Insights, News & Events

WHIPLASH: HOW TO MANAGE DURING JOINT EMPLOYER UNCERTAINTY

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The standard for determining joint employment status has been in a state of near-constant flux for more than three years. The back-and-forth has subjected employers to much indigestion when trying to determine which employees are considered under their authority, impacting organizing campaigns, unfair labor practice charges, and a host of other workplace issues.

The good news? Both the National Labor Relations Board (NLRB) and the U.S. Department of Labor (USDOL) are interested in settling the joint-employer debate through rulemaking. The bad news? What many believed would be smooth sailing could be headed toward rough tides now that Democrats have seized control of the House of Representatives. It would not be surprising to see the agency efforts caught up in the political turmoil that will descend on the nation's capital in early 2019, grinding any progress to a halt. What should employers do during this time of uncertainty?

BRIEF RECAP OF TWISTS AND TURNS

The latest agency efforts are an attempt to overrule the Obama-era joint-employer standard the Board created in 2015 in its *Browning-Ferris* decision. In that case, the Board held that businesses need only retain the contractual right to control to be considered a joint employer—even if they never exercised it. Additionally,

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the Board held that indirect control would be sufficient to find joint employment.

This decision overturned 30 years of stability in the Board's joint-employer standard and exposed employers to new avenues of liability. Prior that decision, the Board held that two companies would only be considered joint employers—equally responsible for certain labor and employment matters—if they shared or codetermined those matters governing the essential terms and conditions of employment, and *actually exercised* the right to control.

Since the *Browning-Ferris* decision, employers and pro-employer groups have been fighting to restore the pre-*Browning-Ferris* standard. In December 2017, employers thought they had achieved their goal when the Board overruled *Browning-Ferris* in its *Hy-Brand Industrial Contractors* decision. Victory was short-lived, however, because the NLRB vacated *Hy-Brand* a few short months later based on a conflict-of-interest allegation against a Board member.

AGENCIES TURN TO RULEMAKING

The NLRB decided to address the much-maligned joint employer standard through rarely used notice-and-comment rulemaking as opposed to the more typical course of ruling on a specific case. On September 14, 2018, it formally proposed its new standard for determining joint employer status; if adopted, the proposed rule would bring the joint employer standard back in line with its pre-Obama-era standard. The public comment period on the proposed rule was recently extended until January 14.

Around the same time, the USDOL announced plans to tackle this same issue through rulemaking, although it is not quite as far as advanced in the process as the NLRB. We are expecting to see a formally released proposed rule from the Labor Department in the very near future.

Even if either (or both) of the agencies successfully complete the notice-and-comment rulemaking process to narrow the joint-employer standard, there could be more legal battles to come. Rulemaking is a drawn-out and difficult process that usually sparks legal challenges along the way. If opponents of either joint employment rule challenge them through the courts, the NLRB and the USDOL will have to defend the reasonableness of its actions—and judges may want to see more than just anecdotal evidence to support the new rule. That could lead to a long slog through appellate courts or a complete re-working of the draft rules at the agency level.

HOW YOU SHOULD HANDLE THE UNCERTAINTY

Looking forward, there is some hope for employers in 2019. Given the amount of time and effort the Board has already exhausted in fixing the joint employer standard, it is likely there will be some resolution through the rulemaking process. While we know there is an appetite to restore significant aspects of the pre-*Browning-Ferris* standard, we cannot be certain what form that will take until the rulemaking process is complete.

Once the comment period closes in mid-January, the Board will begin the process of sifting through what will presumably be thousands of comments from various stakeholders. In the meantime, to prepare for the expected return to a more balanced standard, you should begin to reassess your staffing and related third-party relationships with an eye toward the actual exercise of substantial (as opposed to limited and routine), direct (versus indirect), and immediate (versus potential) control over the employment terms of the workers involved.

To ensure that you are ready to hit the ground running, you are encouraged to work closely with human resources and employment counsel to: (1) develop a plan for recapturing an appropriate (albeit limited) modicum of control and operating efficiency that may

have been ceded while operating under the *Browning-Ferris* standard; (2) draft contract and policy language adhering to the balanced standard we expect to see once a final rule is implemented; and (3) continue to vigilantly evaluate your day-to-day practices for joint employment liability under the new standard. While we expect the Board to return to a more balanced standard that will reduce the number of potential joint employment relationships, any new rule or adjudicative standard will not eliminate them entirely.

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