NLRB Abandons Controversial Joint Employer Rule – But Employers Aren't Necessarily Out of the Woods

Insights
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The controversial joint employer rule that would have made it far easier for workers to be considered employees of more than one entity is now dead once and for all – but that doesn't mean employers should let their guard down. Four months after a Texas federal court judge struck down the National Labor Relation Board's rule that would have resulted in increased union organizing efforts with related companies, the Board dropped its appeal – leaving the Texas federal court's decision as the final word on the matter. But the July 19 legal action doesn't necessarily mean the agency will end its efforts to ensnare as many parties as possible into being considered employers. You can now expect the Board to turn up the pressure through aggressive investigations, unfair labor practice charges, enforcement actions, and through exercise of its traditional decision-making authority in an attempt to reshape this area of law without formal rulemaking. What should you do to prepare for these turbulent times ahead?

Status Quo Remains: Current Standard Summarized

You can read about the joint employer saga that employers have been forced to endure over most of the past decade by reading our recap Insight here. Suffice it to say, the pendulum has swung back and forth multiple times when it comes to defining "joint employment" status since 2015. You might feel confused as to where we stand now – so let's start there.

The March court ruling and the Board's recent decision to drop its appeal means that the 2020 version of the joint employment standard remains in effect – at least for now.

- Under this status quo, an employer is only considered a joint employer of a separate employer's employees if the two businesses share or co-determine the employees' essential terms and conditions of employment. These include wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.
- Equally as important, a business must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in order to be considered a joint employer – and in a manner that is not sporadic and isolated.

What Had the NLRB Been Fighting For?

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The NLRB wanted to switch things up in a big way, and tried to use the rulemaking process to accomplish its goal. It released a revised rule in October 2023 that would have scrapped the current standard altogether.

- A business would have been considered a joint employer not only when it had the *right* to exert control over terms and conditions of another company's employees, but also when evidence exists of *reserved*, unexercised, or *indirect control* over *any* working conditions.
- This would have included obvious situations like hiring and firing – but also such other conditions as wages, benefits, scheduling, supervising, directing, and disciplining.
- This would have led to a tidal wave of new union activity involving all sorts of businesses – including those involved in franchising, contracting, and supply chains.
- Non-unionized businesses might have found themselves forced to engage in collective bargaining if they were found to be joint employers with a unionized employer, as just one example.

Why Did the Board Drop the Fight?

It appears the Board saw the writing on the wall last month when the Supreme Court dropped its *Loper Bright* decision and scrapped the long-standing *Chevron* doctrine that had given agencies tremendous power to issue rules like the joint employer standard. You can read all about it here, but in a nutshell, SCOTUS said that federal judges should exercise their independent judgment when determining whether an agency rule is a permissible exercise of regulatory authority rather than deferring to the agency's position on the matter.

While the NLRB didn't admit as much in its court filing and public statements – instead noting that it wanted to assess its options, further consider the issues, and assess other rulemaking petitions on its docket – it appears the winds have shifted enough to make rulemaking a near-impossible pathway for the joint employment rule. Courts will have an easier time knocking back rules that are seen as too broad, and most observers believed the Fifth Circuit Court of Appeals would have jumped at the chance to exercise this new power and turned away the NLRB's appeal.

Your Blueprint for Navigating Times Ahead

Employers might feel like they have dodged a bullet here, but it's not as if the NLRB will go quietly into the night. Many agencies that have seen the rulemaking doorway close to them because of the Supreme Court's blockbuster decision might instead decide to take matters into their own hands and push resources into enforcement activity. By the same token, the agency could simply bypass the rulemaking process in favor of exercising its decision-making authority, as it has been known to do with some regularity when it comes to issues involving joint employer, independent contractor and related questions of employee status.

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So rather than go through the time-consuming slog of publishing another draft rule only to see a court kill it on the eve of implementation, it wouldn't be surprising to see the Board ramp up its investigations, file more targeted unfair labor practice charges, put its efforts behind enforcement actions, and try to shift the joint employment landscape through agency decisions.

