$6.00 Monthly /:$60.00 per year September, 2015 Volume XIII, No. 09

SMAC Of CALIFORNIA

SMAC Legislative Report

News from the Small Manufacturers Association of California

*A compilation of news and commentary on the recent actions of California legislators and bureaucrats in Sacramento*

# OBAMA NLRB RULES EMPLOYERS USING STAFFING FIRM TEMPS ARE 'JOINT EMLOYERS;" MUST NEGOTIATE LABOR CONTRACTS

"We suppose that our colleagues do not intend that every business relationship necessarily entails joint employer status, but the facts relied upon here demonstrate the expansive, near-limitless nature of the majority's new standard."

NLRB Board member dissent,

"Commerce depends on the enforceability, in most instances, of a duly executed written contract. A party cannot avoid a contractual obligation merely by complaining that the deal, in retrospect was unfair or a bad bargain."

California Supreme Court *Sanchez v. Valencia Holding Co., LLC*, decision

By Tom Martin
SMAC Executive Director
& Legislative Chairman

National Labor Relations Board (NLRB) members, following party lines, have voted 3 to 2 to redefine the employee-employer relationship by granting new bargaining powers to workers caught up in an economy increasingly reliant on subcontractors, franchisees and temporary staffing agencies, according to The Washington Post reporter Lydia DePillis.

The decision by the federal board, appointed by Obama based on union recommendations, could upend the traditional arms-length relationship that has prevailed between corporate employers who use staffing firms to hire employees for them. Especially impacted will be corporate titans such as McDonald's and its neighborhood fast-food franchises, and Uber and Lyft which employ "independent contractor" labor.

In a case that drew intense lobbying by both business and union groups Democratic appointees on the panel split 3-2 with Republicans to adopt a more expansive definition of what it means to be an "joint employer," making it more difficult for companies to avoid responsibility through various forms of outsourcing.

In doing so, DePillis said the panel sided with labor advocates and academics who have described an increasingly "fissured" economy, in which whole industries have been built on business models that offer workers few of the protections of a traditional employer relationship.

"With more than 2.87 million of the nation's workers employed through temporary agencies in August 2014, the Board held that its previous joint employer standard has failed to keep pace with changes in the workplace and economic circumstances," the Board said in a release accompanying its decision.

The Board's action is just the latest to tackle the trend. The Department of Labor has cracked down on employer misclassification of independent contractors, and the Occupational Safety and Health Administration has directed inspectors to consider whether principal employers might be at fault for the safety violations of their subcontractors. Courts, meanwhile, have been scrutinizing companies like FedEx and Uber for their use of contractors.

DePillis reports employers are pushing back. Businesses that might be subject to the new joint employer definition have warned that it could undermine longtime business models that have kept the U.S. economy competitive by holding down labor costs.

As a result of the decision, some businesses may be able to distance themselves from their partners to avoid joint employer status, but others may find they need to exert more control.

Corporations are "trying to have it both ways — have the benefits of the control, and not the disadvantages," says Timothy Glynn, a professor at Seton Hall University Law School. "Where I think it would be very difficult to give up control is circumstances where there's some exacting need for quality, timeliness, or consistency in the product."

"The Board's tortured analysis will undoubtedly be met with skepticism and will be rejected by local franchise owners, legislators and, ultimately, the courts," said IFA president Steve Caldeira in a press release. "IFA and its allies are asking Congress to intervene to halt these out-of-control, unelected Washington bureaucrats to preserve the established joint employer standard."

Congressional Republicans have already obliged, attaching a rider to the budget that would prevent the implementation of a new joint employer standard, among measures meant to block other recent NLRB decisions. Responding to the decision, House Education and the Workforce Committee Chairman John Kline (R-Minn.)

© September, 2015 by Tom Martin. Users are forbidden to reproduce, republish, redistribute, or resell this newsletter or any articles from this newsletter without permission of Tom Martin .Send mail to P.O. Box 70813, Riverside, CA 92513-0813

vowed to “roll back” the NLRB’s shift, while Senate Health Education Labor and Pensions committee chairman Lamar Alexander (R-Tenn.) announced he would introduce a bill to “invalidate” the ruling.

The California case concerned a recycling company called Browning-Ferris Industries in Milpitas, Calif., which used a temporary staffing agency called Leadpoint to provide workers. A Teamsters local tried to organize the employees, but did not just want to limit negotiations to Leadpoint — it wanted the larger Browning-Ferris to qualify as a “joint employer” thus requiring them to negotiate. The union argues that bargaining wouldn’t be effective unless it also included the larger company that determines the conditions of the working environment.

