into doctrine, makes it more likely to apply in the McDonald’s case as well, though experts point out that joint employer designations are typically very dependent on the circumstances of each case.

Business representatives said the ruling could make it much harder to operate franchises in the future, undermining a popular path for many

entrepreneurs.

"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?"

Before Thursday's ruling, the prevailing doctrine typically required the upstream 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 N.L.R.B. ruling moves the standard closer, if not all the way back, to what some say is 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, through requiring the use of certain scheduling software that affects the timing and length of workers' shifts.
