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Temp Organizing Gets Big Boost from NLRB

August 23, 2016 / Harris Freeman and George Gonos

Now temps and direct employees who work together can bargain together. Making use of the Browning-Ferris ruling, temp workers won a union election last fall at a tire recycling business in New Bedford, Massachusetts. Photo: UFCW Local 328

Thanks to a National Labor Relations Board decision, workers employed by temporary staffing agencies may find it easier to organize and bargain.

The Board issued its [long-awaited ruling](#) last August in the case of Browning-Ferris Industries (BFI). The decision revamped the Board's test for what's considered a "joint employer," imposing new legal obligations on employers who hire through temp agencies and potentially also on giant corporate franchisors.

The new joint-employer standard provides a much more favorable legal framework for workers to form unions at temped-out warehouses, manufacturing and food processing plants, recycling facilities, hotels, and franchised janitorial services and fast food outlets.

Prior to this ruling, a factory that hired workers through a temp agency was not considered their employer and could not be compelled to bargain with the temps who worked at its plant.

The same standard would apply to a corporate franchisor like McDonald's, if it were found to be a joint employer along with the franchise owner.

WHO DECIDES CONDITIONS?

The NLRB applied the new joint-employer test in a union election at BFI's California recycling facility, where all 240 low-wage sorters and screeners were hired through Leadpoint, a temporary staffing agency.

The temps [had voted to join Teamsters Local 350](#), which already represents the 60 forklift operators and truckers directly employed by BFI.

The union argued that the temps should be considered jointly employed by both the temp agency and the recycling facility. As evidence, it pointed to contract terms that gave BFI control over the speed of the conveyor belts and the number of temp workers staffing the lines, as well as the right to discharge any agency worker.

Like many standard temp agency contracts, the agreement also limited the length of a temp's assignment to the facility, and capped the top wage the agency could pay. BFI argued that the temps were not its employees because they were supervised by onsite Leadpoint managers.

The Board sided with the union, finding that the temps' wages and conditions were co-determined by both businesses. It certified a bargaining unit that classified BFI and Leadpoint as joint employers, and ordered both bosses to negotiate with the union.

TEMPS ABOUND

The BFI recycling facility is not unusual. In core industries and service sectors, staffing agency workers are everywhere.

Temp agencies accounted for more than 17 percent of net employment gains after the Great Recession of 2008.

The increase is most dramatic in the [blue-collar and low-wage service sectors](#) where “permatemps” are used to staff entire departments, job clusters, or facilities. In many auto assembly and parts plants, for example, [temp agency workers account for more than half the workforce](#).

Temps are often paid as little as half of what regular employees make, with no benefits or paid holidays. For example, [temps in the Chicago warehousing sector](#) average \$9 an hour, while direct hires average \$12.48, almost 30 percent more. Thousands of employers now use temps this way, splitting their workforces into “core” and “contingent” segments.

Before the BFI decision, temps in these segmented workplaces were denied meaningful collective bargaining. They could not join the same bargaining unit as directly hired employees because, under federal law, they had two different employers.

Even in workplaces where temps made up a majority, the companies that actually controlled the terms and conditions of work weren’t considered their employers, and therefore had no legal obligation to bargain.

And if temps engaged in concerted activity, the company could discharge them simply by requesting replacements from the staffing agency or by re-contracting with a different agency. Even if the workers were able to prove the temp agency committed an unfair labor practice, there would be no way to get rehired at the same company.

A NEW DAY

Now—assuming the ruling survives a federal court appeal—all that has changed.

Another important new NLRB ruling, [Miller and Anderson](#), issued July 11, removes another legal obstacle that prevented temp workers and direct employees from belonging to the same bargaining unit, in workplaces where temps and standard employees work together. This decision eliminates the requirement—reestablished by a Republican-controlled Board in 2004—that temp workers and direct hires could belong to the same bargaining unit only if the user employer and the temp agency both consented to that arrangement.

In addition, where joint-employer relationships exist, unions representing temps will now be able to take advantage of their right to picket and boycott both employers—not just the temp agency. For instance, a union representing or campaigning to organize temps at Amazon distribution centers could picket Amazon facilities or corporate buildings, as well as the temp agency shape-ups where the temps are recruited, without being charged with secondary picketing.

Temps now have stronger legal protections against retaliation. Before BFI, if a certain temp at an auto plant was agitating for a union, the plant manager could simply order the temp agency to end the worker's assignment to this worksite—and suffer no legal consequences, because the plant wasn't considered the temp's employer.

Now, the same action would be considered an unfair labor practice, permitting the Board to order the joint employers to rehire the temp worker with back pay and return him to his job at the auto plant.

Making use of the new ruling, immigrant Guatemalan temp workers [won a union election last fall](#) at a tire recycling business in New Bedford, Massachusetts. Food and Commercial Workers (UFCW) Local 328 now represents the temps in bargaining with the temp agency and the tire business.

The organizing campaign took off after the tire company fired three workers when they asked for a raise. Following a workplace protest, the three were rehired by the temp agency and tire business. One of the fired workers became a central leader of the organizing drive.

FAST FOOD TOO

The Board's new joint-employer test may also be applicable to fast-food franchises, and to janitorial and hotel chains where the Board's control standard is met.

In the face of recent protests against low-wages, the fast-food giants have claimed that each local restaurant is the sole legal employer, even when the corporation dictates the particulars of the production process through franchise agreements and detailed manuals.

The Board's General Counsel has already issued unfair labor practice complaints naming McDonald's as a joint employer, along with a group of its franchisees, for retaliating against workers who protested against low wages and work conditions.

The complaints point out how McDonald's operations manual and computer system, which tracks labor costs and schedules employees, provide means of indirect, but substantial, corporate control over employment decisions. These have been consolidated into a massive case now being heard by an administrative law judge in the Board's New York office.

ORGANIZING POSSIBILITIES

Going forward, the Labor Board will make joint-employer determinations on a case-by-case basis. Outcomes will turn on workers' and unions' ability to assemble a detailed picture of the mechanisms of control in the workplace.

This means that unions and worker centers will need to educate workers on the issue of control over the terms and conditions of employment. They'll need to gather evidence that the alleged joint employer co-determines such matters as schedules, overtime, the number of workers on the job, and the pace of work.

Further evidence will include [franchise agreements](#) and staffing agency contracts, which routinely set forth arrangements granting control over hiring, dismissal, work processes, and production standards to corporate franchises and businesses that hire temps.

These documents may also expose the hefty markups that temp agencies charge—for instance, that the temp agency is receiving \$20 an hour for an employee, and paying wages of just \$10. Such information could be used to encourage temps and permanent employees to fight together for better wages and benefits.

Unions may now get access to these agreements at several points in the process of organizing:

- in the context of proving joint employment, when the Board is determining the appropriate bargaining unit
- when seeking evidence to prove an unfair labor practice
- through information requests in the course of collective bargaining

The recycling center has appealed the BFI ruling to the federal circuit court in Washington, D.C. Whether or not this ruling survives appeal, many organizers agree that, to beat corporate divide-and-conquer, unions will need bring temps and direct employees together.

Harris Freeman is a professor at Western New England University School of Law and teaches at the University of Massachusetts Labor Center in Amherst. George Gonos is a faculty member at the Center for Labor Research and Studies at Florida International University. See one of their many other articles on the temp industry, “Taming the Employment Sharks: The Case for Regulating Profit-Driven Labor Market Intermediaries in High Mobility Labor Markets,” here.

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