A regional NLRB director disagreed, and the Teamsters appealed. This time, the pro-union NLRB’s general counsel sided with the union, recommending in an amicus brief that the Board ignore a standard in place since the 1980s and instead apply a broader definition of what it means to be an employer.

The Board’s Democratic majority agreed and struck down earlier cases that had articulated the previous standard, saying that the growth of the contingent workforce has rendered the definition out of step with the core purposes of the National Labor Relations Act. In doing so, it returned to an even earlier standard, the abandonment of which fostered the growth of independent contractor relationships in industries like trucking and taxis.

The Board also reversed the regional director’s decision, saying that Browning-Ferris exercised sufficient control over hiring, firing, discipline, supervision, and work hours to qualify as a joint employer under the new standard. It ordered that ballots impounded after the Teamsters’ election in April 2014 be counted, which — if the union wins — would allow it to bargain directly with the recycling company as well as the staffing agency that hired them.

“Today’s decision is another step to show that companies can no longer claim they are not employers when problems arise,” said Ron Herrera, Director of the Teamsters Solid Waste and Recycling Division. “Instead of pointing fingers if a worker gets hurt, companies will now be accountable. It’s the decent and reasonable expectation that workers should have at work.”

DePillis reports the issue has not just been a bone of contention between unions and employers. It also created sharp disagreements within the labor Board: The two Republican appointees authored a blistering dissent, alleging that the new standard goes beyond the body’s authority and could affect a vast swath of new employers.

“Under the majority’s test, the homeowner hiring a plumbing company for bathroom renovations could well have all of that indirect control over a company employee!” the dissent read. “We suppose that our colleagues do not intend that every business relationship necessarily entails joint employer status, but the facts relied upon here demonstrate the expansive, near-limitless nature of the majority’s new standard.”

This may not be the end of the matter, however. Browning-Ferris Industries is considering appealing to either the 9th Circuit or the D.C. Circuit Court. “We are currently evaluating all of our available options regarding this matter with the objective of not being unlawfully forced into collective bargaining negotiations with another employer’s employees,” said Darcie Brossart, a spokeswoman for Republic Services, the waste company that owns Browning-Ferris.

## BOEING ANNOUNCES PENDING LAYOFF OF SEVERAL HUNDRED EMPLOYEES

Reuters reporter Andrea Shalal writes that Boeing Co has told its workers that it expects to cut as many as "several hundred" jobs in its satellite business through the end of 2015 due to a downturn in U.S. military spending and delays in commercial satellite orders.

Multiple commercial orders were being delayed by recent failures of launch vehicles and uncertainties about the future availability of financing from the U.S. Export-Import Bank, whose government charter lapsed on June 30, the company told key managers in an internal communication.

Boeing spokesman Tim Neale confirmed the reductions and said the total number of people affected would be finalized in coming months. Some could find work in other parts of Boeing, he said.

He said the reductions were "necessary to remain competitive for ongoing and future business."

The Boeing announcement marks the latest fallout from the ongoing debate about the future of EXIM, the U.S. government's export credit agency, which can no longer write new loans and trade guarantees.

U.S. government officials have said they are growing more concerned about the impact of the bank's forced shutdown on a wide range of U.S. companies, including many small businesses.

Tea Party conservatives in the U.S. Congress did not vote to renew the agency's charter, arguing the trade bank provides "corporate welfare" for big companies like Boeing and General Electric Co. Business executives said it was unclear if the bank will be reopened.

EXIM backers say the bank generates revenue for the U.S. government, and helps level the playing field for U.S. companies whose rivals in other countries receive similar trade credits.

Boeing does not break down workforce numbers for separate business units, but the company has about 16,800 workers in California, where Boeing builds satellites and does some commercial airplane work.

© September, 2015 by Tom Martin. Users are forbidden to reproduce, republish, redistribute, or resell this newsletter or any Articles from this newsletter without permission of Tom Martin .Send mail to P.O. Box 70813, Riverside, CA 92513-0813

The announcement comes a little over a month after commercial satellite provider ABS canceled a large satellite contract with Boeing due to uncertainty about the future of the EXIM bank.

Neale said Boeing officials were still working with ABS, based in Bermuda and Hong Kong, to find an alternate financing solution, but ABS was in active discussions with other satellite makers that had access to government trade credits.

