Labor Board Will Roll Back Joint Employer Standard in 2022

Insights
12.20.21

As an early holiday present to organized labor, the National Labor Relations Board recently announced it will issue proposed rulemaking on joint employers in February 2022, almost certainly reworking the legal standards to make it easier for workers to be considered employed by more than one entity for labor relations purposes. The notice of proposed rulemaking, released on December 10, means we can expect the newly constituted Board to make significant changes to the current joint employment rule, bringing us back to the future once more. What can employers expect from this impending unwelcome change?

How Did We Get Here?

For historical reference, the Obama-era Board's 2015 *Browning-Ferris* decision held that, for a joint-employment relationship to exist, an employer need only have *the contractual right* to control an employee's working conditions – whether or not such control is ever exercised. This included control over *any* term or condition of employment, and the analysis was not limited to an exclusive list of factors. Further, indirect control (e.g., control through an intermediary) would be sufficient to find joint employment under this test. Employers were concerned — and rightfully so — because an employer that retained the right to impose even indirect control over the working conditions of temporarily placed employees ran a serious risk of being deemed their joint employer. This was true not only for bargaining purposes, but potentially for unfair labor practice liability as well.

In 2020, the Trump-era Board reversed course and adopted its own rule on joint employment, overturning *Browning-Ferris* and fundamentally altering the definition of joint employment. This revision made it more difficult for businesses to be held legally responsible for alleged labor law violations by staffing companies, franchisees, and other related organizations. The rule also limited the ability of employees from affiliated companies to join together to form unions. Under the rule, an employer is only considered a joint employer if it shares or co-determines essential terms and conditions of employment, including wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. This test requires that a would-be joint employer *actually exercise* direct, immediate and regular control over those *essential* terms and conditions of employment.

It is this 2020 final rule that is nearing its end, as indicated by the Board's latest pronouncement.

What Happens Next?

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

The Board's recent announcement indicated that it intends to revamp its joint employment standard through a formal notice-and-comment rulemaking process, or we could see the Trump-era regulation formally rescinded and the NLRB tackle revisions to the legal test through case decisions.

Either way, employers need to brace for a significantly revised rule that will be as unforgiving to employers, if not more so, than *Browning-Ferris*. The requirement of *actual control* is certain to be set aside in favor of a right to control standard. It's also likely that the idea of control over "essential" terms and conditions is out the window, with control – even indirect control – over potentially *any* working conditions being deemed sufficient to render a business being legally considered as a joint employer.

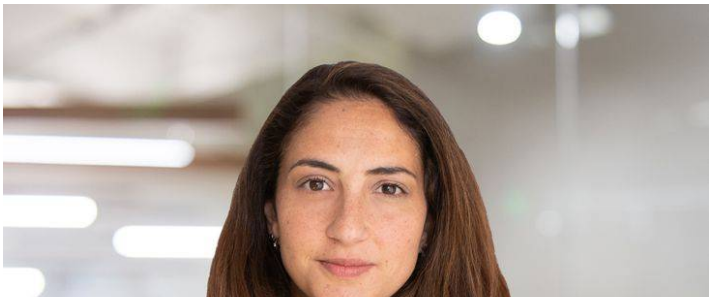
How Should Employers Handle This News?

This announcement didn't result in any immediate changes to your day-to-day operations. While we know there is an appetite to restore significant aspects of the *Browning-Ferris* standard, we cannot be certain what form that will take until the rulemaking process is complete.

However, host employers using employees provided by or compensated through a third party, such as a staffing company, should examine the contracts and procedures associated with such arrangements, with particular emphasis on reviewing the contractual right to control (both directly and indirectly) employment terms and conditions. Staffing companies and other alternative employer service providers likewise should conduct a similar exercise from the perspective of their services and their contractual arrangements. Contract language often is a significant factor in determining joint employer status. The same may be true for franchisor-franchisee arrangements and other business models where employees of one company perform services benefitting another employer (e.g., BPO vendors providing services in the facilities of another employer or multiple employers working on a common construction site).

We will continue to monitor the situation and provide updates as more information becomes available. Make sure you are subscribed to Fisher Phillips' alert system to get the most up-to-date information. Any questions may be directed to your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Labor Relations Practice Group or PEO/Staffing Industry Team.

Related People



Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

Tami Essis Culkar
Of Counsel
303.218.3622
Email

Alex G. Desrosiers
Associate
407.541.0857
Email

John M. Polson
Chairman & Managing Partner
949.798.2130
Email

Service Focus

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

Service Focus

Labor Relations

Industry Focus

PEO, Staffing and Gig Workforce

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.