While we await the potential increase in agency activity, now would be a good opportunity to tighten up some business practices and minimize chances of legal exposure.

- If you have not yet done so, this might be a good time to work with your legal counsel to **evaluate service contracts and related documents** for language reserving the right of (direct or indirect) control over workers staffed by third parties when it comes to their employment terms and conditions.
- **Host employers** relying upon employees furnished by a third parties might want to examine service contracts and corresponding procedures governing such arrangements. Give particular focus on language reserving the contractual and practical right to control (both directly and indirectly) essential employment terms and conditions.
- **Staffing companies and other alternative employer service providers** might also want to conduct similar exercises from the perspective of their own services and contractual arrangements. While reservation of rights language can be a significant factor in determining joint employer status, it may be required by law in certain staffing models, adding yet another layer of complexity to the analysis.
- Similar issues arise in **franchisor-franchisee arrangements and other business models** in which employees of one entity perform services benefitting another (such as Business Process Outsourcing vendors providing services in the facilities of another employer or multiple employers working on a common construction site). If you fall into this category, work with your counsel to discuss your business model and any associated practices and key documents.
- Finally, you should consider **reviewing – or creating – clear policies regarding the role and authority of third-party vendors** with respect to your business practices, especially in their interactions with direct employees. This clarity will help in avoiding any unintended joint employer issues, regardless of which standard is in effect.

Conclusion

You'll want to stay up to speed as this process plays out in the coming months. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. We will continue to monitor the situation and provide updates as more information becomes available. 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, and Gig Workforce Industry Team.

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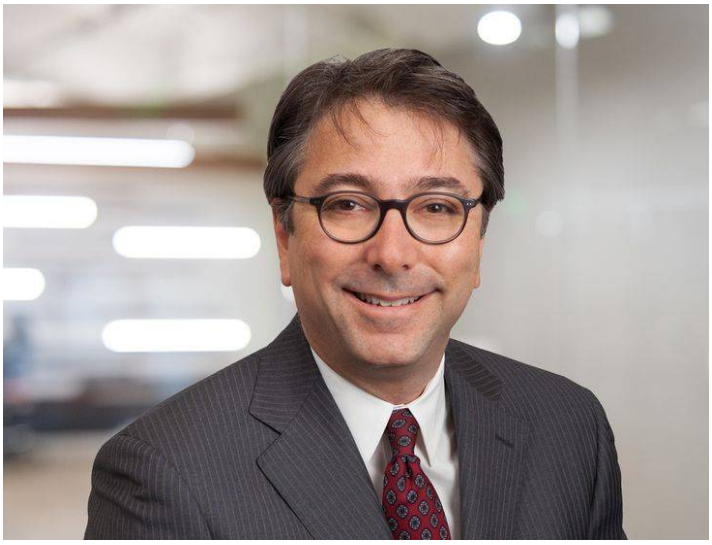

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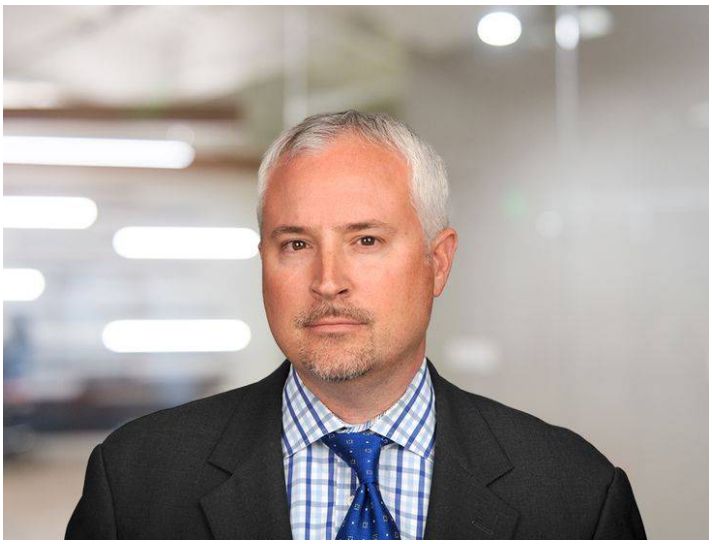