He said many of Boeing's international customers relied on EXIM financing to buy commercial satellites and airplanes, and uncertainty about EXIM's future was making those buyers "very nervous."

"In the absence of Ex-Im, Boeing may need to serve as the lender of last resort but there are real limits to how much of this the company can do," he said.

## CA. CONGRESSWOMAN QUESTIONING LONG RANGE STRIKE BOMBER COSTS

Breaking Defense Colin Clark reports "A top House defense Democrat, Northern California based Jackie" Speier, wants answers from Air Force Secretary Deborah Lee James about costs for the Long Range Strike Bomber (LRSB), which is supposed to be built at a fixed price of $500 million a copy.

The Long Range Strike Bomber (LRS-B) is a proposed long-range strategic bomber for the United States Air Force, intended to be a heavy-payload stealth aircraft capable of carrying thermonuclear weapons. Initial capability is expected in the mid-2020s. A request for proposal to develop the aircraft was issued on 9 July 2014, with a contract expected to be awarded in 2015. The Air Force plans to purchase 80–100 LRS-B aircraft at a cost of $550 million each, at 2010 prices.[1] Northrop Grumman and a team of Boeing and Lockheed Martin are competing for the development contract

Clark says that for those readers who may not know, rumors have been swirling for weeks that Northrop Grumman has won the LRSB contract — but no matter how many usually reliable sources we have heard this from, those reports remain rumors.

"Given the importance of this issue and the magnitude of the discrepancy, the Air Force must explain the nature and cause of this error," says the letter from Speier, who is the top Democrat on the House Armed Services oversight and investigations subcommittee. Spear's office shared the letter prior to a scheduled press conference with James and Air Force Chief of Staff Mark Welsh.

The Air Force recently estimated the 10-year costs of the aircraft at $41.7 billion, a considerable variance from last year's $33.1 billion and from this year's $58.4 billion contained in reports about the Defense Department's nuclear capabilities.

These reports included inaccurate numbers, but the Air Force says this in reply:

"The 10-year cost estimate provided by the Air Force for LRS-B in Table 4 of the FY2015 and FY2016 Section 1043 Report was incorrect. The correct 10-YEAR cost entry for both the FY2015 and FY2016 reports is $41.7B. Again, the program costs have remained stable," Air Force spokesman An Stefanek says in an email.

In what could be considered a note to Rep. Speier, Stefanek also says: "The Air Force is working through the appropriate processes to ensure the Section 1043 Report is corrected, and that our reports in subsequent years are accurate."

The contract award for the bomber program looked to be set for late August but has now reportedly slipped to as late as October. One of six questions Speier asks James to answer is what was the original award date and why did it change. The other five include why do we have new cost estimates and which ones are accurate. And my favorite question: "Given that the B-2 program faced extensive cost overruns after being developed in secret, how much do you envision declassifying once the LRS-B contract is ultimately awarded?"

The Air Force has disclosed the existence of this new program, as well as the target cost per plane for the 80 to 100 aircraft that will be bought, but few other details have been released so it's very difficult to tell just how much complex or advanced it will be. Senior service officials have said it will largely be based on existing technologies, will be stealthy, will be modular and will be optionally manned, but they have also said it will be a system of systems.

Frank Kendall, the head of Pentagon acquisition, has also said the Pentagon "will compete upgrades during the bomber program." So it looks as if Boeing-Lockheed and Northrop Grumman will compete for the first 80 to 100 planes, and then upgraded versions will be open to competition.

# KNOW THE LAW

## CA. SUPREME COURT ENFORCES CLASS ACTION WAIVER IN ARBITRATION

Atkinson, Andelson, Loya, Ruud & Romo attorney Kellie Christianson reports the California Supreme Court issued its decision to enforce class action waivers in arbitration agreements in vehicle sales contracts. *[Gil Sanchez v. Valencia Holding Co., LLC*, case no. S199119] The decision represents an important victory for car dealers and other interstate retailers and should stem the tide of frivolous class action lawsuits brought pursuant to various consumer protection statutes, including the Auto Sales Finance Act. The decision will also likely encourage the enforcement of class action

© September, 2015 by Tom Martin. Users are forbidden to reproduce, republish, redistribute, or resell this newsletter or any Articles from this newsletter without permission of Tom Martin .Send mail to P.O. Box 70813, Riverside, CA 92513-0813

waivers in the context of employment arbitration agreements.

Gil Sanchez filed his complaint in 2010, arising out of his 2008 purchase of a used Mercedes Benz S500V for $53,498.60.

