Labor Law Update

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Board Decisions Regarding Contingent Employment – Staffing Agencies, Subcontractors, and Independent Contractors

National Labor Relations Board decisions have signaled a significant change in approach to questions of contingent employment relationships under the Act. It remains to be seen how a change in composition of the Board under a new administration will affect this trend in the case law.

Browning-Ferris Industries of California, Inc.**,362 NLRB No. 186 (2015)**. The Board held that a user employer is a joint employer with a supplier employer if: 1) They are both employers within the meaning of common law and 2) They share or co-determine matters governing the essential terms and conditions of employment. In finding that Browning-Ferris was a joint employer with its staffing agency, the Board jettisoned its previous standard requiring that the employer must actually exercise control over terms and conditions of employment and found that the right to control is sufficient. The Board also held that indirect control is enough, and that control need not be exercised directly and immediately. The Board explained that changing economic circumstances justified adoption of this standard, particularly the increase in contingent employment relationships. This case increases the likelihood that user employers will be held to be joint employers with their supplier employers under the Act.

Retro Environmental, Inc.**, 346 NLRB No. 70 (2016)**. The Board applied the *Browning-Ferris* standard in finding that a construction company and a temporary staffing agency were joint employers due to the likelihood that the construction company would maintain control over terms and conditions of employment on future projects. The Board emphasized that the user employer determined the number of employees hired and their qualifications and certifications and had the right to request a replacement if an employee underperformed. This case indicates that a typical user employer/staffing agency relationship may be sufficient to establish a joint employer relationship.

Miller & Anderson, Inc.**, 39 NLRB 206 (2016)**. The Board held that employer consent is no longer required for employees to obtain a representation election in a bargaining unit that contains both solely and jointly employed employees of a single user employer. In other words, employees can form a combined bargaining unit consisting of both "regular" employees and temporary workers without the employers' approval. This decision removes a significant legal hurdle to labor organizing in industries with large populations of workers employed through staffing agencies. Going forward the appropriateness of combining staffing agency workers and regular employees in a single unit will be decided based on the community of interest standard rather than employer discretion.

Pacific 9 Transportation, Inc.**, Advice Memo, Case 21-CA-150875 (December 18, 2015)**. The NLRB Division of Advice considered the question of whether the Employer's misclassification of its statutory employees as independent contractors violates the Act. The Division of Advice concluded that the Region should issue a section 8(a)(1) complaint alleging that the Employer's

misclassification of its employees as independent contractors interfered with employees in the exercise of their section 7 rights. The Division of Advice emphasized that the Employer told the employees that they supposedly had no right to form a union because they were independent contractors. This guidance calls for strengthening the Act's protections of employees who are misclassified as independent contractors.

Board Decisions Involving Higher Education

***Pacific Lutheran University*, 361 NLRB No. 157 (2014)**. The Board adopted a new test for the religious exemption to the NLRA. A university "must first demonstrate, as a threshold requirement, that First Amendment concerns are implicated by showing that it holds itself out as providing a religious educational environment." The university "must then show that it holds out the petitioned-for faculty members themselves as a performing a specific role in creating or maintaining the college or university's religious educational environment, as demonstrated by its representation to current or potential students and faculty members, and the community at large." The Board also clarified its *Yeshiva* standard for applying the managerial exclusion by explaining that the analysis should focus on faculty participation in academic programs, enrollment management policies, finances, academic policies, and personnel policies and decisions, giving greater weight to the first three areas.

***Northwestern University*, 362 NLRB No. 167 (2015)**. The Board declined to assert jurisdiction over a representation petition filed by Northwestern University football players. The Board decided to stay out of the high profile world of collegiate athletics. The Board reasoned that "the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of football (in which the overwhelming majority of competitors are public colleges and universities over which the board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case."

***Columbia University*, 90 NLRB 207 (2016)**. The Board ruled that graduate student teaching and research assistants working at private colleges and universities are statutory employees within the meaning of the Act, and are therefore entitled to engage in collective bargaining. The Board expressed reluctance to deny "an entire category of workers the protections of the Act, without a convincing justification." Since the graduate students perform work at the direction of the university for which they are compensated, they are employees under the Act, and such a finding is not "foreclosed by the existence of some other, additional relationship that the Act does not reach."

Concerted Activity Cases

***Hoodview Vending Co.*, 362 NLRB No. 81 (2015)**. The Board ruled that the employer violated the Act by discharging an employee for engaging in a conversation about job security with fellow employees. The Board stated that employee discussions about job security are "inherently concerted," meaning that an employee need not demonstrate that he or she contemplated future collective action. The Board reasoned that like discussions about wages, discussions about job security involve a "vital term and condition of employment" and "are protected, regardless of whether [employees] are engaged with the express object of inducing group action."

***Beyoglu*, 362 NLRB No. 152 (2015)**. The Board held that the "filing of an employment-related class or collective action by an individual employee is an attempt to initiate, induce or prepare for group action, and is therefore concerted activity protected by the Act." An employee told a co-worker that he was going to file a lawsuit against the employer and asked him to join the case, but the co-worker refused. The employee was then terminated by the employer. Although the co-worker did not consent to participate in the lawsuit, the fact that the employee filed a class action regarding wages, hours, or working conditions was protected activity, even if only one employee was involved in the filing of the lawsuit.

***Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015)**. The Board determined that it is unlawful for an employer to adopt a work rule that prohibits employees from recording meetings or conversations with coworkers without a legitimate business justification because such rules impinge upon employees' section 7 rights to engage in protected, concerted activity.

Friedrichs Revisited – The Effort to Constitutionalize "Right to Work"

The issue of whether mandatory agency fees are constitutionally permissible in the public sector was presented last term in the case of *Friedrichs v. California Teachers Association,* 136 S.Ct. 1083 (2016). The case presented a direct challenge to the longstanding precedent in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), which held that a requirement of paying an agency fee or "fair share" fee in the public sector did not violate the First Amendment. After Justice Scalia's death, an equally divided Supreme Court affirmed the Court of Appeals judgment in *Friedrichs*, which adhered to *Abood*. However, multiple cases are currently in process that may present a challenge to *Abood*. One such case is *Janus v. AFSCME Council 31,* Seventh Circuit Case No. 16-3638. In that case the National Right to Work Foundation has requested that the Court of Appeals fast-track the case so that they can petition for Supreme Court review as soon as possible. If the Supreme Court overturns *Abood*, it would establish a "right to work" environment nationwide in the public sector, outlawing agency fees or fair share fees under the federal Constitution.