With the unabashed aggressiveness of the current NLRB, it should come as no surprise that we may soon be looking at legal precedent on joint employer analyses that are more akin to the Browning-Ferris standard than decades of precedent to the contrary.

The move by Local 1400 is almost predictable in that it would allow the union to get inroads into Google's/Alphabet's infrastructure without attacking the company head-on. By attacking from the edges, unions such as Local 1400 are able to target small subcontractors and, if successful, drag mega companies to the bargaining table.

**Dilemma for Employers**

Union-free employers with subcontracted operations can expect more of this tactic. It is, in effect, the low hanging fruit on otherwise nearly insurmountable trees. The tactic also presents a difficult choice when it comes to union-free strategies. On the one hand, to avoid being potentially roped into joint employer collective bargaining, an employer will want to have some say over... some ability to influence... the conditions of employment of the subcontractor—if for nothing else to assure that it has effective union prevention measures. Reserving such power, however, would likely expose the union-free employer to joint employer liability if the labor board returns to the Browning-Ferris standard.

On the other hand, creating a barrier between oneself and the human resources affairs of a subcontractor provides a clearer legal layer of protection, but, in turn, prohibits the employer from effectively influencing the conditions that can lead to unionization at the subcontractor. For truly independent subcontractors who can be easily jettisoned if their decisions lead to an organized workforce, the dilemma is moot. However, for subcontractors that are more valuable, and perhaps subject to certain levels of control, the dilemma is real.

The takeaway for union-free employers is to analyze the terms of their subcontracts and make a deliberate decision as to whether there is value in reserving rights to influence the conditions of employment at the subcontractor. The key is to have such a term in such subcontracts only if it brings actual value to your business. Such a provision, seemingly innocuous, can soon become a hook that will allow unions to involve you in collective bargaining. Unless terms reserving such rights can be identified as bringing value, the better alternative is to eliminate them from contracts now... while they are still, in fact, innocuous.

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**Campaign Workshop**

**COVID May Not Be Used to Mask Unlawful Terminations**

One cannot overstate the effect that the pandemic, which has now gripped the planet for two years, has had on employers. While COVID-19 has caused much business disruption, it cannot be honestly relied upon to justify every business decision that may be subject to challenge. COVID-19, while frequently a reason, is also sometimes being used as an excuse—sometimes an unpersuasive excuse. Such was the case in a recent decision from an NLRB Administrative Law Judge, in Michell Enterprises, LLC, d/b/a McDonalds, Case No. 01-CA-261495, JD-81-21 (December 30, 2021).

In this case, Michell Enterprises operated fast food restaurants along I-95 in Connecticut, including several McDonald's-branded establishments. In 2018, Local 32BJ, Service Employees International Union began organizing employees at Michell's Darien, Connecticut, McDonald's. After learning that the store's employees were allegedly not receiving sick days or being paid wages required under state law, the union began conducting rallies and demonstrations, including at the Darien location. The actions were covered by local media and involved the state governor as well as state politicians.

Two employees were particularly involved in early organizing efforts, including the solicitation of other employees to sign a petition in support of the union. The two employees were photographed at union protests and one photo, taken with the governor, was distributed at the Darien location. The union and employees continued to stage multiple demonstrations and appeals to the media.

Near the start of the pandemic, Michell laid off many of its employees due to COVID mitigation measures instituted by the government which, among other things, led to an increase in traffic and sales. Among those laid off were the two main employee organizers and two other employees who had demonstrated strong support for the union. When those four laid off individuals were not recalled to work, the union filed an unfair labor practice charge.

The NLRB Administrative Law Judge ruled in favor of the union and the employees. She found (Continued on next page)
the employer clearly knew of the pro-union activities of the employees by reason of their very public support for the labor organization. The judge also found that the employer had exhibited anti-union animus by, among other things as found by the judge:

- A supervisor warning employees that she knew the union was at the Darien location, that signatures were being collected, and that the union “wasn’t good for any of [the employees]” and that “if [employees] accepted to be in the Union, [they] would have a lot of problems.” (A clear threat of unspecific reprisals for support the union).

- Supervisors were observed walking around the protests and “appearing to photograph or video tape the protestors.” (By doing so, without justification, an employer can be found to have created an unlawful appearance of surveillance).

The main thrust of the decision, however, was found in the judge’s conclusion that “On its face, the economic plight resulting from the pandemic may appear to be a reasonable justification for not returning the [union advocates] to work in May. However, I find that [the employer] seized upon it as a pretext and cover for retaliating against the [former employees] for engaging in Union and other protected activity in violation of the Act.” In rejecting the employer’s arguments, the judge found many of the employer’s witnesses were not credible and the employer could not reconcile purported shift unavailability of the discriminatees with the actual openings available. She questioned why the fired employees, who were among the longest-serving employees at the restaurant with good job performance records, would not have been recalled when employees started to be returned to work.

In short, the court concluded, “Here, [the employer’s] articulated reasons have been proven to be false and a mere pretext to cover its scheme to use the pandemic layoffs as an excuse to terminate the discriminatees. Therefore, I find that [the employer] violated the Act when it failed to recall the four discriminatees.”

The decision provides an important reminder to management in making adverse employment decisions in the context of union organizing. The NLRB and administrative law judges will not take proffered reasons for such actions at face value, no matter how compelling (for example, a global pandemic) they may seem. The government will drill down on the motivations underlying such actions. If those motivations are not legitimate, non-discriminatory and capable of being credibly articulated and supported by objective evidence, defeating unfair labor practice charges can be an uphill battle. The financial burden of defending such claims, having a union succeed in forcing the employer to reinstate its primary supporters can be devastating to an effort to maintain union-free status. Careful legal consideration should always be given before taking adverse actions, whether by termination or failure to recall, that impact union organizers.

**Countering the Union’s Offer of a “Trial Period”**

A favorite strategy of union organizers is attempting to persuade reluctant voters to cast a “trial vote” in favor of the union. The union promises that if the employees are unhappy with the union after a year, “You can always vote us out.” Of course, it is not so simple. Complicated rules govern decertification petitions. Without the assistance of employers, which is prohibited when employee seek to decertify, employees unhappy with a union often become so overwhelmed and disillusioned by the decertification process that they give up trying. Further, union representatives generally do not sit idly by when employees seek to develop support for a decertification effort. Union representatives can exert significant pressure on employees “to keep them in line” and squash their efforts towards certification.

What can an employer do during a union organizing campaign to educate employees on the realities of decertification and the fact that a “trial year” is really nothing other than a false union promise? The best approach is often found in sample questions and answers published to employees.

**Sample No. 1**

**Q.** Why can’t we try out the union for a year and then drop it if we don’t like it?

**A.** You should all know that once a union is voted in, it is very difficult to get out.

If a contract is negotiated, you lose your right to get rid of the union during the term of the contract, except for a very short window of time near contract expiration. During the first year following a union election, there is nothing you can do get rid of a union, even if the union is not able to negotiate a contract with us.

In addition to this potential limitation on when you are allowed to try to get rid of the union, the procedure to decertify a union is very complicated, technical and often requires you to foot the bill. Sometimes, employees feel the need to hire their own lawyer to represent them at NLRB proceedings... at their own expense! The company cannot give you any help to eliminate a union... that is illegal.