He claimed that the dealership engaged in various improprieties in the sale, and filed suit on behalf of four putative classes of consumers whose contracts: (1) failed to separately itemize the amount of their down payment that was deferred; (2) failed to separate the registration, transfer and titling fees from the licensing fees, as amounts paid to California; (3) charged an “optional” $20 electronic DMV registration fee without the customer’s consent; and (4) charged new tire disposal fees for used tires.

Sanchez sought class-wide rescission, based on the Auto Sales Finance Act, the Consumer Legal Remedies Act and the Unfair Competition Law. However, Sanchez’s sales contract contained an arbitration provision which specified that all disputes with the dealer must go to arbitration, and that he was giving up the right to be a class representative or a class member.

MOTION TO COMPEL ARBITRATION

Valencia Holding responded to the complaint with a motion to compel arbitration. The trial court denied the motion, based on its conclusion that the class action waiver, and in turn, the entire arbitration agreement, was unenforceable. Valencia sought appellate review and while the matter was pending, the U.S. Supreme Court decided *AT&T Mobility v. Concepcion* (2011) 563 U.S. __ [131 S. Ct. 1740] which held that the Federal Arbitration Act [“FAA”] pre-empted California’s state law prohibiting class waivers in consumer arbitration agreements. However, Concepcion reaffirmed that the FAA does not pre-empt generally applicable contract defenses, such as unconscionability.

The Court of Appeal sided with Sanchez and held that the arbitration provision was unconscionably one-sided, in favor of the dealer. Valencia Holding sought review with the California Supreme Court, relying on *Concepcion*.

A six-justice majority, of the California Supreme Court, found that the arbitration clause was not unconscionable, and reversed the appellate court, stating: “Commerce depends on the enforceability, in most instances, of a duly executed written contract. A party cannot avoid a contractual obligation merely by complaining that the deal, in retrospect was unfair or a bad bargain.”

The Court was not persuaded by Sanchez’s argument that it was unfair to enforce the arbitration agreement because he didn’t read it and/or did not know it was in the contract. In fact, the Court not only noted that Valencia was under no obligation to highlight the arbitration clause to Sanchez, but also that any state law imposing such an obligation would be preempted by the FAA.

The Court also acknowledged that “An evaluation of unconscionability is highly dependent on context.” Justice Liu pointed out that this case involved a luxury vehicle, and he implied that the decision might have been different had this been an employment arbitration agreement. “Someone buying a luxury car is simply in a different position than someone required to sign a pre-dispute arbitration provision as a condition of getting a job.” No doubt, those lines will appear in countless Opposition Memorandums when employers seek to enforce arbitration agreements post-Sanchez.

In light of this decision, employers and retailers should review their arbitration agreements and class action waivers to ensure that their terms are tied to legitimate business needs. If defense attorneys can explain to trial courts why the terms are not unconscionable in the context of their clients’ business, the *Sanchez* decision should greatly assist in compelling disputes to arbitration.

Irvine based AALRR partner Kellie Christianson (kchristianson@aalrr.com) represents car dealerships and small businesses exclusively in all aspects of employment and business litigation including defending claims for wrongful termination, harassment; discrimination, defamation, and unfair business practices. She can be contacted at 949-453-4260.

## MOST AMERICAN MADE VEHICLES IN U.S.

Cars with at least 75 percent domestic content are becoming an endangered species, and for the first time in the Cars Com’s American-Made Index's nine-year history, the list has fewer than 10 cars. In 2015 there are only seven.

Listed In order they are: 1) Toyota Camry, 2) Chevrolet Traverse, 3) Toyota Sienna, 4) Honda Odyssey, 5) GMC Acadia, 6) Buick Enclave, and 7) Chevrolet Corvette.

*Thanks and a tip of the hat to:*

*AALRR Attorney Kellie Christian*
*Andrea Shalal, Reuter’s reporter*
*Car Com American Made Index*
*Colin Clark, Breaking Defense*
*Lydia DePillis, The Washington Post reporter*

*Tom Martin can be reached at 951-353-0770*
*Or*
*Tomforsmac2 @gmail.com*

*If emailing please list*
*SMAC Newsletter in the subject*

© September, 2015 by Tom Martin. Users are forbidden to reproduce, republish, redistribute, or resell this newsletter or any Articles from this newsletter without permission of Tom Martin .Send mail to P.O. Box 70813, Riverside, CA 92513-0813