Proposed Joint Employment Law Clears Important Hurdle, Passes House

Insights
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By a vote of 242 to 181, the House of Representatives passed the "Save Local Business Act" today, a bill that would significantly narrow the definition of "joint employment" and limit employers' wage and labor problems. HR 3441 will now move to the Senate, and if it passes a vote there and receives the signature of the president, it will significantly reduce the risk of unwarranted legal claims based on a claim of joint employment.

Summary Of Proposed Law
If passed into law, 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 sea change in the way courts and regulatory agencies view joint employment when assessing federal labor issues and wage and hour laws. The new 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 essential terms and conditions of employment**" of a worker.

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 Although the Trump administration rescinded this interpretation in June 2017, many employers worry that courts and investigators will continue to apply an expansive view of the law.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.

New Standard Would Look To Certain Critical Factors

Under the bill's proposed standard, courts and regulators would look to at least five factors to determine whether a business is sufficiently exercising significant control over the essential terms and conditions of employment to be considered a joint employer. If it passes, HR 3441 would ensure that 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. But importantly, it appears that a variety of common actions and activities would no longer be considered when examining whether joint employment exists. 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, 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 if this proposed law takes effect:

- 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.

Bill Would Not Solve All Employer Headaches

It is important to remember, however, that this bill would not represent a magic bullet that would solve all workplace problems in the joint employment arena. If passed, it would only alter the definition of "employer" in the definition section in the NLRA and the FLSA. However, there are many federal, state, and local laws that would remain untouched by this bill.

Among others that would 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, meaning that you could still face the danger of a broad joint employment interpretation in various other contexts.

What's Next?

The bill will now move to the Senate for review, and although that chamber is currently controlled by the business-friendly Republican Party, there is no assurance that the bill will pass as currently written. It could be amended to significantly water down the protections currently contemplated; it could be bottled up by special interests that wish to see it die a slow death; it could be the subject of political horse trading and sacrificed for other legislation deemed more important to certain members; or it could be pushed to the back burner in light of other developments in Washington, D.C.

We will continue to monitor the status of this legislation as it reaches the Senate 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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