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ALLEGHENY COUNTY LABOR COUNCIL
REPORT OF LEGAL COUNSEL
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Relaxation of the NLRB's Joint-Employer Standard

Recent events at the NLRB indicate that dramatic changes may be on the horizon for collective bargaining in industries where franchising and independent contracting are common. Although no final decisions have been made, the NLRB appears to be reconsidering the standard it applies when determining whether a business is a joint-employer.

Under the current joint-employer standard, businesses are typically not required to bargain with, nor are they liable for unfair labor practices filed by, employees of their franchisees or independent contractors. Businesses are not found to constitute joint-employers unless they actually exercise substantial, direct, and immediate control over the employment matters of their franchisees' and independent contractors' employees. In industries where franchising and independent contracting are common, it is difficult to meet this standard because potential joint-employers typically exercise only indirect control. Given how difficult the current joint-employer standard is to meet, it is quite difficult to organize workers and hold businesses liable for violating their employees' rights in these industries.

On June 26, 2014, the NLRB General Counsel filed a brief in *Browning-Ferris Industries of California, Inc.*, Case No. 32-RC-109684, urging the Board to revise its joint-employer standard in order to be consistent with changing patterns in the American economy. The General Counsel argued that the current standard is significantly narrower than the standard that existed before the Board's *Laerco Transportation* and *TLI, Inc.* decisions in 1984. The General Counsel also argued that the current standard is inconsistent with the NLRA because (1) the use of the term "employer" was intended to be construed broadly, (2) the current joint-employer standard inhibits meaningful collective bargaining given changing patterns in the American economy, and (3) the bargaining obligation covers any entities that are essential for meaningful bargaining. Although the Board has not yet issued a decision in this case, the General Counsel has clearly articulated the opinion that the Board should relax the requirements necessary to find that a business constitutes a joint-employer.

Also, on July 29, 2014, the NLRB General Counsel announced that it found merit in 43 charges alleging that McDonald's franchisees and McDonald's, USA, LLC violated the rights of employees as a result of activities surrounding employee protests. However, what is particularly

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noteworthy is that the General Counsel has determined that McDonald's, USA, LLC constitutes a joint-employer of workers employed by its franchisees. As a result of this determination, the General Counsel intends to name McDonald's, USA, LLC as a Respondent if the parties are unable to reach a settlement in the case. This announcement is particularly important because it shows the willingness of the General Counsel to name a business as a Respondent based upon unfair labor practice charges filed by employees of its franchisees.

If the NLRB ultimately relaxes the joint-employer standard, this change will make it easier to organize employees and easier for unions to assert their members' rights in industries where franchising and independent contracting are common. Relaxation of the joint-employer standard would be a welcomed development because it would make it more difficult for businesses to avoid the collective bargaining process and evade liability for unfair labor practices by using franchising and independent contracting. We will keep the Allegheny County Labor Council informed about new developments regarding these exciting potential changes at the NLRB.

Respectfully submitted,

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