Joint Employment Game Changer? Proposed Law Would Radically Alter Definition In Employers' Favor

Insights
7.27.17

Employers across the country should collectively cross their fingers and hope that HR 3441, also known as the "Save Local Business Act," becomes law in the near future. The bill, introduced in the House of Representatives this morning, would significantly narrow the definition of "joint employment" to eliminate existing workplace law headaches when it comes to federal wage and hour law and traditional labor law. If passed, it would significantly reduce the risk of unexpected and unwarranted legal claims in any business model where a claim of joint employment is a possibility.

FAQs: What Would The Law Change?
As currently written, HR 3441 would have an impact on two critical federal workplace laws: the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA). It would cause a radical shift in the way courts and regulatory agencies view "joint employment" when assessing situations arising under these federal laws. Here are the basics regarding the bill as currently introduced.

In A Nutshell, What Would The Law Do?

If passed, the law would establish that joint employment could only be found if an entity "directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over the essential terms and conditions of employment" of a worker.

How Would That Change Things?

This would be a welcome narrowing of the joint employment theory, which has ranged to near-absurd proportions in recent years. The U.S. Department of Labor (USDOL), which enforces the FLSA, issued a 2016 interpretation calling for a very broad standard when assessing the issue of joint employment. Although the Trump administration recently rescinded this interpretation, many employers worry that courts and investigators will continue to apply an expansive view of the law.

Meanwhile, the National Labor Relations Board (NLRB) released the controversial Browning-Ferris decision in 2015 that casts a very wide net when determining whether joint employment exists for collective bargaining purposes. This decision says that joint employment is present even where one company only has the right to exert "indirect or potential control" over the terms and conditions of another company's employees.

As evidence that courts are applying these principles in a broad manner, earlier this year a federal appeals court created a brand new standard that goes even further than any previous interpretation created by the judicial branch. The 4th Circuit Court of Appeals issued a ruling making it far easier for employers to be caught up as defendants in wage and hour claims, and there is significant danger this standard could spread to other jurisdictions. These regulatory actions and court cases threaten to alter the landscape of joint employment across the country.

What Would The New Standard Examine?

To determine whether a person, firm, corporation, or other association or organization is sufficiently exercising significant control over the essential terms and conditions of employment to be considered a joint employer under the bill's proposed standard, courts and regulators would look to at least five factors. Joint employment could only be found after an examination of whether the entity directly, actually, and immediately controls such aspects of an individual's employment as:

- Hiring and firing;
- Determining individual employee pay rates and benefits;
- Day-to-day supervision of employees;
- Assigning work schedules, positions, and tasks; and
- Administering employee discipline.

This list is not exhaustive, however. Employers could always point to other terms and conditions of employment in an effort to disprove joint employment.

What Would Most Likely Be Deemed Irrelevant?

Given that the bill goes out of its way to indicate that "limited and routine" control over an individual does not create joint employment, one would assume that a variety of common actions and activities would no longer be considered when examining whether joint employment exists. If the bill passes, employers could legitimately contend that courts or regulatory agencies should not be allowed to rely upon the following to arrive at a joint employment determination:

- franchisor or distributor control over the manner in which services are provided to the end customer;
- control over supplies and equipment used to provide services to customers; and
- the provision of human resource support services related to payroll, workers' compensation insurance, and benefits.

How Would Regulatory Agencies Act?

If the law passes, the regulatory agencies that enforce these two federal statutes would be subject to the tighter definition. The two federal agencies overseeing the laws – the USDOL and the NLRB – would be required to make determinations of joint employment in accordance with the new standard. This means that any conflicting regulations and interpretative guidance would need to be scrapped or rewritten to conform, so we could expect to see new interpretative guidance and regulatory material published in the aftermath of passage.

What Would And Wouldn't Be Affected By The New Law?

If passed, the new law would alter the definition of "employer" in the definition section in the NLRA (Section 2(2)) and the FLSA (Section 3(d)). However, there are many federal laws that would remain untouched by this bill. Among others that might retain a broad interpretation of the joint employment standard are the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, the Family and Medical Leave Act (FMLA), the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), and the Occupational Safety and Health Act (OSHA).

Moreover, the bill wouldn't force states and local jurisdictions to amend their own workplace laws to conform to the new standard. Employers could still face the danger of a broad interpretation with regard to any of these other standards.

Conclusion

Although the business community currently enjoys a business-friendly Congress and a president receptive to the interests of business, the bill – like all legislation – has an uncertain future. Labor unions and worker advocates will likely mobilize in an effort to defeat or significantly water down this bill. The legislative process is often unpredictable and time-consuming, so the final outcome and timing is anyone's guess at present.

We will continue to monitor the status of this legislation and publish updates as additional actions are taken. If you have any questions about this bill or how it may affect your business, please contact the author at JPolson@fisherphillips.com (949-798-2130), any member of the Staffing and Contingent Workers Practice Group, or your regular Fisher Phillips attorney.

This Legal Alert provides an overview of proposed legislation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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