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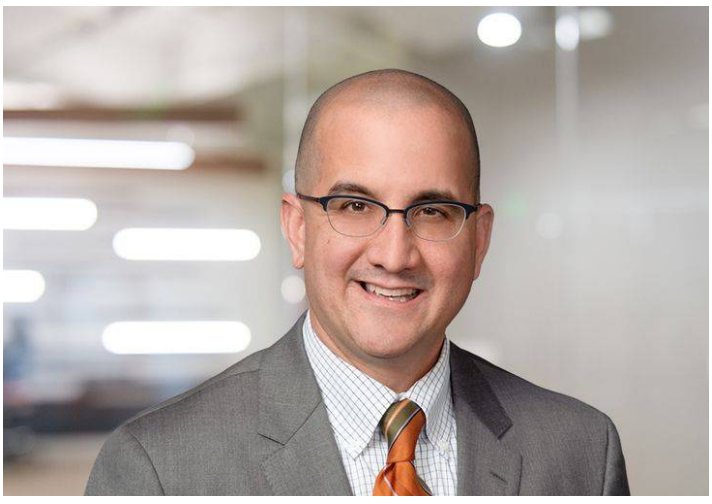

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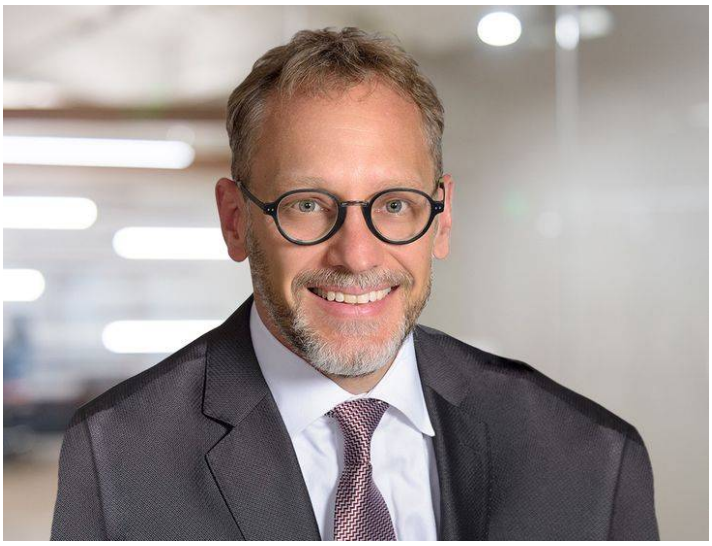

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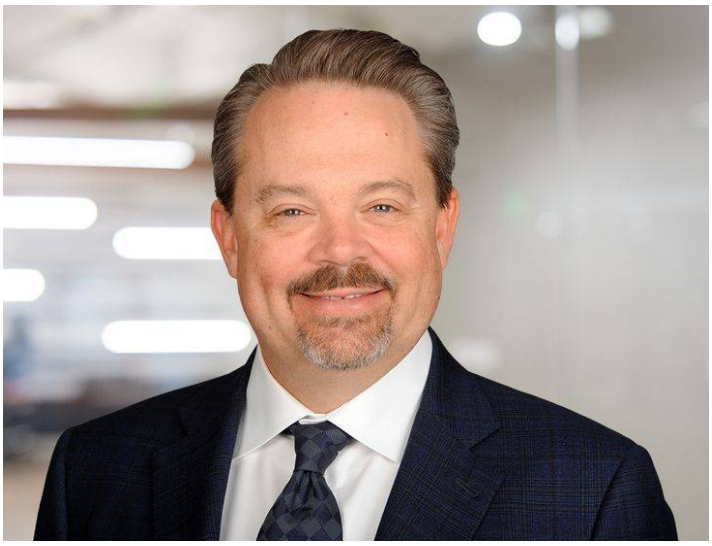

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